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Lawyers in the Third World: Comparative and Developmental Perspectives

Editors

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Studies of Law in Social Change and Development

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Preface

The main part of this book is a collection of empirical and historical studies of lawyers in various Third World countries. Differences among the lawyers and professions studied and the social settings in which they exist, and the variety of approaches used to study them, will be readily apparent. Readers may wonder what one can usefully compare and conclude.

Hopefully, these studies offer data and insights of value to legal and other scholars of the countries and regions examined. Some provide interesting material for historians of colonial societies. Others contribute to theories of professionalism and the sociology of occupational groups or to theories which link characteristics of legal professions with characteristics of the political economy within which they exist.

But the underlying reason for this book, though not necessarily the motive for all of the research reported in it, derived from concerns about the social impact of these legal professions on "development" and "underdevelopment," and their impact on the capacity of the mass of people in the countries studied to use law to better their social condition.

Most people in the Third World live in rural settings; they have lived for generations under authoritarian (notably colonial) regimes which have ruled through socially distant, non-participatory institutions and processes. During the past century these regimes created legal systems, based on European models. In part these legal systems can be seen as elements of the political superstructure of governments which enjoyed attenuated accountability at best to most of the people governed; in part they can be seen as elements of a social infrastructure created to facilitate modes of economic development which were hardly designed with the essential needs of the common man as the first priority. During the first "development decade" efforts were undertaken in many countries to reform professional legal systems, legal education and legal professions in various ways. There was an underlying assumption that law and lawyers were important to "development." The concepts of development generally articulated were based on paradigms drawn from Western experience and ideas about "modernization," "economic growth," "integration" into the "world economic system," and effective "development administration."

Today these assumptions are increasingly questioned. The benefits of the "development" which has taken place are seen to be badly skewed. Increasing numbers of rural people lack resources essential to meet "basic human needs" for nutrition, health care, clothing, habitat, education, and minimal economic security. There are now calls for another kind of development which puts a far more explicit priority on meeting the needs of those most in want and (as a corollary) on the use of more participatory structures to define these needs and allocate essential resources to meet them.

It is suggested by some of the evidence in the case studies, and by other materials discussed in the final chapters, that legal professions (developed according to existing models and structures) contribute to the highly skewed distribution of wealth and power now characteristic of many polities. In any event, if earlier paradigms of development and legal development need reappraisal and if (as an increasing body of development literature argues) fundamental social transformations are necessary to the realization of alternative paradigms, then one needs to examine whether and in what ways existing legal professions create constraints.

These are among the questions which we have asked in reviewing material for this book and in attempting to give it focus. They are value-oriented questions, for we think research concerned with "law in development" issues has to proceed from a reasonably explicit set of evaluative criteria. In the opening chapter we discuss different concepts and assumptions (e.g., about "rule of law") which have influenced thinking about development and the significance of lawyers in it, and we outline different approaches which may affect the study and evaluation of legal professions. The country studies come next. The chapters in the concluding section attempt some generalizations about social factors which have influenced the history and character of Third World professions and about their social impact on the rural poor. A final chapter explores the implications of these findings for alternative kinds of development which emphasize "basic human needs" concepts and approaches.

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Part I
Studies of Lawyers and Their Professions

Lawyers, Legal Professions, Modernization and Development

There is growing literature about lawyers and their profession in various parts of the world.¹ Much of this work – whether focused on local particulars or more theoretical and comparative propositions – suggests a need to consider what is being studied, and why.² These questions seem particularly troublesome when lawyers in the Third World³ are studied.

In most of these countries legal professions patterned on Western models exist. They evolved as a consequence of the introduction of European legal systems through colonial governments, or (as in Latin America and countries like Ethiopia, Thailand or Liberia) through the efforts of “modernizing” rulers and elites to import Western legal structures.⁴ As there occurred economic and educational opportunity, so indigenous lawyers, schooled in the law of the metropole appeared. They sought and gained professional recognition, and with it a degree of status and power in the legal system, and they became important factors in the reproduction, adaptation and maintenance of foreign-inspired, official legal structures. In varying ways the imported, imposed legal structures have displaced indigenous, traditional norms, institutions, processes of dispute settlement, and professional lawyers have assumed increasingly important, intermediary and arbitral roles in struggles over valued resources.

When, in the 1960’s, law-oriented scholars became interested in relationships between legal systems and development, some began to study legal professions.⁵ Thus, in this research about lawyers and legal professions, questions were asked about the “role” of lawyers and the legal system in “development” – and about reforms which might be attempted to make them more effective agents or facilitators of the kinds of social change envisioned. But determining an approach to orient this research was, in retrospect, a troublesome task. In introducing the studies which follow, we trace a changing intellectual context in which they have taken place.

Aspirations and assumptions of the first development decade, circa 1960, shaped thinking about the role of law and lawyers in paradigms of social change. The evolution of these ideas and of consequent efforts to strengthen legal professions and legal education are described in Section 1 of this Chapter.

By the 1970’s there had been repeated discoveries of persisting, often widening, social gaps in many countries between the relative few who seemed to benefit by the political economy of development and the vast numbers who did not.

Recognition of these trends has forced reconsiderations of the central problems of development – and thus a reappraisal of the social significance of professions. Section 2 describes this changing milieu of thought about “development” and suggests that, if social gaps are the source of one’s concern, questions should now be directed to whether and how lawyers generally contribute to skewed development and whether and how they might contribute to alternative kinds of development which seek to close the gaps.

I

In the post-war decades, problems of nation-building and poverty in the “emerging” Third World demanded attention from political leaders throughout the world, induced a proliferation of international assistance agencies and stimulated new efforts at understanding by scholars of many disciplines. “Development” became a new article of political faith, the “raison d’être” for a vast network of international bureaucracies and the object of many theories. No doubt motivations of those professing interest in development have varied, and so have meanings ascribed to the term, but many concepts and assumptions were once widely shared during the early 1960’s when the first “development decade” was launched with fanfare and optimism. Development (as then expounded) frequently meant acceleration of a polity’s movement through historical “stages” from a primitive, subsistence, static community to a complex, industrialized, changing, society; from “traditional” to “modern” conditions of life; from widespread poverty to widespread consumption.⁶ The “religion of development” which then prevailed often “prejudged” social phenomena in the Third World, “favoring that which was ‘modern’ and castigating that which was ‘traditional,’ exalting the elite and deprecating ‘backward masses.’”⁷

“Modernization” is of course an elusive concept, but in the 1950’s and 1960’s an enormous literature⁸ tried to capture its meaning and explain how it occurred. Histories of various sorts and the writings of earlier master theorists of social change – such as Weber, Durkheim and (in varying ways) Adam Smith and Marx – were ransacked for propositions about social change. A number of themes recurred.⁹ Modern societies enjoy high levels of technology, production, savings and growth, increasing affluence and better “standards” of living. In modern societies there is division of labor and professionalization of occupations entailing special learning and skills. Modern societies have distinct, specialized, political and legal structures (institutions, rules and procedures managed by specially trained actors) which “process” demands and disputes, “manage” conflict and “deliver” services and “distribute” resources; which are functionally differentiated and organized as a system. The men and women who operate the key structures are professionals; they can think in abstract, universal, scientific and rational terms; they can perceive and conceptualize problems and use reasoned theories and empirical observation to weigh competing interests to work towards solutions. “Modern” people are the opposite of “traditional” or “primitive” people, who are constrained in thought and action by their sense of lowly status, by their ignorance, prejudices, superstitions and fatalism.¹⁰

The "drive toward modernity" by "new elites" was said to be a "major factor" in the "public life" of developing countries.¹¹ The task of planners and political leaders was to mobilize modern-minded human resources, and give them control over other resources; to encourage creation of new modes of production and new social structures which would accelerate the inevitable transition of communities towards modernity. In economic terms this often meant efforts to induce conditions for "sustained economic growth," the benefits of which would be gradually diffused among undeveloped places and peoples.¹² "The objective" of the "development decade" declared the UN General Assembly must be for each country to attain "a minimum rate of growth of aggregate national income of [at least] five per cent."¹³ It was "a virtual certainty," declared the Secretary General, "that nearly all the under-developed countries have in their physical and human resources the potential means for achieving decent standards of living for their people. The problem is to mobilize these latent . . . resources" to produce the growth sought.¹⁴ Since planning and government regulation, or direct participation in the economy, were usually essential, political development was important – and often interpreted to mean a government which, above all, could govern, which could mobilize people and power, and operate effectively in many new spheres of activity.¹⁵ Development and modernization were to be induced from the top – they were dependent on the way the state controlled, directed or guided production, reproduction and allocation of resources, on a new kind of "development administration" by new kinds of professionals.¹⁶

Thus, the 1960's was a time of assessing "human resource needs" and engaging in "educational planning" geared to a process of generating new skills.¹⁷ Great importance was accorded to higher education, particularly to professional education.¹⁸ Within the academic ranks of all "professions" there emerged a new "profession and development" literature.¹⁹ Lawyers should be one of these development-oriented professions: that was the claim of a large body of scholarly – but often "aspirational" or speculative – writings in the 1960's.²⁰

Much of this writing borrowed implicitly from modernization paradigms. "Legal development" or "modernization of law" were terms used to denote the kinds of legal phenomena found in a "modern" society – qualities ascribed to the basic concepts, rules, institutions, processes and actors of a legal system which fostered development. There are different ways to describe these characteristics (indeed, that project can generate much jurisprudential debate),^{20a} but some stand in sharp contrast to the "traditional" legal phenomena often displaced by it.²¹

Modern law puts emphasis on rules, on defining the "rights" and "duties" of individuals (including corporate individuals), and on the state increasingly acting through legal specialists, as the ultimate source of authority to ordain and sustain these rules. Modernization of law occurs as a more "scientific," permanent, government law displaces the idiosyncratic fiat of kings, feudal lords or chiefs – or particularist, local customs and modes of dispute settlement; when there emerges a concept of unitary state law as a body of distinct, secular, sanction-backed rules distinguishable from norms derived from religion or ethics; when the content of law

becomes written and the rules speak with some certainty in universal, impersonal, transactional terms; when law consciously purports to recognize and compromise between competing social interests; when there are distinct modes of reasoning to determine the application of rules to particular situations; when functional categories and hierarchies of rule making and adjudicative institutions are developed; when the processes for legislating and dispute settlement come under a regime of rules, and when procedure becomes valued for its own sake; when institutions and actors administering law achieve a degree of social autonomy, and the "legal system" becomes an independent, specialized activity.

Just as with other kinds of modernization, so these kinds of legal developments seemed to be the outcome of various combinations of historical events: when a new, heterogeneous polity is formed and there are efforts to incorporate quite different peoples into a pan-tribal state; when there are changes in technology and new modes of production and more complex economic relations; when there is growth in culture through the development of writing and language; when there emerges a new body of values and social paradigms – shared at least by elites and dominant classes; when there are efforts to create larger trading communities and to develop other transnational relations.

Modernization of law could, of course, be equated with the ideology of western legal development, and as a form of attempted, continuing cultural and political domination; or as an inevitable response of the state and ruling classes to particular changes in political economy.²² But it was also described in terms which depicted it as a universal, inevitable process. Since the state, in the modern world, was not about to wither, it would inevitably generate more and more law.²³ Moreover, the legal structures of western Europe had already been imported over much of the world. But history suggested that it was only through the creation of legal professions that replication of the paradigms of legal development were made possible: the degree to which modernization of law could bring other benefits depended on the character of the legal profession.²⁴ For evidence of this one could compare the history of the emergence of legal professions in Rome,²⁵ Western²⁶ and Eastern Europe,²⁷ the Near East,²⁸ Japan²⁹ and Latin America.³⁰ An eminent "international" encyclopedia, purportedly speaking in universalistic terms offered these propositions about relationships between legal development and development of legal professions.³¹

... The more the distinctiveness of law is emphasized and the more society aspires to legality, the greater is the need for an autonomous profession.

... Thus, the more developed a legal order, the more demands and responsibilities are placed upon its legal profession. The lawyer is called to bring a set of distinctive skills to his task.

... Expertise of that nature is essential if the lawyer is to perform his task, that is, to add to social and legal institutions. ... [The lawyer must] strain toward the rational and the justified, which is the source of growth and strength of the legal order.

This view of the relationship between legal development and professional development was widely urged in the 1960's. Political leaders as different as Haile

Selassie and Julius Nyerere spoke of the importance of lawyers.³² And so of course did professional leaders and educators.³³ Two roles for lawyers were emphasized: the establishment of "rule of law," and the creative use of law as an "instrument of development".

The "rule of law" themes bristled with professional chauvinism. A strong, independent profession and judiciary could assure the autonomy of a legal system guided by its own, internal norms, and thus assure robust interpretation of constitutional standards, fair administration of criminal justice, defense of the disadvantaged and continuous reforms in the legal system to prevent misuse or abuse of legal rules by dominant groups or by the state itself. Prominent lawyers and judges throughout the Third World espoused this ideal on many occasions.³⁴

The "law and development" theme was more often set out by academics. Modern law, should (in their view) be seen as a means of shaping development. Laws could be fashioned to create the underlying premises and understandings for sophisticated economic transactions, for organizing complex enterprises and structuring choices in decision-making, and for orderly and expert reasoned resolution of difficult disputes.³⁵ The instrumental notion of law was coupled with a concept of lawyer skills.³⁶ The use of modern law required not only technical legal knowledge, but it was frequently asserted, unique skills in formulating and interpreting rules, ascertaining evidence, weighing and mediating between competing interests, and so forth. These skills could be widely used in diverse settings. A famous passage by Karl Llewellyn captured the thought:³⁷

... the essence of our craftsmanship lies in skills and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for regularizing the results, for building into controlled large-scale action such doing of things and such moving of men. Our game is essentially the game of planning and organizing management (not of running it), except that we concentrate on the areas of conflict, tension, friction, trouble, doubt – and in those areas we have the skills for working our results. We are the trouble-shooters. We find the way out and set up the methods of the way, and get the men persuaded to accept it, and to pick up the operation. That is the essence of our craft.

The "development lawyer," properly trained, would (it was assumed) inevitably gravitate to strategic positions in decision making. He would prepare important social legislation (lawyer as draftsman), or work for a commission of inquiry (lawyer as investigator, "trouble-shooter"), or bargain for the terms of a joint venture agreement with a foreign investor (negotiator), or plead for recognition for important interests and principles (advocate, defender or rule of law). In a much-cited article Wolfgang Friedmann wrote:³⁸

The contemporary lawyer... in the developing nations must become an active and responsible participant in development plans.

An ever increasing... part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the scope and formulation of policies, in the exercise of legal powers constructively establishing or altering the relations between private legal parties inter se, between public authorities and private parties, between governments and foreign investors, and the like. . . In all these questions, the lawyer must

play an important, often decisive part. It is he who must draft the necessary legislation, or the complex international agreements; it is he who will usually be the principal or one of the principal representatives of his country in international negotiations. . . It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to strictly legal issues.

This depiction of "the role of the lawyer" in developing countries drew heavily from North American ideas (and was vigorously propagated by North Americans).³⁹ It was not universally accepted as an aspiration,⁴⁰ and, in any event, as most thoughtful observers knew, it did not often reflect the facts of professional life in the Third World. The legal professions which existed were patterned after European counterparts of an earlier historical period. As we shall see, the social bases of Third World professions (in terms of recruitment and participation in the economic and political system) were narrow. So, too, the prevailing conception of law and the lawyer's "role" tended to be legalistic, and his relationship to clients was more limited, and so was the range of services offered. Most lawyers were litigators and legal technicians; the usual lawyer did indeed "confine himself to strictly legal issues." That was the market for his services. There was little evidence of a professional urge towards instrumental, social engineering or use of "inventive skills for getting things done, any kind of thing in any field."⁴¹

These kinds of obstacles were duly noted in much of the writings (in the 1960's) about lawyers in Asia, Latin America and Africa. The prescription for the problem was legal education.⁴² While there was no single model for development-oriented, legal education, there was, again, a cluster of common themes: one could hear them discussed at international meetings in such diverse settings as Santiago, Lima, Ife, Lusaka, Kampala, Addis Ababa, Poona, Beirut, or Kuala Lumpur⁴³ and in numerous reports of "advisory teams" and special "consultants" to governments and universities on the development of legal education.⁴⁴ Indeed, it was through writing on legal education that many notions about "law and development" gained currency. Founders of new law schools, or reformers of old ones, called for a broadening of curriculum, pervasive use of interdisciplinary perspectives and more attention to "policy analysis." They called for more emphasis on "skills" training, problem-centered exercises and "clinical" kinds of learning experiences and the introduction of "active" teaching methods to replace didactic pedagogy. They called for research – and the production of new kinds of legal literature which would go beyond doctrinal analysis and treatment of law as a self-contained discipline, which would examine "social contexts" in which laws operated, and non-legal factors which affected the actual impact of different kinds of laws on different kinds of people.⁴⁵ Within some law schools in Asia, Africa and Latin America there were periods of energetic effort to produce these activities, outbursts of unusual creativity.⁴⁶ But, over time, the aspirations seemed elusive.

A number of interesting assumptions were made.⁴⁷ For example, it was assumed that just as national systems of education could be "planned" and redesigned to serve local developmental needs, so with legal education; that inherited educational structures could be changed from within by the logic of reforms. It was assumed that

the merit of plans would also overcome objections of the more conservative leaders of the profession who often exerted, in one way or another, important controls over legal education. It was assumed, despite troublesome evidence to the contrary, that the orientation of the private bar could be changed to reflect public rather than private concerns, a broad rather than a narrow conception of the role of lawyers. It was assumed that a crucial resource for reform – a new breed of law teachers, competent to undertake these complex tasks – could be recruited and retained. It was assumed that “skills” of the kind depicted in development literature could be taught, though the whole notion of these skills was, arguably, problematic and in any event difficult to implement without careful attention to the experience, special abilities, loads and ratios of teachers. It was assumed that the employment and work tasks offered to law graduates, particularly in the public sector, would reflect the reforms; that markets for employment would unfold for the development lawyers which good legal education would produce. It was assumed that career interests and other influences affecting the engagement and professional socialization of students would respond to these changes – that the image of the broad-gauged, selfless, public lawyer would replace the image of the narrow, client-centered practitioner despite the material benefits and status which often attached to success in the unregulated marketplace for private lawyers.

Other problems often went unexamined. Professionalization of legal and administrative structures when coupled with other kinds of social modernization could create – or exacerbate – problems of gaining access to courts, administrative bodies and other institutions which, as social change proceeded, exercised powers affecting more and more people. Modernization was often intended to bring commercial agriculture to rural areas: but this often meant increasing pressure to produce cash crops, increasing pressures on land, increasing contacts with and dependence on official agencies which taxed, regulated and dispensed important goods or services (such as credit) for success in commercial farming. These developments could force new kinds of economic relations and disputes, new kinds of encounters with law and administration.⁴⁸ Evidence of the access needs and difficulties which poorer people experienced in dealing with modern agencies was reflected, for example, in the growth of endogenous sub-professional groups: “bush lawyers,” “scribes,” “pleaders” and other kinds of self-made “fixers” and intermediaries.⁴⁹

Of course the modernization of state legal systems may be an inevitable and necessary phenomenon: For better or worse, the modern state needs increasingly complex law to organize a wide variety of activities, national and transnational. Sophisticated legal specialists are undoubtedly useful human resources. Legal education is important. But the development of these kinds of legal skills also depends on how lawyers are deployed and used, for whom they work and what they are asked to do.

Moreover, modernization and professionalization of law could be viewed from two perspectives. The first examined these phenomena from the standpoint of an elitist, top-down, professionally guided transformation of society in accordance with

prevailing paradigms of development and sought to produce human resources for the challenge. A second perspective viewed modernization of legal structures from the standpoint of the poor – notably the rural poor: small farmers, tenants, landless agricultural laborers living in a changing, and often increasingly class-oriented, ruthless, competitive social environment. The second perspective – once ignored in the dominant literature – has become increasingly important as doubts have grown about the validity of earlier paradigms of development and as a better picture of the social impact of Third World professions emerged.

II

Aspirations and claims which characterized the early rhetoric of the development decade faded quickly. "Since about 1965" many "development specialists" began "to realize that development [did] not work in the expected way."⁵⁰ Concerted efforts to increase industrial and agricultural production, investment, per capita GNP and income failed, by themselves, to produce benefits for the mass of people. Rather, as Dudley Seers suggested in his 1968 "Presidential Address" to a meeting in Delhi of the Society for International Development, orthodox strategies might be producing "obscene inequalities that disfigure the world." It was time to rethink "the meaning of development."⁵¹

The questions to ask about a country's development are therefore: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned. If one or two of these central problems have been growing worse, especially if all three have, it would be strange to call the result "development," even if per capita income doubled.

Country studies began to provide more detailed answers to these questions, using – as Seers had suggested – a broader range of "social indicators" to measure development,⁵² such as the distribution of land, health care, water and sanitation, education; opportunities for political participation, availability of credit; the quality of habitats. Poverty and inequality were often increasing, seldom decreasing. By the 1970's the World Bank manifested concern over these social trends. In his 1973 Presidential speech, in Nairobi, Robert McNamara spoke of people living in "absolute" poverty – "a condition of life so degraded by disease, illiteracy, malnutrition and squalor as to deny its victims basic human necessities," a condition which assured perpetuation of their poverty. In most of the Third World at least 40% of the population, sometimes far more, lived in "absolute poverty."⁵³

What some described as poverty others saw as impoverishment. In most countries the state exercised increasing control over resources essential to decent human existence. The problem was one of priorities and allocation.

Whether in food, habitat, health or education, it is not the absolute scarcity of resources which explains poverty in the Third World but rather their distribution. . .⁵⁴

Thus, by the end of the development decade there was a rediscovery – at least among non-Marxists – of "political economy," of politics as a struggle in different

arenas, for control over resources and advantage in economic relations.⁵⁵ Dudley Seers had observed:⁵⁶

Practically every decision taken by government officials has implications for the degree of equality – to lend to big farmers or small, to set prices of public corporations at levels that tax or subsidize rich consumers, to build roads for private motor cars or for goods vehicles, to put the best equipment in rural or urban schools. It would not be a bad thing to put up in every civil service office a sign: “Will it reduce inequality?”

Seers had warned that decisions favoring equality might not be forthcoming unless basic changes were made. He suggested that class interests of decision-makers, dependence on foreign investors and trade and technology, and pathologies in public administration (such as corruption, social biases and organizational defects) created powerful forces influencing inequitable allocation. Other studies⁵⁷ suggested other factors to explain what was happening. Historically – as a result of colonial experience or the creation of indigenous imperial political economies – many societies now incorporated in modern states had long been characterized by social gaps: “elites” and the “mass;” “patrons and clients;” “modern” economic and social enclaves and “peripheral” or subsistence sectors; urban growth and rural underdevelopment. Exploitation of peasant producers and the breakdown of traditionally self-sufficient, rural communities were seen as historic trends.

Most post-colonial states had been built, not on social revolutions nor destruction of the laws, institutions, bureaucracies, sub cultures and economy fostered by the colonial powers, but on inheritance and continuous usage of many of these structures by dominant groups in the new state. Even in avowedly socialist states, such as Tanzania, there was often considerable retention of colonial structures despite discontent with them – as witnessed by the uncertainty continually expressed in official quarters about what to do with the received legal system.⁵⁸ Whether socialist or otherwise the strategic institutions of the state were often dominated by coalitions of professional or occupational groups: political executives, the military, high-level bureaucrats, doctors, lawyers, wealthy owners and managers of businesses, party leaders – and traditional elites such as chiefs or religious leaders. The interests of these sometimes diverse groups tended to converge; their power over various resources and their opportunity for patronage was extensive, and their social accountability was limited. Arenas for effective participation of ordinary people in politics – through parties, parliaments, demonstrations and organization – were limited.⁵⁹ Access to law and use of it to impose accountability on those who wielded power was limited. Access to key decision-makers in bureaucracies was limited. The “gaps” which existed were cultural, social and political as well as economic: not only did the poor lack material resources essential to improvement of their condition, they increasingly lacked means to gain voice in distributional decision making. Those were the assertions of the new development literature.⁶⁰

III

Thus, over the past two decades, studies of legal education, lawyers and legal professions in the Third World have been pursued in a changing intellectual milieu:

a period of "paradigms lost," of shifting perspectives and perceptions of the problems warranting concern, of increasing awareness of the importance of understanding the political economy context, and of growing concern about the competence of existing political structures and professions to serve the needs of the poor. This changing milieu helps to explain why the materials in this book reflect different approaches and are directed to different questions.

"... [T]he history of [these]... studies reflects a movement from purely policy concerns to more basic issues, and from relatively narrow to much broader ideas about the methods of inquiry."⁶¹

Earlier work was often shaped by modernization concerns and assumptions, by efforts to compare aspirational models of professions and lawyer roles with the "reality" discovered.⁶² As late as 1973 (at an international seminar on "the study of legal professions in developing societies") many scholars still thought it was important to work with a "profession-centered" approach which emphasized concepts and categories concerned with "structure" and "functions."⁶³ An idealized model of lawyers and professions as "agents of social change" and "brokers of rule of law" was developed, e.g., a profession recruited from a wide, social base; capable of providing many kinds of services in a variety of institutional settings (apart from the courts); "pragmatic" (rather than legalistic) in outlook; "active" in promoting the autonomy of law and public service responsibilities of the profession; "inventive" as developers of new legal doctrine. The task was to assess the progress towards and prospects for realization of this kind of "ideal" professional development, to find impediments and constraints – in the hope they could be removed by addressing flaws in legal education and professional socialization.⁶⁴

Yet, by the 1970's other researchers – influenced, for example, by the shifting emphasis of development studies to political economy – began to suggest a quite different approach. Scholarship in other areas had begun to focus on the social gaps and on the political economy of underdevelopment of many people as a cost of the development of some. These trends were explained, in part, by tracing continuities between colonial and post-colonial societies:⁶⁵ continuities in the social organization of wealth-producing sectors of the economy; continuities in the way power and thus (often) laws and legal institutions were used by dominant groups to legitimize economic relations and the allocation of resources; continuities in the characteristics of structures through which governments planned "development" and allocated publicly-controlled resources; continuities in terms of persistent ethno-linguistic, religious or other cultural divisions which perpetuated segmentation as well as stratification of society. The task of research on legal professions – as some now perceived it – was to see whether and how the interests and behavior of lawyers and their professional culture related to this broader political economy context; to see whether and how historic divisions in society continue to affect the clientele, work tasks and social roles of different sub groups within the profession. Thus the character of a legal profession was seen more as a product of external social forces rather than dynamics developed within an autonomous legal system. Professions were alleged to be part of an official

superstructure which sanctioned distributive injustice, social stratification, class interests, and "peripheralization" of impoverished people.⁶⁶

Even before the end of the first "development decade" there was increasing disenchantment with growth-centered strategies of development and earlier modernization paradigms.⁶⁷ Today, in one way or another, many who are concerned with development are concerned with the social "gaps."⁶⁸ New questions are pressed. Development for whose benefit? Of what? How – by what means? There is growing interest in new alternative concepts and approaches to supply answers: "people-centered" development; distribution of land, goods, services, work and wages to enable satisfaction of the "basic human needs" of everyone; "self-reliant participation" in new, more "endogenous" structures which allocate these resources.⁶⁹

These concepts suggest still another approach to the study of legal professions, one which looks at them from the perspective of the victims of the social gaps. The "access approach" examines the social impact of the professionalization of legal and administrative structures on the capacity of people who are poor and "peripheralized" to gain access to resources essential to the satisfaction of their basic needs.

The studies which follow reflect, for the most part, either a profession-centered (essentially "modernization") approach, or a social context (essentially "political economy") approach. However, in varying ways they also provide information or insights for an access ("bottom-up") approach. All of these approaches are important in order to assess the social importance of lawyers in development. But the more ideas about development are centered on concerns about the gaps, the more important it becomes to look at lawyers and the legal system from the viewpoint of victims of the gaps – from an access approach. In the concluding Chapters in this volume we use all three approaches to draw some general observations about the social impact of legal professions on the poor and disadvantaged; and we explore the unmet legal needs of the poor and ways of meeting these needs and, the importance of that task if one is concerned with alternative development strategies designed to close the gaps.

Notes

(See list of Selected Readings and References, p. 381)

1. For some partial bibliographies see, e.g., Maru (1972); *ILC Newsletter*, No. 15 (1975); Galanter (1968) (India).

2. On these problems, cf. Luckham (1975); Lynch (1975); Hazard (1965). For widely varying treatment of the same subject, compare, e.g., Berle (1933) with Nonet and Carlin (1968) (different entries at different times in the same encyclopedia). Compare Pound (1953) with Auerbach (1976) (the legal profession in America). The problem is not new: many research themes are suggested in the wide variety of propositions about lawyers offered by diverse characters of Shakespeare; see Hood Phillips (1972) for an interesting analysis.

3. The term "third world" is obviously a very troublesome classification as many have noted. See, e.g., Worsley (1979). For purposes of examining legal phenomena, it obviously may be important, depending on the questions asked, to distinguish between, e.g.: "richer" countries like Venezuela and those with little wealth; socialist and non-socialist countries (and the varieties of socialist countries); countries in the Francophonic (or Hispanic) civilian legal family and those which retain English as one official language and the English common law as the primary source of official law. Compare further those countries which have "mixed" bodies of received law (e.g., Ethiopia) and those which have adopted civilian laws and institutions but without a European language as an official medium for transmission (e.g., Turkey, Thailand). For some purposes it may be important to distinguish between countries like India (or Indonesia) where there are many lawyers and countries like Kenya where there are comparatively few and where the indigenous lawyer of African descent is a newcomer on the scene. There are also countries which have largely developed (until recently at least) their legal systems without lawyers of the kind discussed here, e.g., China, Saudi Arabia, Ethiopia. The main focus of this volume is on countries which have legal systems and officially recognized legal professions which are modeled on a Western counterpart, which have large poverty sectors and significant problems of differential access to administrative and legal institutions and where there are significant social gaps of the kind described in this chapter. These conditions, we suggest, make for common problems. See Chapter 14, *infra*.

4. For fuller discussion, see Chapter 13, *infra*. On this history see, e.g., T. Johnson (1973) (legal professions in British Colonies); Samaraweera (1978) and Fernando (1970) (Sri Lanka); Adewoye (1968) (1970) (Nigeria); Rwelamira (Chapter 8) (Tanganyika); Luckham (1976) (Ghana); Ghai and McAuslan (1970) (Kenya); Vacha (1962) and Setalvad (1971) and Schmitthener (1969) (India); Geraghty (1962) and Worku Tafara (1972) (Ethiopia); Lowenstein (1970) (Chile); Lynch (1978) (Colombia); Perez Perdomo, Chapter 3 (Venezuela); Steiner (1971) (Brazil); Cuneo (1972) (Chile); Pedamon (1972) (Francophonic Africa); Kasemsup (1976) (Thailand); Zaideh (1968) (Egypt).

5. For an account of the development of this interest by some researchers see, e.g., ILC *Newsletter*, No. 9 (1973). For noteworthy early efforts to study a profession empirically from the standpoint of "roles" of lawyers in development-related activities see, e.g., Lowenstein (1970); Ross (1973); Geraghty (1968). Cf. Luckham (1976) ("Natural History of a Research Project").

6. The intellectual history discussed here is reviewed (from somewhat different perspectives) in Pye (1979) (Western theory) and Inayatullah (1975) (Asian reception of it) and Mafeje (1970) (African and Marxist perspectives). See also Jinadu (1978) (reviewing concepts of "modernization" developed by Nkrumah, Cabral and others). See also Haven (1975) (methodological implications of "modernization" and other approaches to "development").

7. Uphoff and Ilchman (1972), p. 21.

8. See Brode (1969) (extensive annotated bibliography). Much relevant literature is reviewed in the materials cited in Note 1 and in Coleman (1968). See also, e.g.: Parsons (1960); Eisenstadt (1963); Levy (1966); Wiener (1966) for some discussions suggestive of legal implications of modernization.

9. They are interestingly catalogued and critiqued in Haven (1972).

10. Perhaps high water marks in this kind of speculation about the tradition-bound poor are McClelland (1961) and Hagen (1962).

11. Shils (1962).

12. Cf. Rostow (1960).

13. United Nations, Department of Economic and Social Affairs (1962), pp. 7-12 quoting UN General Assembly Resolution 1710 (XVI).

14. *Ibid.*, pp. 7-12.

15. See, e.g., Lewis (1966); Huntington (1969).

16. Cf. Schaffer (1969).

17. See, e.g., Harbison and Meyers (1966); Loken (1969).

18. See, e.g., UNESCO (1963).

19. Cf. Beneviste and Ilchman (1969).

20. For a review of some of the themes found in this writing, see Galanter, "Towards a Taxonomy of Theorizing About 'Law and Development'" (I.L.C. Working Paper 1972). Another partial bibliography of lawyer authored materials and a listing and description of regional and international meetings and

projects which focused on "law and development" appears in Merryman (1977). See also Bainbridge (1972) (projects in Africa); ILC *Newsletter* No. 2 (1969) (Latin American projects). Surveys of some of the writing about "law and development" within Africa, Asia and Latin America can be found in working papers prepared for the ILC reports, *Law and Development* (1974) and *Legal Education in A Changing World* (1975). See, e.g., Baxi (1972); Ghai (1972); Ghai (1973); Zolezzi (1972); Tiruchelvam (1972); Cuneo (1972).

20a. See, e.g., Sacks (1978); Chiba (1978) and Lombardi (1978) for recent critiques of North American writing which dominated these discussions in the 1960's. See, e.g., for a radical critique Diamond (1971).

21. See Galanter (1966). For Weber on modernization of law, see Rheinstein (ed.) (1967), especially Chapter XVI. For Maine, see Maine (1897), especially at 391-400; Maine (1930), 34-75; 180-182; 338-340. See also Berman (1977) and (1978) (modernization of law in medieval Western Europe). For a provocative study of the case for "modern" law in Ethiopia, see Sedler (1967). See also Sedler (1968) and Rheinstein (1963).

22. See note 20, cf. Luckham (1979).

23. Cf. Seidman (1978) (e.g., Chapter 3); Galanter (1966).

24. For theorizing about this, see, e.g., Beckstrom (1974).

25. See, e.g., Dawson (1968); Pound (1953).

26. Dawson (1968), see also Deak and Rheinstein (1936). Cf. Berman (1977).

27. Barry and Berman (1970); Kucherov (1953).

28. Zaideh (1968). Cf. Brinton (1930).

29. Henderson (1968); Rabinowitz (1956); Abe (1962); Hattori (1962).

30. Lowenstein (1970); Steiner (1971).

31. Nonet and Carlin (1968).

32. See Nyerere (1964) and Haile Sellassie's "Introduction" to the Civil Code of Ethiopia (Addis Ababa, 1961) and his address to the graduates of the Faculty of Law, Haile Sellassie University quoted in 2 *Journal of Ethiopian Law* 515 (1966). Cf. Kaunda (1970); Matrajan (1962) (describing the commitment of Indian leaders to the legal profession).

33. The literature reflecting these views is vast. For statements by professional leaders on the need for a strong bar, see materials in note 34, below. For statements by persons prominent in the founding or reform of university law schools, see materials cited in notes 43 and 44. For accounts of "law and development" meetings during this period, see note 20.

34. For reports of professional meetings in Asia, Africa and Latin America (during the 1969's) on the legal profession and the rule of law, see, e.g., ICJ (1959); ICJ (1961); ICJ (1962); ICJ (1965); Verhelst (1971); Boni (ed.) (1971); Verhelst (ed.) (1971); Harvey (1975) (p. 111. Founding of the African Bar Association). For "rule of law" statements by some prominent African and Asian legal figures, (see, e.g., Obwanger (1964) (Minister of Justice, Uganda; a particularly eloquent statement); Iyer (1974) (impassioned plea by Justice of Indian Supreme Court); Aguda (1974) (Chief Justice of Botswana); Awolowo (1966); Bentsi-Enchill (1969); Nwabueze (1977); Amissah (1976); Gajendragadker (1969); Shawana (1976); Kanyeihamba (1975) (Chapter 3) (present Attorney General of Uganda); James and Kassam (1973) (speeches of Chief Justice P.T. Georges of Tanzania); Verhelst (ed.) (1971) (numerous statements by prominent African judges); Worku Tafara (1972).

35. See Note 20. See also Seidman (1978) (leading text on "law and development" which contains edited version of articles written during 1960s and early 1970s). See also for reports on law and development meetings in Asia and Africa; Könz (1968); Morgan (1973); note 20, *supra*.

36. Lowstein (1970) (Chapter 2) contains a good statement of the propositions which follow. See also Vanderlinden (ed.) (1968) (discussions of skills needed by African lawyers) and Agrawala (ed.) (1975) (skills needed by Indian lawyers). Cf. ILC, *Legal Education in a Changing World* (1975) at 62 (skills as a problematic concept used to define tasks of legal education).

37. Llewellyn (1942) cited and discussed in Lowenstein (1970) (Chapter 2). See also Cuneo (1972). Lasswell and McDougal (1948) was also widely cited and propagated (see, e.g., Agrawala (1975); McDougal (1946) and (1973)). Viewed in a third world context this piece seems to be the penultimate aspirational statement on the role of legal education.

38. Friedman (1963). (See also Nyhart (1962) reporting on a workshop at Massachusetts Institute of Technology on "law and development" which helped to generate the Friedman paper).

39. See Merryman and Galanter in Note 20. Cf. ILC (1974), Trubek and Galanter (1974), Franck (1977).

40. For material reflecting differing and sometimes sharply disputed contrasting views of "roles" of lawyers, see e.g., Ghai (1972); Vanderlinden (ed.) (discussion and debate about work tasks of lawyers in African societies); Agrawala (1975) (same, in India). Cf. Schwartz (1968) (India); Gower (1968) (Africa). The presentation of Galanter reported in ILC *Newsletter* No. 9 (1973) develops two models for comparison of legal professions – i.e., a profession more geared to Llewellyn's "trouble shooter," "inventive," "planner" lawyer who emphasizes the instrumental use of law in development and a profession oriented towards more strictly legal tasks and a more modest conception of the lawyer's role.

41. For early empirical studies portraying this gap between aspiration and reality, see, e.g., Lowenstein (1970) (Chile); Ross (1970) (East Africa); Geraghty (1968) (Ethiopia); Cottrell (1972?) (Nigeria). Cf. Galanter (1969) (reporting on research on the Indian legal profession); Kusumaatmadja (1969) (Minister of Justice and Dean of a major law school in Indonesia) (offers critical review of Indonesian lawyers and legal education using skills and orientation as evaluative criteria). Gower (1968) (critique of legal profession in West Africa). See also ILC *Newsletter* No. 9 (1974) (Reports on research on lawyers). Cf. ILC, *Legal Education in a Changing World* (1975) (Chapter 1) (critique, by international panel with wide experience, of legal education and professional acculturation).

42. The history of efforts to gear legal education to "development" and to new roles for lawyers is described in numerous writings. It is summarized by the International Committee on Legal Education in Developing Countries in ILC, *Legal Education in a Changing World* (1975) and in various working papers (regional reports) prepared for the committee: Ghai (1972); Cuneo (1972); Markose (1972); Pedamon (1972); Hazard (1972). See also Kusumaatmadja (1969); Howard (1972).

43. See, e.g., ILC *Newsletter* No. 2 (1969) (Chile, Perú, Brazil); Ford Foundation Annual Report 1969 (p. 64) (Beirut); 3 *Journal of Malaysian and Comparative Law* No. 2 (December 1976) (Papers presented and discussed at Kuala Lumpur Regional conference on legal education); *Journal of African Law Supplement* (1967) (Ife conference on legal education); Vanderlinden (ed.) (1969) (Addis Ababa; Africa); Agrawala (1972) (Poona, all-India); Könz (1968) (Kandy, Sri Lanka and India); Morgan (1973) (Lusaka, Zambia and southern Africa); 4 *Japipur Law Journal* (1964) (Kasauli, India); Kusumaatmadja (1969) (Indonesian meetings); Cuneo (1972) (Latin American meetings); Gardner (1974) (same); (results of study for USAID).

44. See, e.g., United Kingdom Cmd. No. 1255 (1961) (early expression of concern about state of legal education in African and Asian countries); Gower (1962) (Report to Ford Foundation); Gower, Cowen and Sutherland (1959) (Ghana); Gower, Johnstone and Stevens (1969) (Uganda); Paul and Twining (1971) (Botswana, Lesotho and Swaziland); Etole (1964) (India); Von Mehran (1965) (India); University of Delhi (1964); University of Kerala (1965). See also Johnstone (1972) (survey of ILC and other technical assistance activities in Africa); Franck (1972) (USAID).

45. See, for a summary of prescriptions, ILC, *Legal Education in a Changing World* (1975). While the literature is immense, interesting country reports and proposals for reform may be found in Vanderlinden (ed.) (1968) (Africa) (reports from various law schools); Agrawala (1975) (India); Ryu (1964) (Korea); Ollenu (1970) (Ghana); Mustafa (1966) (Sudan); Menon (1974) (India); Kusumaatmadja (1969) (Indonesia); Twining (1965) (East Africa).

46. Cf. Gardner (1974); Johnstone (1972); Bainbridge (1970). On efforts to develop legal literature, see Uglov and Twining (1979) (forthcoming) (a survey and report on problems of developing legal literature in smaller Anglophonic jurisdictions).

47. See ILC, *Legal Education in a Changing World* (1975) (Chapter III). Cf. Paul (1976) (difficulties in planning reforms); Baxi (1979).

48. These themes are developed in Chapter 13 (section 9), *infra*.

49. On the significance of "lay" legal figures, see, e.g., Lev (1973); Geraghty (1969); Morrison (1974). See also ILC, *Legal Education in a Changing World* (1975) at 69–71.

50. Adelman and Morris (1973) (p. 1).

51. Seers (1969).

52. See, e.g., the ILO/UNDP studies, initiated in 1969, which focused on rural poverty in Colombia, Sri Lanka, Kenya, the Philippines, Sudan and Ethiopia (which are cited and discussed in Francis Blanchard's "Introduction" to ILO (1976)). The World Bank initiated a number of other country studies which highlighted maldistribution and inequality; see, e.g., World Bank (1975) (Kenya). See also World Bank

(1975); United Nations, Department of Economic and Social Affairs, 1974, *Report on The World Social Situation* (1975).

53. McNamara (1973). Cf. Mohamed ul Haq's revealing account on changing attitudes towards the inevitability of inequality in Haq (1976).

54. Dag Hammarskjöld Foundation (1975).

55. Cf. Coleman (1972).

56. Seers (1969).

57. Cf., e.g., Amin (1977); Frank (1969); Leys (1975); Myrdal (1968); Stavenhagen (1970); Furtado (1970); World Bank (1975); Mellor, J.W. (1976); Goulet (1973) Inayatullah (1975).

58. Cf. Ghai (1976).

59. Cf. Uphoff and Ilchman (1972) (153–201).

60. See Chapter 13, notes 76–82.

61. ILC (1975) (*Law and Development*), p. 58.

62. See e.g., Lowenstein (1970).

63. See ILC *Newsletter* No. 15 (1974).

64. *Ibid.*

65. See, e.g., Leys (1975); cf. Ghai and McAuslan (1970).

66. See Luckham (1976) (Natural History).

67. See note 57, *supra*.

68. See Chapter 14, note 1.

69. *Ibid.*

Legal Roles in Colombia

Some Social, Economic, and Political Perspectives*

Legal institutions and members of the legal profession have played central roles in the history of most Latin American nations. During the Colonial period, Spain used legal decrees to define its relationship with the Colonies and legal institutions to maintain the crown's control.¹ After independence in the early nineteenth century, legally trained men were prominent in the political organization of the new governments and legal scholars contributed to the development of ideologies and values justifying the state's power.²

With the introduction of new professions and the diversification of higher education, legally trained individuals are no longer as dominant in the public sector, but they are still influential. Industrialization, urban growth and the expansion of government control over economic production are generating new demands for legal skills in both public and private spheres. Governments rely heavily on regulatory laws to implement public policies and lawyers exercise influence over the impact of these policies through the daily interpretation and application of government regulations. The legal profession's monopoly over legal knowledge has contributed to lawyers' roles as intermediaries between private parties engaged in commercial transactions. Similarly, state control over resource allocation has enhanced their roles as brokers of information on government regulations and as intermediaries between state agencies and private interests. Access to public decision-making has become critical to the protection of private interests, and lawyers enjoy a monopoly over many of the formal channels for influencing specific government decisions.³

Given the influence the legal profession has enjoyed in Latin America, it is surprising that there has been so little research on the bar's organization, functions, work settings, values, and methods of allocating and delivering legal services.⁴ Little is known about the interrelationships between the organization of legal services and

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the process of social change. There is a sizeable body of literature on legal education which includes studies of the practicing bar and reflects some concern over the lack of awareness about the relationships between the legal order and social change, but the authors rarely attempt to analyze the social forces which have shaped legal training, the economic and political interests the profession serves, or the way the demand for legal services constrains and orients the development of legal skills.³

This study is a limited effort to provide some perspective on these questions through a series of interviews with lawyers in one Latin American city, Bogota, Colombia. Information was gathered on the distribution of access to membership in the bar, career patterns, work settings, and modes of allocating and delivering legal services. The findings on the profession's characteristics are examined in the light of Colombia's class structure, economic order and political system.

The first section of the paper is a brief description of the Colombian national context. Its purpose is to provide a general picture of the historical forces which have shaped the bar's traditions and the current social, economic and political trends which are fostering new legal roles and skills. The second section examines the relationships among the social origins of the profession, law schools, career patterns, and the class structure. This is followed by a discussion of the way the distribution of legal services among different types of clientele reflects the economic order. The fourth part is concerned with government legal roles, the judiciary, and political control over the bar in light of the state's expanding power.

The latter three sections are based on interviews with a random sample of individuals who graduated from the six principal law faculties in Bogota.⁴ They included private schools with a reputation for educating the political and economic elite, the public supported national law faculty and night schools regarded as avenues of upward mobility.⁵ The sample population was stratified by combinations of schools to make sure a cross section of the bar would be interviewed and by the date of graduation to obtain comparative information on lawyers at different stages in their careers.⁶ The problems of stratifying the sample in this way of course set limits on any generalizations about the profession as a whole that may be based on this study.⁷ On the other hand, this methodology forced the author to interview lawyers in a wide variety of work settings. The results should be seen more as an impressionistic summary of what was learned through the interviews, rather than as quantitatively significant.

I. The National Context

A. The Colonial State and Early Independence

The Colombian legal profession originated in an agrarian society tightly controlled by the colonial state. The Spanish Crown used the legal order to regulate economic production, social relations and the allocation of political power.⁸ Its policies were administered by a colonial bureaucracy staffed at the top by Spanish civil servants trained in law.⁹

The dominant groups in Colombian colonial society were the Spanish Crown, the

Catholic Church, the local Spanish bureaucracy, and the American born Criollo with an accepted Spanish blood line.¹² These groups did not always share common economic and political interests. As the major political force, the Crown's principal objective was to develop a new source of wealth for Spain. The land and mines in the New World could only be productive for Spain if the king controlled access to the scarce factors of production – the Indian and slave labor force. The Church's public position was to assure the development of a Christian society in the New World, but it also saw the opportunity to increase its wealth through taxes, donations, and land holdings, justified as necessary to finance the missionary effort and the educational institutions in the colonies. Government revenues had to be high enough to provide an incentive for the Spanish colonizers to make the trip to Latin America, to staff the Crown's local bureaucracy, and to manage the mines and large plantations.¹³

To integrate these diverse interests and still maintain control, the Crown promulgated an elaborate and complex body of legal rules administered by the local bureaucracy. By the seventeenth century there were over 100,000 such royal decrees regulating all aspects of life in the colonies.¹⁴ The unmanageability of these laws led to a codification known as the *Recopilación de Leyes del Reino de las Indias* (hereinafter referred to as the Laws of the Indies) encompassing approximately 6,500 decrees divided into nine books.¹⁵ The code defined the rights of persons granted permission to exploit natural resources,¹⁶ regulated the legal forms for the use of Indian and slave labor,¹⁷ gave Spain a monopoly over all international trade, provided for the organization and duties of the Catholic Church in the New World and its role in the educational system,¹⁸ and defined the structure of the bureaucratic colonial government.¹⁹ Almost all forms of private economic activity were at least formally subjected to some type of government regulation.

Spain's efforts to control most economic activity beyond subsistence farming and the parallel power of the bureaucratic state led to an emphasis on legal roles in government. The bureaucracy was financed by a complex set of taxes on the exploitation of all natural resources and labor, and on consumption.²⁰ The acts of the colonial government, and its relations with private parties were overseen by the legal institution known as the Real Audiencia.²¹ It was staffed by Spanish law graduates and a degree in law was required to represent private parties bringing claims before it. The Real Audiencia had jurisdiction over (a) conflicts among persons of a Spanish blood line, (b) the protection of the Indian labor force from excessive exploitation adverse to the long-run interests of Spain, (c) the local interpretation of the Crown's policies, and (d) the collection of taxes and payments to Spain.²²

The public importance of men schooled in law and legal institutions was a natural outgrowth of the structure of higher education in Spain and the reproduction of the Spanish educational system in the colonies. A Spanish university student could specialize in Canon Law, Civil Law, theology, or medicine.²³ The schools of theology prepared the priests; future public officials studied law. Their training included an interesting mixture of legal concepts.²⁴ There were the natural law principles

underlying Canon Law, and the concepts of individual property and contract rights embodied in the Spanish adaptations of the Justinian Code. In their final year, they studied the laws of the Indies oriented toward a state managed colonial economy with individual rights determined by a person's status and special legal privileges.

This same university structure was reproduced in Colombia and the law faculties were destined to play a central role in the colony's political life. Several factors contributed to their importance. First, the students were the children of the Criollo²⁴ elite who had acquired property and a long-run economic stake in the country's political future. Access to the university was restricted to persons with a pure Spanish blood line, as were most government positions of any importance.²⁵ Secondly, because of the orientation of public law courses, law faculties were the intellectual center for discussions of recent philosophical and political trends in Europe and the United States.²⁶

When the increases in Spanish taxes caused the Criollo elite to begin considering a movement for political independence late in the eighteenth century, the Spanish Crown ordered the law schools to cease teaching constitutional law and prohibited the circulation of any copies of "The Rights of Man" or the "French Constitution."²⁷ These prohibitions were difficult to enforce and the law schools continued to be focal points for informal debates over European political trends.²⁸ When economic and political forces brought the independence movement to the level of open defiance, law school graduates were in the unique position of being the only Colombians formally educated in government administration.

The character of the government they structured after independence reflected contradictions between the formal liberal ideology embraced by the political elite and the reality of the Colombian context. The first state constitutions included adaptations from the United States' Declaration of Independence, from the "Rights of Man" and from Rousseau's social contract,²⁹ but the actual form of the state was very different. After a brief effort at liberal economic and fiscal reforms, state monopolies over revenue producing agricultural products were retained. Indirect taxes on production and consumption were increased, and the prior decrees and orders of the Spanish Crown were maintained as part of the legal order unless in direct conflict with a decree or legislative act of the new government.³⁰

Over the next thirty years, the law faculties were one of the focal points for an ideological struggle among the dominant classes.³¹ On the one side, the large landowners and the Catholic Church feared the breakdown of the "Senorial Order". This order was based on an accepted social hierarchy with each individual's status established by the position of his family and a minimum existence guaranteed to the peasants by the landowning class. On the other side, urban groups dependent on the growth of commerce and small industry, and agrarian entrepreneurs raising cash crops for export, favored fewer government restrictions on private economic production and trade. They utilized the liberal ideologies of nineteenth century Europe to defend their position.³²

In the law faculties the conflict centered on the use of Jeremy Bentham's treatises on legislation as required texts. In 1825, acting President Santander, a friend and

disciple of Bentham, decreed that translations of Bentham's works would be required texts.³³ The large landowners and the Church reacted strongly through the "Association of Concerned Parents." Church leaders threatened to excommunicate anyone teaching Bentham's ideas. They argued that the principle of utility as a basis for guiding human action was immoral, contrary to Christ's teachings, and a direct threat to the existing social hierarchy.³⁴

This conflict over the law school curriculum continued until the middle of the century with each new government promulgating decrees on the required courses and texts.³⁵ It illustrates the importance of legal education as the training ground for the dominant class' children with an interest in a government career. The attention Bentham received probably reflects Colombia's economic ties to England.³⁶ Bentham's emphasis on clear and simple rules, predictability in contractual relations, and security in property was also consistent with the needs of Colombian commercial groups.³⁷

When tobacco exports began to stimulate the economy in the late 1840's there was a breakdown in the old political order based on state monopolies, and young liberals, schooled in Bentham's ideas, transformed the legal order and reoriented the state.³⁸

B. The End of the Colonial Order and the Importation of European Liberalism

In the middle of the nineteenth century, the growing demand for tobacco in Europe stimulated Colombia's export sector.³⁹ The producers of export products and the urban commercial interests gained in political power and they took steps to end state monopolies, establish free trade, reduce sales taxes, expand the money market, force the sale of church landholdings and initiate a federalist policy to minimize government intervention in the economy.⁴⁰

Historians differ on the consequences of these policies. The most common interpretation is that nineteenth century economic and political liberalism were necessary to break down the colonial economic order and to establish the basis of a modern state and economy.⁴¹ A second group of historians have argued that the liberal policies led Colombia into a period of economic stagnation and decline, but both share the view that the colonial economic order was transformed during the latter half of the nineteenth century.⁴²

Many of the liberal political leaders were trained in law by the disciples of Bentham and they had ties with foreign interests through legal careers in commercial law. Three of the most prominent were Florentine Gonzalez and the Samper brothers.⁴³ Most of the liberal economic reform policies date from the appointment of Gonzalez as finance minister. He had worked as a lawyer for English mining interests and as finance minister, he argued against protective tariffs and emphasized the need to expand the exportation of Colombia's raw materials to Europe.⁴⁴

The Samper brothers also went into business with British interests and they accumulated a sizeable family fortune.⁴⁵ Miguel Samper devoted his writings to

convincing the Colombian elite about the virtues of the English bourgeoisie. Jose Maria Samper was more of a jurist and political philosopher. In *Ciencia de la Legislacion*, he described the basic legal concepts which have dominated Colombian law schools for a century.⁴

Jose Maria Samper attempted to blend the European motions of natural law and legal positivism into a unitary and autonomous method of legal reasoning. He argued that legal scholars should use the positive method of the natural sciences to deduce a systematic framework of legal norms from basic principles, self-evident in the nature of man. These principles or natural laws were seen as being universal in the sense of not being linked to a specific temporal or historical context. Their universal character helped Samper to argue the relevance of a set of ideas developed in the more industrialized, market-oriented European economies for an agrarian society characterized by a patron-client form of social organization. The natural laws could be identified by a process of pure reasoning focusing on man's nature and from these principles, the norms of a rational legal order could be deduced.⁵

His ideas were not original. They were similar to the concepts of legal science as they had evolved in Europe. They are important, however, for the way they reflect the efforts of the dominant Colombian classes to perceive their own society through a set of ideas developed in a totally different economic and political context. The ideas enabled them to identify with the metropolis of Europe while establishing a legal order that provided security in property, respected the individual rights of the dominant classes, and created predictability in economic relations.⁶

A further manifestation of this desire to modernize Colombia by adopting European political and legal forms, was the importation of European civil and commercial codes by the liberal reformers. Concerns about the confused state of Colombian law were expressed as early as 1822 when Santander appointed a commission to draft civil and criminal codes, but the codification process was slow getting started.⁷ The first penal code was not adopted until 1837 and the first commercial code was enacted in 1853.⁸ Both were based on Spanish models. Andres Bello's adaptation of the French Napoleonic Civil Code was originally enacted by two departments in 1859 and then by the central government in 1887.⁹

The reasons for this delay in the codification movement had less to do with any opposition to the enactment of foreign models than with the lack of public resources to spend on the task of retaining persons to review the European sources and to prepare them for enactment. Concern over the confused state of the law was not great enough to make codification a high priority issue.¹⁰

Once the codification movement did take hold in the 1850's, it was still isolated from the realities of Colombian life. For example, in 1853, the commercial code was introduced in the Colombian Congress by a liberal party deputy from Panama who was from a family with important commercial interests.¹¹ It was enacted with little or no debate even though it was based on a Spanish Code of 1829 drafted for a very different social and economic context. One legal scholar, Robert Means, who has done extensive research on the sources of the commercial code has characterized this isolation of the whole Colombian codification movement as follows:

A certain degree of isolation is a natural part of codification in the civilian tradition because of the relative autonomy of that tradition's intellectual structure. But the disparity in development between Colombia and even relatively under-developed European countries like Spain magnified the isolation in two ways. The first concerned the number of persons for whom the code had any relevance. Even in Europe commercial law governed a relatively small part of the population, but that proportion was drastically smaller in an under-developed and basically noncommercial country like Colombia. The second concerned the proportion of the new code that was relevant to anyone. The arguments for codification had been basically procedural and thus had little to do with most of the code. Colombia's acquisition of a new law of business associations was not due to any demand for new rules governing this field; it was due to the structure of the Spanish code.⁴

The "basically procedural" arguments to which Means refers are the requests of merchants for a more rapid method of collecting interest and debts than was available through the ordinary courts.⁵ He could find little evidence of any concern about the extensive substantive provisions of the code governing commercial contract rights or over the lack of government power to regulate the process of incorporation under the code.⁶ In fact, Means concludes that for some time after the enactment of the code, Colombian commercial groups were largely unaware of its contents.⁷

This isolation of the codification movement is another example of the tendency to import European political and legal forms in an effort to pattern the formal character of the Colombian state after the European metropolis. The Spanish Commercial Code of 1829 and Andres Bello's Spanish version of the French code were the most complete and readily available examples of European codes. Protests against the importation of legal frameworks developed in a totally different societal context were rare. The emphasis was on creating a rational and systematic legal order irrespective of its origins and lack of relation to the lives of most Colombians.

This does not mean the orientation of these codes was not a significant factor in the formation of the Colombian state. Since its enactment, the Civil Code has provided the basic framework and set of rules for resolving conflicts between private parties engaged in civil litigation.⁸ The study of the code and the first principles underlying it have dominated the content of Colombian legal education for almost a century.⁹ It is based on the sanctity of private property and the individual's right to exploit his property as he wishes as long as his actions do not infringe on the property rights of others. The discretion of judges to interpret provisions of the codes or to give them new meaning with changing social and economic contexts is strictly limited.¹⁰ Judges are to interpret the rules in terms of their literal meaning. Legal doctrine or scholarship can be used to clarify a norm's literal meaning, but the purpose of a law or its spirit can only be consulted where other sources still leave the literal meaning vague. Custom is only important in situations where there is no relevant provision of any code which is applicable. Even in these situations, the judge should deduce the result by reasoning from the first principles which give the code its logical consistency. These principles are formal legal equality, private property, and the moral precepts of the Catholic faith.¹¹

The codes are based on the assumption that economic growth will occur by productive resources reaching their highest use through private contractual

relations. They provided the legal foundation for the growth of a private bar facilitating private agreements, but with the limited amount of actual commercial activity, the demand for legal skills in the private sector did not really expand until industrialization in the twentieth century.

C. Industrialization and Urban Growth in the Twentieth Century

At the beginning of this century Colombia was still predominantly an agrarian society. Coffee had become the major export late in the nineteenth century, but it was not until the 1920's that the high international price of coffee generated the capital and foreign exchange earnings to stimulate a sustained period of economic growth. "The expansion of industry and commerce over the past fifty years has been accompanied by many developments which have influenced legal roles. Only the major ones are summarized here.

In the social and economic spheres, two important trends have been rapid urban growth and a change in the composition of the work force. From 1938 to 1967 the percentage of Colombians living in urban centers increased from 30% to 50%." During this same period the percentage of the work force engaged in agriculture, mining and fishing decreased from around 76% to 45%." Industry and commerce have not grown fast enough to absorb the migrants to urban areas and unemployment is high." The estimates are not very exact, but over the past decade around 20% to 25% of the work force has been unemployed."

With this shift from a rural to urban population, a larger percentage of the work force earns a wage with minimum benefits guaranteed by labor legislation. Urban migrants need housing and credit which has led to more legal work concerned with property transfers, mortgage foreclosures, actions of ejectment, and the collection of debts through garnishment or attachment." An increase in urban crime has also meant more legal work for prosecutors, judges and criminal defense attorneys. It should be noted, however, that the government tends to use a "state of siege" to keep order during periods of serious political unrest which could cause civil disorders." In a "state of siege" the military maintains order and military tribunals adjudicate persons accused of crimes with only minimal procedural protections. The role of the ordinary courts in the maintenance of order has been primarily limited to adjudicating crimes without political overtones.

The most significant change in the demand for legal services was caused by the growth of private business entities. A few large corporations, banks and insurance companies control a major portion of the nation's capital." They are in a position to hire the best legal talent and this is having an impact on legal career patterns. The increase in foreign investment by United States' interests in the oil industry and manufacturing enterprises has also contributed to the formation of Colombian law firms."

The dominant trend in the legal order remains the continuation of the codification process. New codes were enacted to facilitate the expansion of private corporations and, more recently, to increase government control over the use of corporate capital. The first major development occurred at the beginning of the

industrialization process in 1923, when the Colombian government retained a commission of United States' experts headed by E.W. Kemmerer to make a study and recommend legislation in the fields of finance, banking, and commerce.⁷⁴ A national bank was created to regulate credit and manage the money supply, and foreign exchange controls were reformed.⁷⁵ These developments were followed in the 1930's by the enactment of labor legislation, by changes in corporate law to allow for limited liability corporations, and by the first of Colombia's agrarian codes designed to initiate a land reform policy.⁷⁶

Over the following thirty years, there were a variety of legal changes in all of these fields, but the next major wave of code reforms occurred in the late 1960's after the two major parties formed a coalition government, known as the National Front, based on an agreement to alternate the presidency between the two parties over a sixteen year period.⁷⁷ This agreement eased political tensions among the dominant groups which had been in a struggle to control the central government, and made it possible for the political leadership to focus its efforts on bureaucratic reforms and economic planning. The court system was reorganized; there were reforms of the codes in criminal law, commercial law, civil procedure, and mining and oil; there were three new efforts at agrarian reform; and finally, a constitutional reform weakened the legislature's power and strengthened the executive and the office of national planning.⁷⁸

The university system has been expanding to meet the demands for higher education from the growing middle class and becoming more diversified to provide the technological skills needed in the industrial sector. At the beginning of this century, there were five universities in Colombia, four public and one private.⁷⁹ From 1900 to 1940, four new private universities were opened and one new public university.⁸⁰ The private ones were essentially law faculties founded by political parties as alternatives to the public law schools controlled by the opposition party.⁸¹ The fields of specialization were still mostly limited to law, medicine, dentistry, engineering, education and agronomy.⁸²

After 1940 there was a boom in higher education. Thirty-two new universities were founded between 1941 and 1967, over half of them after 1960.⁸³ Degrees began to be offered in economics, public administration, the social sciences and the humanities. Prior to this time students interested in these fields had studied law. This caused a decline in the percentage of university students graduating from law faculties from 54% in the late Thirties, to about 15% in the late Sixties.⁸⁴ During the same period, the number of students enrolled in higher education increased from approximately 3,000 to over 62,000.⁸⁵ This is an admirable expansion in higher education, but it should be noted that it is still only 3.7% of the university age population.⁸⁶ Access to higher education continues to be limited primarily to children of the privileged classes.

Two of the most prestigious universities, heavily funded by American foreign aid and foundations, did not offer degrees in law.⁸⁷ Instead they emphasized the need to train the nation's future elite in what Colombians refer to as the "technocratic" and "scientific" skills (i.e., economics, business administration, public

administration, engineering, architecture, and the exact sciences) needed to guide and plan Colombia's industrial growth. Graduates of their programs are now prominent at the policy-making levels of the central government and in private industry."

Law graduates must now compete in the public and private sectors for positions they had previously occupied because law was a basic field of study for most non-scientific occupations. This is a natural result of specialization and diversification in higher education, but it does make lawyers less prominent at the highest levels of government, industry, and commerce. The change has contributed to a general image of the legal profession's declining prestige.

A wider segment of the Colombian population is also obtaining access to the legal profession with the founding of more urban night law schools. Colombian law faculties have traditionally operated with little or no full-time faculty and only limited library facilities." All that has been needed to open a law school is classroom space, a limited collection of law books, and practising attorneys who are willing to teach part time for a small salary and the additional contacts and prestige which come with being a professor." Given the demand for higher education and the large classes in law faculties, operating a law school became a paying proposition.

There were at least twenty-seven law faculties operating in 1974, five of which still lacked government approval. Sixteen of these had been founded since 1950 and about eight had been started in the early 1970's." Most of the recently founded faculties have structured their curriculum to allow students to work a full day and still obtain a law degree within the basic five years." These urban night law schools accounted for approximately two-thirds of the students enrolled in law in 1973, and in the eight years prior to 1973, the overall number of law students approximately tripled."

The legal profession has recently responded to these developments to protect its monopoly position. Lawyers argue that the increased access to membership in the profession and the lower quality of education is destroying the profession's prestige." In 1974, the Ministry of Justice established a more stringent set of minimum standards for the operation of law faculties and government supervision was increased." Whether these steps will eventually mean a reduction in the size and number of faculties remains to be seen.

While the Colombian Constitution requires a university degree in law to practise," there are numbers of unauthorized practitioners providing legal services to the lower classes in urban and rural areas. Very little is known about them. In the interviews for this study, many leaders of the bar claimed the unauthorized practitioner had almost disappeared, but the individual practitioners serving the middle and lower-middle classes complained about the competition and lack of enforcement procedures."

The most important trend in the political sphere has been the increase in government planning and the use of regulatory law to control the economy. At the close of the nineteenth century, the government had become a caretaker state primarily concerned with maintaining order and enforcing a set of rules designed

to facilitate private economic agreements. The two major parties competed for control over the public bureaucracy as a source of jobs, money, and status." The party in power used the public treasury to reward its faithful with jobs and manipulated the capital investment of government funds to their advantage. There were ideological differences between the Conservative and Liberal parties, but basically a Colombian was born into one of the two parties, and he would remain a member of that party because his economic position, and his family's, depended on the party's political success."

This form of political conflict caused a series of civil wars peaking in the *violencia* of the late Forties. After a period of military dictatorship to restore public order, the political elite of the two parties agreed to share power over a sixteen year period by alternating the presidency and dividing all public employment equally between Conservatives and Liberals.¹⁰⁰

Analyses of the Colombian political process under this agreement have stressed the emergence of a new "modern" element among the leadership in the two parties.¹⁰¹ The studies characterize the "traditional elites" as political leaders oriented toward maximizing the rewards of participation in the political process without any real commitment to an ideology of development. In contrast, the "modernists" are described as sharing the following beliefs:

economic development is essential not only as a means of raising the material standard of living but as a prerequisite to the modernization of a society whose organization is still dominated by the hierarchical principle that roles are assigned on the basis of class rather than ability; the public sector must be the 'leading sector' in the development process, the critical policy instrument being a large public investment budget devoted to the provision of an economic infrastructure and the elimination of bottlenecks not attacked by the private sector; the characteristics of the market mechanisms in Colombia are such that detailed public control over relative prices and the direct allocation of scarce resources such as foreign exchange are necessary to secure a socially acceptable distribution of the economic gains of development; and modernist policy objectives must be institutionalized within the public sector through creation of a bureaucracy that is substantially independent of the party structure.¹⁰²

The "modernists" emphasize the need to develop a partially autonomous government bureaucracy which regulates and channels private economic investment. The Constitutional reforms President Lleras Restrepo proposed in 1968 were designed to strengthen the influence of the "modernist" elements.¹⁰³ He suggested (a) transferring the budgetary initiative from Congress to the National Department of Planning under the control of the President, (b) reducing the size of Congress, and (c) establishing formal procedures for declaring a state of economic emergency which would empower the executive to enact laws by decree. His efforts met strong opposition from the legislature, but he won on the budget process and the special Presidential powers. He also managed to strengthen the decentralized agencies which operate under the executive and outside of the normal forms of legislative control.¹⁰⁴ During the Presidencies of Misael Pastrana and Alfonso Lopez the power of the executive, the bureaucracy, and public development corporations has continued to expand.¹⁰⁵

The decentralized agencies and National Planning have been staffed at the policy

level primarily by specialists whom the Colombians commonly call the young "*tecnicos*" (technocrats).¹⁰⁶ They are professionals trained in economics, engineering, public administration, the hard sciences, architecture, or regional planning as contrasted with law and the humanities. The institutions they dominate have been delegated the responsibility of using the public budget and the regulation of private activity to foster economic development and to achieve a desirable distribution of the benefits of growth.

One of the key instruments of the plan-oriented bureaucracy is government decrees or regulations specifying the allocation of public resources and channeling private economic investment. The regulations embody specific policies and are different in character from the legal codes in the private law field which set a framework to facilitate rather than direct private action.¹⁰⁷ The hypothesis that this change in the character and use of legal rules is making "traditional" legal knowledge and skills less relevant to the governing process will be explored in more detail in the section of this paper concerned with lawyers and the state.¹⁰⁸

In summary, Colombia is changing from a rural agrarian society into an urban exchange economy dependent on a mixture of agriculture, commerce, and industry. Increased employment opportunities in industry, commerce, and the growing public bureaucracies have contributed to the formation of an urban middle class. The university system has expanded rapidly to meet the demands for more social mobility through education and to provide new human resource skills needed in the private and public sectors. The state has assumed a dominant role in the management of economic growth through the capital investment of public funds, the management of public development corporations, and the regulation of private economic activity.

The remainder of this paper is devoted to an analysis of the way the legal profession is adjusting its skills and roles to protect the bar's economic security and influence in the face of these changes. Modifications of legal roles at the practical level are not difficult to identify, but the more interesting issues are concerned with the way changes in the profession reflect the relationship between legal roles on the one hand and the class structure, the allocation of economic power and the political system on the other.

II. Access to Legal Education, Career Patterns and the Class Structure

The legal profession's role in class formation appears to be changing with the expansion of access to membership in the bar and the development of new legal career patterns. A general picture of the direction of this change can be developed by using the interviews with Bogota lawyers to examine the relationships among (a) the respondents' social origins, (b) the law school they attended, and (c) their subsequent legal careers and working environments.¹⁰⁹ This is followed by a brief

TABLE I. *Comparison Between the Educational Level of Respondents' Fathers and the Educational Level for all Colombian Men between the Ages of 40 to 59 in 1964.**

Level of education	All Colombian men between the ages of 40 to 59 in 1964**	All Respondents' Fathers	Fathers of Respondents from Javeriana and Rosario	Fathers of Respondents from Externado and National Univ.	Fathers of Respondents from Libre and Gran Colombia
		N=102	N=39	N=37	N=26
Education					
No formal Schooling	30.1%	0%	0%	0%	0%
Primary Incomplete	47.8%	3%	3%	3%	4%
Primary Complete	11.4%	15%	5%	16%	27%
Secondary Incomplete	7.4%	14%	13%	13%	15%
Secondary Complete	1.6%	35%	38%	30%	38%
University Incomplete	.3%	6%	0%	11%	8%
University Complete	1.4%	27%	41%	27%	8%

*In 1964 the youngest of respondents would have been between the ages of 20 and 25 putting most of their parents in their forties. Most of the older respondents would have been between 36 and 45 making their fathers in their late fifties and early sixties. The educational level for all Colombian men over sixty in 1964 is somewhat less than that of the men 40 to 59. The resulting bias in Column 1 is to overestimate slightly the educational level for all Colombians in the exact same age group as respondents' fathers.

**Source: German W. Rama, *El Sistema Universitario en Colombia* (Bogota, 1970) p. 76, citing the XIII Censo de Poblacion, July, 1964.

discussion of the implications of the findings for the delivery of legal services and for the use of the legal system.

The analysis confirms the view that most lawyers enjoy a relatively privileged position in Colombian society, but it also indicates that the profession is far from being a homogeneous group. The bar is stratified internally and working environments and attorney-client relations vary widely with the type of clients an attorney serves.

As a group, lawyers tend to be a part of the Colombian upper middle class.¹⁰⁰ They are, by definition, university graduates which places them in approximately the upper 2% of all Colombians in terms of education.¹⁰¹ The respondent with the lowest income was a lower level judge earning 6,500 pesos a month, (U.S. \$260)¹⁰² and his monthly salary still left him in the upper 10% of the Bogota working population.¹⁰³ The mean income of all respondents was approximately 24,400 pesos monthly (U.S.

TABLE II. *The Major Occupations of Respondents' Fathers Compared with the Distribution of all Economically Active Colombians in 1964*

Occupation	Respondents' Fathers	1964 Census of the Colombian Population
1. Day Laborers	0%	45%
2. Small Farmers	4%	
3. Small Merchants*	2%	26%**
4. Salaried employees without special formal education	13%	15%
5. Medium size landowners with permanent employees	12%	
6. Medium size commerce with staff of permanent employees	20%	9%**
7. Salaried employees with special formal education or technical training after secondary education	8%	2%
8. Professionals and high level public officials and administrators	29%	1%
9. Owners or executives of large industrial, commercial, or financial enterprise		1%***
10. Large landowners	13%	

*The occupational categories used for the 1964 census do not correspond exactly to the ones used in this study. This figure in the census includes all independent workers, other than professionals and technically trained individuals, who are not employees with a permanent staff. It comes the closest to matching the independent merchant and individual farmer.

**This figure actually includes all employers from the smallest to the largest. Thus a small percentage of this group actually belongs in occupational categories nine and ten and some may be a small merchant with one permanent employee.

***This figure represents the high level executives in the private sector and administrators in the public sector so it partially overlaps with category 8.

Source: Rama, p. 82, citing the Censo de Poblacion, 1964.

\$976.00) which placed the average respondent's personal income in the upper 1% of the work force in Bogota."¹⁴

The lawyer's social relations with other Colombians confirmed this upper-middle class status. Only 16% included someone other than another professional, a large landowner, or a business executive among their best friends. Approximately 70% interacted socially only with other professionals, and one-third of respondents limited themselves to close friendships with other lawyers.

In addition, most law graduates come from families which have already achieved some degree of middle class status. This conclusion is based on comparisons of the relationship between the education and occupation of respondents' fathers and similar information on all Colombian men who were in the forty to fifty-nine age group at the time of the 1964 census. As Table I illustrates, only 3% of respondents' fathers never finished primary school, as compared with 78% of all Colombian men of a similar age. Sixty-eight percent of the law graduates' fathers had attained an educational level which placed them in the upper 3.3% of their generation. Even in

TABLE III. *Occupation of Respondent's Father by Respondent's Law School and Date of Graduation*

	Occupational Groupings				
	1 Small Farmers and Small Merchants	2 Salaried employees without technical training	3 Employees with formal training & owners of medium size farms & commercial enterprises	4 Professionals and high level public officials & administrators	5 Large land- owner and owner or executive of large industrial commercial or financial entity
<i>Law Schools</i>					
<i>Javeriana & Rosario</i>					
graduates 1950-51	0%	15%	32%	32%	21%
graduates 1966-67	5%	0%	35%	45%	14%
All Graduates	3%	8%	33%	38%	18%
<i>National U & Externado</i>					
1950-51 graduates	6%	6%	24%	47%	17%
1966-67 graduates	5%	20%	50%	20%	5%
All Graduates	5%	14%	38%	32%	11%
<i>Libre & Gran Colombia</i>					
1950-51 graduates*	8%	23%	61%	0%	8%
1966-67 graduates	16%	17%	42%	17%	8%
All Graduates	12%	20%	52%	8%	8%
All Respondents	6%	13%	39%	29%	13%

*1957-58 for Gran Colombia

the case of the law faculties with large night school sections, over 54% of the respondents' fathers had finished secondary school.

There are, however, some differences among the law schools in the status of the families from which they draw their students.¹¹ The fathers of graduates from the two small private law schools, Rosario and Javeriana, with a reputation for educating children of the upper classes, are the most likely to hold a university degree and very few have failed to finish at least primary school. At the other extreme, few of the graduates of Gran Colombian or Libre, the two schools with large evening sections, come from families where the father has achieved the education of a professional.

The results were similar in the case of their fathers' occupations. Table II gives a picture of the relationship between the occupational distribution of the Colombian work force in 1964 and the occupations of the interviewees' fathers. The distribution among respondents' fathers is the inverse image of the distribution among all

TABLE IV. *Current Occupation of Respondents by Law School*

Current Occupation	1	2	3	4
	All Respondents	Javeriana & Rosario	Externado & National U.	Gran Colombia & Libre
	N = 101*	N = 38	N = 36	N = 27
1. Judge, prosecutor, or other position in a legal institution below the level of a Superior Court of a Department.	5%	0%	8%	7%
2. Salaried on the legal staff of a government agency	1%	0%	3%	0%
3. Salaried on the legal staff of a private institution	3%	3%	6%	0%
4. Independent commercial activity	4%	3%	6%	4%
5. Head of a department with non-legal functions in a government agency	1%	3%	0%	0%
6. Head of a department with non-law functions in a private institution	1%	0%	0%	4%
7. Head of a legal department in a government agency	5%	0%	8%	7%
8. Head of a legal department in a private institution	4%	3%	8%	0%
9. Private practitioner primarily engaged in litigation	40%	24%	33%	70%
10. Magistrate on the Superior Court of a Department or the Colombian Supreme Court or Counsel of State	3%	5%	0%	4%
11. Law Professor – full-time	2%	3%	0%	4%
12. High level administrator in public agency or politician	3%	5%	3%	0%
13. Executive in private institution	12%	26%	6%	0%
14. Private attorney primarily serving as legal advisor or planner	17%	26%	19%	0%

*Two respondents had retired.

economically active Colombians. Ninety-four percent of respondents' fathers were engaged in occupations which placed them in the upper 25% of Colombia's occupational structure. The relationships among law schools parallel the findings on the educational level of fathers.¹⁴ Over half the fathers of graduates of Rosario and Javeriana were professionals, important public figures, large landowners or executives in private institutions. The same figure for Gran Colombia and Libre was only 16% (See Table III).

TABLE V. *Occupational History of Respondents*

Type of Work	Respondents' first position after graduation from law school	Percentage of respondents working in each occupation at some time during their career	Current occupation
	N = 103		
Private Practice	11%	74%	55%
As a Judge or Prosecutor in the Court System	47%	70%	8%
In a government position other than the legal process	25%	50%	10%
In a private or semi-public institution	15%	31%	20%
Other	2%		7%

The same pattern in the differences among the law schools appears in the data on respondents' careers and current occupations.¹¹⁷ To a limited degree, Rosario and Javeriana still play the role of educating the generalist of the dominant economic groups, particularly in the financial and corporate sector (See Table IV). A majority of the graduates from these two schools are either executives in a bank, insurance company or a public utility or they are independent legal advisors with private companies as their major clientele.¹¹⁸ In contrast, 70% of the respondents from Libre and Gran Colombia are litigators in private practice representing individual clients, primarily from the middle and lower classes.¹¹⁹ None of them are business executives or corporate legal advisors. The occupational distribution for the National University and Externado is again between these two extremes.

At the more general level, approximately 79% of respondents are engaged in occupations reserved by law for members of the bar. Most work in the private sector as litigators or legal advisors to corporations.¹²⁰ Only 8% were working in the legal process as judges, magistrates or prosecutors and 6% as legal advisors to government agencies. These results, however, are more a reflection of the current level of respondents' legal careers than an indication of the actual percentage of Bogota law graduates working in public sector legal positions.

As Table V illustrates, most young Colombian lawyers obtained their first practical legal experience working as a judge or in a government agency. The typical respondent obtained his first position as a municipal court judge shortly after graduation. After one or two promotions in the judiciary, he moved to a position on a government legal staff. These positions provided practical legal training and the opportunity to develop contacts in a network of lawyers and potential clients. After about four to five years in these public sector positions, the lawyer normally tries private practice or seeks a higher salaried position in a private institution. If he

cannot make more in private practice after a couple of years than he would earn on the legal staff of a government agency or at an intermediate level in the judiciary, he often returns to a public sector legal position. He then remains in the public sector until he retires with a pension and can try private practice to supplement his guaranteed pension income.

There were many variations of this pattern. If the lawyer was successful in private practice, he still might return to government for a limited period of time to hold a political office or to work as a high level administrator or legal advisor to a ministry. His public salary would normally be less than his income from private practice during this period, but he could anticipate recouping any loss when he returned to private practice. His government experience and contacts would increase the value of his subsequent legal services as an advocate of private interests before government agencies.

This pattern of moving from the judiciary to a government agency and then into private practice with the option to return to the public sector is not common to many civil law nations. In fact, the tradition in most European civil law jurisdictions is for young law graduates to make a choice among a variety of distinct career lines shortly after graduation. Professor Merryman describes the law graduate's situation in a typical civil law jurisdiction as follows:

He can embark on a career as a judge, a public prosecutor, a government lawyer, an advocate, or a notary. He must make this decision early and then live with it. Although it is theoretically possible to move from one of these professions to another, such moves are comparatively rare.¹³¹

There are undoubtedly many reasons why legal careers in Colombia deviate from the typical European civil law jurisdiction, but the major cause is probably the low salaries of judges and government lawyers and their lack of prestige within the legal community. The government's recent efforts to create a career judiciary have not been supported by sufficient public funds to pay judges a salary similar to the earnings of the average private attorney. Prior to the expansion of the private demand for legal services with the growth in commerce and industry, public legal positions may have been comparatively more attractive, but today they are mostly a training ground for young lawyers and a fallback for the attorney who does not do well in private practice.

These observations are supported by the data on respondents' income. At the time of the interviews, judicial salaries ranged from approximately 5,400 pesos monthly (U.S. \$216) for a municipal court judge to 12,000 pesos (U.S. \$480) for a magistrate of the highest district court.¹³² Of course a justice of the Supreme Court enjoys considerable prestige, but he only earns 20,000 pesos monthly (U.S. \$800). The average private practitioner in the sample earned around 25,000 pesos monthly (U.S. \$1000) and no private attorney admitted to earning less than 10,000 pesos (U.S. \$400) (See Table VI). Similarly, the top salary for a government lawyer is about at the level of the average private attorney. A government staff lawyer earned from 6,500 pesos to 10,500 pesos which makes the best staff attorney's job about equivalent to the least well-off practicing lawyer. Public sector salaries appear to set the lower limits on the cost of private legal services.

TABLE VI. *A Comparison of the Mean and Median Income of Government Lawyers, Private Practitioners, and Lawyers in Private or Semi-Private Institutions*

	1 Top Government Legal Advisors from Sample of Government Lawyers	2 Salaried Lawyers in Government Positions from Sample of Law Graduates	3 Private Practition- ers from Sample of Law Graduates	4 Salaried Lawyers in Private or Semi- Private Bureau- cracies from Law Graduate Sample
	N = 20	N = 10	N = 45	N = 17
Mean Income	14,450	16,500	25,300	23,800
Median Income	13,500	16,000	22,000	25,000
Range	8,000 to 22,500	6,500 to 26,500	10,000 to 99,000	7,000 to 70,000

The relationships between family status and law school and between law school and current occupation suggest that both family connections and social relations are important to an attorney's career. Interestingly, the data indicate the more important variable is the law school. The relationship between the status of a respondent's family and his current occupation and income disappears when controlled for the influence of the law school.¹³³ Family status is important for access to the more prestigious law schools, but once a student is enrolled, the friends he develops, his relations with professors, and the school's placement network become the critical factors in his future career.

These observations are consistent with respondents' general comments on the factors which determine a lawyer's success. Table VII summarizes their specific views on what is important for an attorney's career, but their supplementary observations were more interesting. In discussing what makes a successful young lawyer, the graduates of the night schools combined law school, social relations and political contacts. They claimed the deans and professors of Rosario, Javeriana and Externado form the core of a network which guides the careers of their law graduates. The schools use the influence of their older graduates and professors to place young lawyers and the faculty serves as a contact point recommending the graduates for better positions as they obtain more experience. The graduates, in turn, are expected to help other young lawyers from their alma mater and to perform political favors for members of the school's network. Since most law schools are linked to a political party, the extent of their network can also be an important factor in determining the outcome of more general political conflicts.¹³⁴

There is less cohesion among the graduates of Gran Colombia, Libre, and National University. These law schools lack continuity in their leadership and they do not have a cohesive alumni association. As a result, many respondents from these schools felt they had been shut out of the best career opportunities irrespective of their legal capabilities.

These views are consistent with the overall relationship between family status¹³⁵ and law school¹³⁶ on the one hand, and occupation,¹³⁷ type of client,¹³⁸ field of

TABLE VII. *Respondents' Views on the Relative Importance of Different Factors to a Attorney's Professional Career*

	Very Important	Important	Unimportant
Professional ethics	61%	15%	24%
Legal knowledge	73%	15%	12%
Family's social status	45%	28%	27%
Being a professor	40%	39%	21%
Publishing	57%	28%	15%
Political connections	60%	22%	18%
Knowledge of foreign languages and legal systems	21%	24%	55%
Law School	56%	20%	24%
Social Relations	78%	15%	7%

specialization¹³⁹ and income on the other (See Table VIII). As noted earlier, the students with well-educated parents working in high status occupations are more likely to attend Rosario or Javeriana. The graduates of these schools have a good probability of earning a high income working for business or financial interests as an executive or legal advisor specializing in commercial law. A graduate of Gran Colombia or Libre tends to work as a judge or prosecutor for four to five years and then to represent white collar employees, small merchants, farmers, or workers with problems in civil, labor or criminal law.

This pattern of stratification in the bar has created at least two different worlds of legal practice. The legal advisor¹⁴⁰ has a large private office with a separate location for his secretary and a place for clients to sit while waiting. Most clients either have a permanent relationship with the legal advisor or have used him before for specific legal problems. Clients are treated with deference and they have considerable control over the terms of their relationship with the attorney and the legal actions he takes on their behalf.

The setting for litigators representing middle and lower-middle class clients is distinct. Approximately 60% of these lawyers had one small room for an office. The lawyer's desk was normally on one side of the room, the secretary's on the other, and clients sat on chairs along the wall or stood in the hall while waiting to speak with the lawyer. In numerous offices, this researcher waited with four or five clients while we overheard the lawyer's discussion with each client before our turn. There was little concern for the client's privacy; social distance between attorney and client was maintained; and there was little effort to explain legal procedures. The relationships were of a patron-client character with the lawyer firmly in charge and able to shape the transaction to protect his economic needs as well as his client's legal interests.

The attorneys working in these two distinct environments have little in common.

TABLE VIII. *Matrix of Spearman Correlation Coefficients among Indicators of Social Origins, Educational Background and Current Working Environment*

	Law School	Type of Clientele or Employer	Current Occupation	Field of Specializa- tion	Income
	(N = 103)	(N = 103)	(N = 103)	(N = 103)	(N = 82)
Social and economic status of family	.31 Sig. .001	.32 Sig. .001	.13 Sig. .089	.20 Sig. .023	.18 Sig. .049
Law school		.55 Sig. .001	.41 Sig. .001	.23 Sig. .009	.37 Sig. .001
Type of clientele or employer			.25 Sig. .006	.27 Sig. .003	.24 Sig. .015
Current occupation				.27 Sig. .003	.55 Sig. .001
Field of specialization					.24 Sig. .013

The litigators regard legal advisors as business consultants or professional intermediaries who use personal contacts and a knowledge of government to make a living. They are disdainful of the legal advisor's inability to litigate. On the other side, the legal advisors make a point of their distance from the "unethical" and "undesirable" world of litigation.

The implications of these career patterns and the stratification they reflect are difficult to access, but some speculation is possible. The divisions within the bar appear to be both a result of the class structure and a factor maintaining class differences. Lawyers serving the dominate economic interests have higher incomes and they enjoy more prestige and influence in the bar. They, in turn, can use their influence to protect their clients' interest through the bar's law reform activities and through their control over legal education and the training of young lawyers. In their legal work, these attorneys provide the legal instruments their clients need to aggregate wealth and to control the society's productive resources.

Class differences also contribute to the individual litigator's capacity to dominate the attorney-client relationship with middle and lower income groups. Lawyers serving these clients maintain an aura of expertise combined with social distance. They can use this aura to help shape an acceptance of the existing social hierarchy by determining what is a legitimate demand on the political or economic system. In other words, the demands or needs which people perceive as legitimate are partially determined by the organization of legal services and by what the attorneys recognize as a legal right.¹¹

At a more concrete level, the fact that lawyers tend to work for the government when they are young and inexperienced or if they do not succeed in private practice, suggests the quality of legal services in the public sector is likely to be inferior to the

legal counseling obtained by private clients. In addition, the more competent young attorneys have an incentive to use their government position to develop contacts which will eventually advance their private legal careers. If this is true, one would expect to find tension in public legal roles when the legal or policy interests the government attorney represents are in conflict with the interests of the clients the attorney eventually hopes to serve in the private sector. These issues are discussed in more detail in the subsequent section on lawyers in government.¹³

A second important consequence of the career patterns is the limited legal capability of the judiciary. The low salaries increase the potential for legal outcomes to be determined by bribery. The backlog in the court calendar and the low quality of the judiciary may also reduce the predictability of legal outcomes. This, in turn, is likely to encourage the use of alternative methods to resolve disputes.

One cannot automatically assume that fostering more private dispute resolution is a negative result. The amount of public resources needed to attract better quality lawyers in the judiciary and to hire enough judges to reduce the backlog would be substantial. In a developing society with limited public investment funds, the costs in terms of the alternative uses of the resources may be high. The benefits are not clear.

Disputes between business entities or members of the dominant economic class are normally resolved through negotiations and settlements in which private attorneys play an important role.¹⁴ The one area where the Colombian courts are relatively effective today appear to be conflicts between institutions and individuals such as the collection of debts, repossessing property, or foreclosing on a mortgage. The procedures are quick and they permit few defenses if the plaintiff satisfies the formal written requirements. Improving these procedures might make credit cheaper, but it is difficult to believe it would improve the overall position of low income groups.

Little is known about the way individuals in the lower classes resolve conflicts among themselves. Studies have found that local public officials, priests, political party officials, community patrons and neighborhood governing bodies all have the potential to play roles as mediators or arbitrators of disputes.¹⁵ Improving the quality of the judiciary will not influence these patterns of conflict resolution unless the groups have access to private attorneys to present their cases. These access issues are related to the distribution and costs of legal services which are the subject of the following section.

III. The Organization and Allocation of Private Legal Services

In the Colombian context, the private bar can be viewed as the "gatekeeper" to public decision-making. The legal profession enjoys a statutorily protected monopoly over access to the legal process and to government procedures where the

applicant is asking the state to recognize a claim to legal rights or property.¹³³ There are few circumstances where the law permits a claimant to take action on his own behalf or through a non-lawyer intermediary to protect property or individual rights.¹³⁴

This state sanctioned monopoly makes the distribution of private legal services an important factor in the protection of vested interests or in the recognition of new rights. The recent increase in public planning and state control over the allocation of resources has further enhanced the importance of access to public decision-making.

Legal services are allocated on a fee for service basis so one would expect to find a relationship between the highest paid and most prestigious members of the bar and the groups who control the country's capital and productive resources. Most of the wealthy have aggregated their interests through the formation of a business corporation, an investment company or a special interest association.¹³⁵ The aggregation of capital allows them to achieve economies of scale in the management of resources including legal services. They have property to protect and a variety of legal needs which create an incentive for them to retain high quality legal talent and to utilize lawyers on a regular basis.

Outside of unions, individuals in the middle and lower income groups lack institutionalized methods of aggregating their interests. It is more difficult for them to use lawyers to represent their common legal needs. One would expect lawyers serving these groups to work only in legal areas where the impact of a legal problem on one individual is great enough to justify hiring an attorney. The supply of lawyers and, in turn, the cost of their services will be a critical factor in determining who uses lawyers and for what purpose at this level.

These observations suggest those groups who have institutionalized methods of combining legal needs will be able to use legal services more effectively.¹³⁶ To the extent that expert and continuous advocacy can make a difference in the outcome of government decisions, the organized groups should be favored over time.¹³⁷ In the case of Colombia, this means private corporations and interest associations of landowners.

These hypotheses raise a series of complex issues about the relationship between the allocation of legal services on the one hand and the outcome of legal conflicts and government programs to distribute resources on the other.¹³⁸ The data generated by this study is inadequate to test these ideas, but it does provide some basis for general impressions about the cost and allocation of legal services among different types of clientele.

Many respondents were sensitive to questions concerned with the cost of their services and their typical clientele, so the inquiries had to be posed in a way which would not undermine the interviewee's willingness to speak openly. First, they were asked to estimate the percentage of their income coming from different types of clients.¹³⁹ The lawyers who worked primarily for individual clients were also asked about the frequency of their contact with different clientele categorized by a combination of social class and occupation.¹⁴⁰ The responses to the two questions are

TABLE IX. *The Distribution of Practising Lawyers among their Potential Clientele. (N = 61)*

Type of client	Percentage of practising lawyers working primarily for that client
1. Large Colombian business	25%
2. Foreign business	3%
3. Medium size business	3%
4. Mixed business clientele	7%
5. Unions	3%
6. Government agencies	3%
7. Professionals, executives in the public and private sector and large landowners	3%
8. Mixed individual clientele with some income from business institutions	20%
9. White collar employees and small merchants	13%
10. Small merchants, workers, and campesinos	20%

combined in Table IX to yield an overall distribution of private attorneys among types of clientele.¹⁴ Table X gives a picture of the relationship between an attorney's primary clientele and his field of specialization.¹⁴

Several aspects of the results merit special emphasis. First, approximately 60% of the practising attorneys have frequent contact with small merchants as clients. This is mostly debt collection work which is one of the "bread and butter" areas for private practitioners.

Secondly, only about one-third of the practising attorneys have contact with individual clients from the upper income groups. Over half these lawyers are already obtaining most of their income from business institutions. Only two attorneys had developed a practice which enabled them to serve exclusively large landowners, executives and other professionals.

Thirdly, the results indicate that a sizeable percentage of private practitioners often have workers and small farmers as clients. Approximately one-fourth of the private attorneys frequently work for these clients and about 20% of the practising lawyers almost exclusively serve these groups.

These results should not be over exaggerated, however, because many skilled workers make relatively high wages and some "*campesinos*" own sizeable amounts of land.¹⁴ On the other hand, the sample probably underestimates the actual percentage of the Bogota profession serving these lower-middle and lower class groups because it is biased toward the elite schools and the more prestigious occupations.¹⁴

The night school graduates are a much larger percentage of young practising attorneys than is reflected in this study.¹⁷ Such a result is due to the stratification of

TABLE X. *The Relationship between Type of Clientele and Field of Specialization for Private Attorneys (N = 61)*

Type of Clientele	Field of Law							
	Commer- cial Law	Admini- strative Law	General Civil Law	Labor Law	Criminal Law	Debt Collec- tion	Genera- list	All Private Practicio- ners
Business (N = 23)	44%	9%	4%	9%	13%	17%	4%	38%
Government agencies (N = 2)		100%						3%
Unions (N = 2)				100%				3%
Large landowners, Executives or professionals (N = 2)			100%					3%
Mixed individual clientele (N = 12)	8%	8%	42%	8%	25%	8%		20%
Small merchants and white collar employees (N = 8)	13%		37%		13%	25%	13%	13%
Small merchants, small farmers and workers (N = 12)			33%	25%	33%	8%		20%
All private practitioners	20%	8%	25%	13%	18%	13%	3%	100%

the sample by university without adjustment to account for the greater number of lawyers graduating from the night schools than from the two elite schools. This bias is important for any estimate of access to legal services among the middle and lower-middle classes because approximately one-half of the respondents providing services to these groups were young graduates of Libre and Gran Colombia.¹⁴

The recent expansion in the night law schools and the lower quality education they offer, if respondents are to be believed, suggest a number of hypotheses related to the cost and quality of legal services. An increase in the supply of lawyers with more limited social connections and a lower quality education should cause more competition among litigators representing low income clients. In the past, these people may have been represented by paraprofessionals or they may have dealt with problems without using the legal process. The complaints of respondents practising at this level about excessive competition from other lawyers and from "tinterillos" (unauthorized practitioners)¹⁵ in the form of fee cutting are consistent with this hypothesis. If it is true, one would also expect the average hourly cost of an attorney's time serving this group to be less than the hourly fee of an attorney serving middle or upper income clients.

No direct information on the cost of private legal services could be obtained to assess the validity of these observations. With the exception of a few large firms,

TABLE XI. *Average Daily Earnings of Private Practitioners and Estimate of Average Cost of a Lawyer's Time According to Clientele Served.**

	All private practioners	Private practitioners serving business	Serving individual clients	Serving employees, small merchants, workers & campesinos	Least cost attorney
	N = 45	N = 20	N = 22	N = 11	N = 5
Daily earnings based on median income	1,000	1,364	909	727	455
Plus overhead	1,150 ^a	1,636 ^b	1,000 ^c	800 ^c	500 ^c
Cost of 1/2 day	575	818	500	400	250
Cost of one hour	144	204	122	100	62

*based on an assumption of 22 working days a month and 8 working hours each day.

a An overhead charge of 15% was added to the base salary.

b An overhead charge of 20% was added to the base salary.

c An overhead charge of 10% was added to the base salary.

private attorneys charge clients on the basis of a fee the lawyer and client agree on in advance. If a claim is involved, it is normally a contingent fee. Otherwise, the fee is set according to the attorney's estimate of how much time the case will take and the amount at stake in the outcome of the legal conflict. Almost no attorneys charge by the hour and few are kept on retainer by business clients. In Bogota the bar is disorganized and there is no schedule of even suggested minimum fees.¹⁹⁰

Indirect estimates can be calculated, however, from the income information given by the forty-five private practitioners who were willing to answer questions about their current economic situation. Using the median monthly income of this group, an estimate was made of the average cost of a lawyer's time according to the clientele he serves.¹⁹¹ These estimates are summarized in Table XI; in Table XII they are related to the capacity of different clients to hire an attorney.¹⁹² The comparison provides an idea of how much an average person in each occupational group must forego to purchase one-half day (or four hours) of a practising attorney's time in Bogota. The professionals and high level functionaries generally use an attorney serving business. At the other end of the spectrum, workers and laborers probably select an attorney from among those who charge the least. Thus the four boxes in the Table represent the sector of the market for legal services where the average person in each occupational group would be expected to look for an attorney.

While the average cost of an attorney's time serving the lower income groups is much less than the cost of an attorney serving private institutions and upper income clients, there is some similarity in the amount of time each occupational group works to hire an attorney in the market defined by the boxes. It ranges from a high

TABLE XII. Number of Days Average Person in Each Occupational Grouping Must Work to Purchase 1/2 Day (4 Hours) of a Practising Attorney's Time in Bogota, (Based on Median Monthly Incomes)

Type of Private Practitioner	Days each group must work to hire attorney for 1/2 day							
	1 Professionals	2 Executives	3 Clerical & middle level administrative personnel	4 Employees in small commerce & street vendors	5 Workers in service sector	6 Workers in agriculture	7 Laborers	8 Total Population
1. All private practitioners	3.1	1.5	5.0	8.0	10.1	10.0	9.3	7.8
2. Private practitioners serving business	4.4	2.1	7.0	11.4	14.4	14.1	13.2	11.1
3. Private practitioners serving individual clients	2.7	1.3	4.3	7.0	8.8	8.6	8.1	6.8
4. Private practitioners serving employees, small merchants, workers & campesinos	2.2	1.0	3.4	5.5	7.0	6.9	6.5	5.4
5. Least Cost Attorney	1.3	.6	2.1	3.5	4.4	4.3	4.0	3.4

of 5.5 days to a low of 1.3 days, but most choices are centered around the three to four day range. The supply of lawyers graduating from the night schools appears to be fostering a fairly competitive market for legal services among all types of potential clientele.

As long as the marginal purchasers of legal skills have information on lawyers' backgrounds, the difference in the price of an attorney's time should reflect distinctions in the quality of the services. This does not mean it can be assumed that the higher priced attorney has much better legal skills, since the client may also be paying a higher fee because of the attorney's social and political contacts among government decision-makers or judges. In addition, there is no basis in this study to arrive at any conclusions about whether the cheapest legal services available in the market are still adequate for the most common legal problems of low income groups. This is an important issue, however, because the bar is attempting to restrict the continued expansion of the night law schools by arguing that the education the night schools offer is inferior and their graduates incapable of practising law.¹³ None of the profession's leaders have mentioned the fact that if these night schools are closed or excessively restricted in the size of their student body, the result may be to drive up the cost of legal services so that low income groups have no access to lawyers.

These comparisons of the cost of legal services also fail to reflect the economies of scale which some firms or individual lawyers may realize through specialization. By handling similar claims at the same time, an attorney may be able to reduce the

time needed for each without altering the quality of his service. For example, one respondent divided among three attorneys the legal work involved in representing laid off government workers making claims for welfare benefits from a public agency. No procedural form such as a class action was available, but by dividing the gathering of evidence, the preparation of court documents, and the handling of hearings, the firm could handle many more cases than three attorneys working alone. This firm was developing a reputation for doing good work at a relatively low cost and the members claimed they could attract as clients more than half of the people laid-off by certain government agencies.

This type of reorganization in the delivery of legal services to meet the needs of a low income clientele was rare. Normally the attorney serving these groups was an individual practitioner specializing in labor, property, wills, or criminal law. These tended to be the fields where individual low income clients identified a problem as legal with enough impact on their lives to merit seeing an attorney. The labor cases could be handled on a contingent fee basis. In a conflict over real property or the probation of an estate, the family's basic economic security was normally at stake. Criminal law problems involved the client's personal liberty.

Attorneys rarely mentioned working for a low income client outside of these areas. This is not surprising since low income groups in Colombia barely earn enough to obtain food, housing and a minimal education for their children. Hiring an attorney on any basis other than a contingency fee means foregoing some basic necessity of life for a period of time.

The poor also have few incentives to consult a lawyer unless no other option is available. Most of their contacts with the legal system in the past are likely to have been negative. These contacts will often have involved a threat to personal liberty, the taking of personal property to satisfy a debt, the taking of land they have farmed, or the probation of their family estate through a complex procedure they do not understand. When the negative nature of their most frequent contacts with the legal process is combined with the social distance between the lower class and lawyers, there is little reason to believe they would identify a problem as "legal" if an alternative means of coping with it existed. To make the point another way, if the public funds which would be necessary to mount a meaningful legal aid program were granted to the potential clientele in the form of a direct payment, there is no reason to believe they would use these funds to purchase more legal services in the market place.

Almost nothing is known about the way the bulk of the population copes with problems that the more wealthy classes would take to an attorney. Some studies, focusing on disputes over property, have identified community conflict resolution procedures which the disputants can use in lieu of the legal process.¹⁴ If the same problem is shared by members of a community such as the failure of a public service, the political parties often provide an avenue for access to the appropriate government body.¹⁵ There are also a variety of non-lawyer intermediaries who made a living obtaining important documents or government rulings for private parties.¹⁶ They are not formally recognized by the system, but one only has to visit

such places as the office for tax declarations, the public land registry, or the center for identification documents to see how prevalent the intermediaries are. They depend on a system of informal contacts built up over time through favors and small bribes.

The point of these observations is to stress how little is known about the way private parties identify a problem as "legal" and about the role lawyers play within any overall set of alternatives for dealing with problems. Such knowledge is necessary, however, to assess the potential consequences of any proposed government action to reduce the number of lawyers or to alter the distribution of legal services through legal aid or another form of public subsidy.¹⁹

To understand the significance of the way legal services are allocated, it is also necessary to have some idea of what lawyers do for different clientele. As noted above, the lawyers representing middle and lower income individual clients tend to be litigators specializing in property, wills, domestic relations, labor, and criminal law.¹⁹ The other major area of legal work for litigators is the representation of banks and commercial enterprises in the collection of debts through expedited procedures providing for the attachment of a debtor's property.

Attorneys who litigate rarely have time to research a case (See Table XIII). Approximately two-thirds of their working day goes to interviewing clients and visiting the judicial offices where their cases are pending. For example, one of the respondents described a typical day as follows:

From 6.00 a.m. to 9.00 a.m., I prepare my written arguments, study the cases and organize my day. By about 10.00 I am in the office and from then until approximately 1.00 p.m. I see one client after another. After lunch I make my daily visits to the judicial chambers where I have pending cases and usually I am back in the office between 4.00 and 4.30. Then I see another group of clients until about 6.00 in the evening.

In contrast, the legal advisors to corporations spend most of their time negotiating agreements and planning the future affairs of their clients to avoid legal problems. They tend to work primarily in commercial law, administrative law, tax, labor or mining law. Most legal advisors have a few major corporate clients who are well organized and who have a precise idea of the legal problems they want their lawyers to study. Legal advisors spend less time with their clients than do litigators and they concentrate on researching legal questions, drafting contracts or other legal documents, and preparing an analysis of potential legal problems.¹⁹ Only the legal advisors spent much time negotiating with government officials on behalf of their clients.

In a sense, the legal advisors are intermediaries between private corporations or between the state and private centers of power and wealth.¹⁹ The litigators are intermediaries between individuals in conflict or between private institutions and individuals. Litigators offer primarily an individualized type of legal service. Their clientele in the middle and lower classes lack the information to identify shared legal needs as well as the methods to aggregate their interests and to purchase legal services on a group basis. The more fundamental disparities in the use of lawyers and the legal process appear to be less between rich and poor than between

TABLE XIII. *The Percent of Time Practising Attorneys Devote to Different Tasks or Functions During an Ordinary Working Day*

By Tasks	Average percent of time devoted to task each day	
	Litigators	Legal Advisors
	N = 39	N = 17
1. Preparing legal documents	25%	30%
2. Legal research	10%	25%
3. Meeting with clients	35%	20%
4. Visiting the courts	30%	10%
5. Meeting with administrative officials	0%	15%
	100%	100%

By functional type of legal problem	Litigators	Legal Advisors
1. Problems being litigated in the courts	85%	15%
2. Problems settled without litigation	15%	35%
3. Legal planning to prevent future legal problems	0%	50%
	100%	100%

organizations and individuals. Lawyers have provided legal forms to facilitate the organization of the dominant class' economic interests, but no similar legal methods have been developed to unify other groups in Colombia.

Consequently, the organization of legal services tends to reinforce the existing economic system and class structure. The dominant economic interests pay the highest salaries, attract the best legal talent with wide social and political contacts, and use their lawyers for a variety of tasks. These patterns are reflected both in the way legal careers develop and in the work of practising attorneys.

IV. Legal Roles in the Public Sector and the Expansion of State Power

One objective of this study was to obtain some insight into the way the growth in government control of the economy influences public legal roles and shapes the relationship between the state and the bar. Too few respondents in the original survey were employed by government agencies to provide a basis for any careful analysis of public legal roles, so a second sample was drawn from a population of high-level government legal advisors. Twenty government agencies were selected

at random from a list of the fifty-six most important government entities and the highest level legal advisor to each of the twenty was interviewed.¹⁴¹

The sample is small, but so is the sample population and it provides an interesting picture of government legal advisors' (1) daily work, (2) specialization, (3) involvements in public policy formulation, (4) relations with other occupational groups participating in policy-making, (5) approaches to legal questions, and (6) views on government power and the rule of law. The results raise interesting questions about the role law and the legal profession play in constraining and legitimizing state power. After a discussion of these issues, this section ends with a few observations on the autonomy of the Colombian judiciary and on the relationship between the state and the private bar.

Government agencies are a major source of employment for young lawyers, and the orientation of legal work in the agencies may have a lasting impact on the development of a lawyer's legal skills. To facilitate looking at government legal roles from this perspective, it was hypothesized that the agencies were developing a need for new types of legal skills and modes of reasoning as a result of the increased use of regulatory law to implement public policies, and that lawyers would find themselves competing in the formulation and implementation of these regulations with experts in the substantive areas being regulated. The hypotheses assume that lawyers will adjust their skills to new demands in order to protect their monopoly over law and their economic security.

Some clarification of these ideas may be helpful. Colombian legal education presents law as an internally coherent set of first principles from which all legal norms or codes can be derived deductively.¹⁴² Legal scholarship has been primarily concerned with a comprehensive and rigorous examination of these basic legal concepts and the derivation from them of a self-contained analytical structure to guide legal reasoning.¹⁴³ Embodied in these first principles is the concept of formal legal equality or law as a framework facilitating private action but not favoring one set of interests over another. The codes establish the rules of the game, but they are not consciously designed to determine resource allocation or distribution, even though they will affect both.¹⁴⁴

Regulations are different. Instead of being perceived as a neutral framework of universal rules, they are enacted to achieve specific economic goals.¹⁴⁵ Regulations are unsystematic and sometimes contradictory. They lack generality and permanence. When applied in specific cases, the standard for interpretation is what result will best promote the economic objective the rule is meant to achieve and not what decision correctly interprets the rule as written in the light of the first principles of the legal order. This causes the distinction between economic planning and legal reasoning to become blurred. People trained in the substantive fields being regulated such as economics, health, education, or urban planning are in a position to challenge the monopoly the legal profession has enjoyed over the drafting, interpretation, and application of legal rules. A knowledge of the whole legal order and its procedures is no longer a prerequisite to participate in the formulation and application of legal rules.

To the degree that the competition or tension with specialists actually exists, the government lawyers might react in a variety of different ways. First, they might regard the unsystematic instrumental use of law to manage economic activity as destructive of an orderly legal process and seek to integrate regulatory law into their existing form of deductive reasoning.¹⁴⁶ Secondly, they could ignore the whole phenomenon; leave control over the drafting and interpreting of regulations to other specialists and only deal with the regulations if there is a violation of established procedures or a conflict with the codes or first principles.¹⁴⁷ Thirdly, they could adjust their own skills and reasoning to facilitate their participation in the drafting and implementation of the regulations.¹⁴⁸ At a more general level, the profession's overall reaction to such changes in the use of law should reflect the profession's dependency relationship with different economic groups and the vested interest of these groups in existing modes of legal reasoning.

Of course, the dichotomy between legal formalism and regulatory law may be a false concept based on an ideal characterization of legal reasoning drawn from legal education and scholarship rather than from the daily work of attorneys. Lawyers have a practical capacity to adjust to changing circumstances. In the end, the real question may be what sustains the theoretical orientation of legal scholarship and education in the face of what lawyers actually do. In summary, this dichotomy is exaggerated, but it provides a useful framework for examining legal roles in government.

The results of the survey indicate there is tension between lawyers and other occupational groups, but that government lawyers react more in accordance with the first and second alternative than the third in the sense of altering their approach to law. Even the highest level legal advisors are relatively isolated from policy-making and devote most of their time to making sure existing procedures are observed. Only two of them spent as much as 10% their time on general questions of public policy. About one-half met with other department heads in their agency once or twice a week, but they described their role as limited to comments on the legality of the proposed method for implementing a policy.

Table XIV gives a picture of how the average respondent distributed his working time. About half went to research in the preparation of memoranda on legal issues and to drafting contracts. Another 30% was spent dealing with administrative law questions, 20% with the preparation of contracts, and 20% with labor law issues.¹⁴⁹ The latter were mostly questions about the statutory and individual contract rights of government employees. However, in the case of agencies in the fields of health, education and transportation, the public employees are extensively organized and the legal advisors devote considerable time to the collective bargaining process and labor grievances.¹⁵⁰

The key legal advisors also had little contact in their work with private interests. Sixty percent did not devote any time to meetings with private interests and no legal advisor devoted over 35% of his time to such sessions. Those having the most contact with private parties were in the regulatory agencies or the labor field where private actors regularly sought clarifications of regulations. This is surprising for a country

TABLE XIV. *The Percentage of Time Devoted to Different Functions, and Specific Types of Legal Problems by Legal Advisors to Government Agencies. N = 20.*

A. Functions	Mean percentage of time devoted to function
1. drafting legal documents or memoranda.....	35%
2. legal research	25%
3. drafting statutes, decrees or administrative regulations.....	10%
4. revising drafts of statutes, decrees or regulations	10%
5. conferences with public administrators.....	10%
6. conferences with private interests.....	10%
7. planning public policy.....	0%
8. court visits.....	0%
9. administration.....	0%
B. Type of legal problem	Mean percentage of time devoted to problems of each type
1. legal consultations involving litigation in the courts.....	5%
2. legal problems solved through settlements	10%
3. making sure the government agencies' actions do not violate the law.....	75%
4. designing the legal means for a government agency to achieve its public policy objectives.....	10%

where personal contacts are central elements of public decision-making, but it may be a reflection of legal advisors' lack of control over policy.

Their isolation from policy formulation was a source of considerable dissatisfaction. For example, in response to a general question about the difficulties he encountered in his work, one lawyer at a high level in the executive branch described the situation as follows:

The administration is now controlled by politicians and technocrats. Legal concepts are in conflict with the approach of the technocrat who acts as if he were a private individual. He does not understand the limits on the exercise of public power. When a lawyer attempts to explain these limits, friction develops and the lawyer is not asked to participate in making public policy decisions. He is only asked to justify them.

Over half of the government legal advisors expressed similar concerns about the increased influence of planners, economists and engineers and their lack of understanding about the "need for orderly legal procedures."¹⁷ Out of the twenty, only one argued that the real problem was the limitations the legal order placed on the agency's ability to achieve redistributive goals.¹⁸ Three others discussed failures of the legal process, but they cited the lack of coherent administrative codes and regulations to define and to limit the powers of their agencies. It is difficult to say whether these lawyers were concerned with increasing legal controls to enhance their own influence within the agency or whether they were expressing legitimate concerns about the abuse of public power. The examples they gave were always at the level of legal formalities rather than any substantive impact on private rights.

Another question about the typical legal problem which government legal advisors handle on a daily basis elicited a similar concept of the legal advisor's role.

Approximately 75% of their time goes to "making sure the government agency's actions do not violate the law". This response was selected from among the four alternatives listed in Part B of Table XIV. The differences between alternatives three and four in the Table are difficult to identify from any description of an attorney's functions. They are mostly a reflection of the frame of mind a lawyer brings to his work. The responses indicate whether he primarily perceives his role as a guardian of the legal order or as a government employee responsible for finding a legal means to implement policy decisions. Over half said they did not devote any time to designing a legally valid method of initiating policy.¹³

This concept of the government lawyer's role as the guardian of the legal order is consistent with the hypothesis concerning the sources of friction between government lawyers and the Colombian "*tecnicos*." To obtain more specific information on this, the twenty government attorneys were asked the following question toward the end of each interview: "In your experience in government, do the lawyers and technocrats who work together understand one another's views or do they have different ideas about the process of change?"

Only one respondent had not experienced any tensions between the two groups. More than half blamed the technocrat's failure to appreciate legal skills, the need for legal procedures, or the lawyer's more "universal" approach to the process of change. Their responses are a defense of both the traditional dominance of lawyers in public administration, and the need to maintain universal first principles as the basis for law and an ordered society. Only a quarter blamed the excessive legalism of some Colombian lawyers, but they felt this was changing.

There is no real basis to explain the difference of opinion among respondents, but in the larger sample those who were critical of legal education or the intellectual orientation of the profession often possessed one of the three following characteristics: (a) a left leaning political ideology critical of Colombia's form of capitalism and a Marxian view of law as superstructure or as an instrument of the economic and political elite; (b) foreign postgraduate training in law, economics, or another field in the social sciences; (c) a strong ideological commitment to the idea that "modernization" could be achieved through planning and state regulation of the economy. While these characteristics are very different, they all seemed to lead persons to be critical of legal formalism even if for distinct reasons.

It was equally difficult to develop any basis to determine whether respondents who were critical of legal formalism would actually approach a legal problem from a different perspective. An effort was made in this direction by asking all respondents to analyze two hypothetical problems dealing with delegations of authority from the legislative to the executive branch of government. In the first hypothetical, the executive promulgated a regulation which fell within the purpose of the delegation but not its literal meaning.¹⁴ In the second, the executive regulation was within the literal interpretation of the delegation, but arguably contrary to the policy behind it.¹⁵ The coding scheme and the results are summarized in Table XV.

It is interesting to note that the twenty government legal advisors were more

TABLE XV. *The Legal Reasoning of Government Lawyers as Compared with the Sample of Law School Graduates in all Occupations*

Type of Response	Hypothetical 1		Hypothetical 2	
	Sample of law school graduates N = 102	Sample of Government lawyers N = 20	Sample of law school graduates N = 102	Sample of Government lawyers N = 20
1. No analysis: repeats the question or rephrases it with no answer	9%	0%	4%	0%
2. Literal: analysis of the literal or doctrinal definition of the terms used in the delegation to decide if the executive action was legal	59%	75%	44%	50%
3. Congressional purpose: respondent determines the meaning of the phrases used in the delegation in light of the reasons Congress gave for making the delegation of authority to the executive	9%	20%	12%	15%
4. The Congressional purpose and the factual context of its implementation: respondent analyzes the meaning of the delegation in light of its wording, the specified Congressional purpose and his understanding of the factual context in which the executive is acting in an effort to achieve the Congressional purpose	11%	0%	25%	20%
5. Political opinion: respondent states whether he thinks the executive's action was right or wrong as a political or policy matter with no legal justification	11%	0%	4%	10%
6. Other:	1%	5%	11%	5%

exegetic or formalistic in their answers than the sample of all law school graduates. This undercuts the hypothesis that public sector working environments will encourage purposive forms of legal reasoning. On the other hand, four out of five of the government attorneys who said lawyers were becoming less legalistic did discuss the purpose of the delegation in at least one of their responses and two did in both. In contrast, only three of the twelve who emphasized fixed legal procedures and the technocrats' failure to understand the legal order mentioned the objective of the delegation in either response. This methodology is too speculative to support any firm impressions, but the results are at least consistent with the hypothesis that lawyers who make an effort to use law to implement policy decisions will alter the substantive character of their legal reasoning.¹⁷

Even if some government attorneys are becoming more policy oriented, they are still a small minority. When asked about the legal profession's role in the development process, most placed lawyers in a central position, but as orientors of change with the "cultural background" and "understanding" of society which comes

from studying fundamental legal principles such as justice, formal equality and stability. Only one of the government attorneys and 14% of the sample of law school graduates discussed the lawyer's participation in the formulation or implementation of public policy, or the creation of the legal instruments the public and private sectors need to stimulate economic activity.

Thus, in working out the tension between their roles as the guardians of procedures limiting the state's power and as the administrators of procedures to implement public policies, the government attorneys tended to emphasize the former role. The growing instrumental use of law has not had any marked impact on the government attorney's approach to legal problems or modes of reasoning.

This emphasis on "rule of law" may reflect the profession's economic dependency on capitalist interests and the way existing modes of legal reasoning serve the needs of the capitalist class. It can be argued that legal formalism and the rule of law contribute to the concept of an autonomous legal order which is independent of the preferences of particular capitalist groups while furthering their overall interests.¹⁷⁷ The first principles of the legal order, the constitution and the codes define property relationships in a way which protects vested interests and the rule of law constrains the state's capacity to alter these relationships. They make law a forum for mediating conflict within the ruling class as well as among classes. For example, it may be in the interest of industrial and commercial groups to support a government program to redistribute land from large landowners to small farmers in order to increase agricultural production, expand consumption markets, and foster social stability. If such a policy is implemented, law becomes the forum the affected landowners use to protect their individual interests by seeking compensation. Legal formalism provides an abstract framework for mediating the conflict by balancing the interests of the state and the individuals through the compensation awarded. The legal decision simultaneously constrains the government's power to act against a particular individual or group while expanding the state's overall power by making its actions more legitimate. In the same sense, the rule of law inhibits the capitalist class from using direct force to achieve its goals and thereby expands their power by increasing the legitimacy of the state they control.¹⁷⁸

At the more concrete level, there are few incentives for young lawyers to adapt their modes of reasoning to the legal needs of specific government agencies as contrasted with private economic interests. Economic rewards are greater in the private sector.¹⁷⁹ Most government attorneys envision their work as a way of making contacts with private interests which will eventually contribute to their careers in private practice. If a policy goal of an agency is in conflict with the needs of private interests whom the young attorney eventually hopes to have as a client, it is easy to see why the attorney would resolve the dilemma by emphasizing procedure over substance. He must do a competent legal job to enhance his career, but he lacks incentive to develop skills or modes of reasoning which are not consistent with the interests of the profession's dominant clientele in the private sector.

Recently, rule of law concepts have become a more important and highly visible part of the Colombian Constitution. In 1969 a new Constitutional Chamber was

created in the Supreme Court to deal only with cases attacking the constitutionality of a Colombian law.¹⁰⁰ This Chamber analyzes the cases and presents a majority opinion and any dissents to the full Supreme Court for the final decision.¹⁰¹ Under Article 214 of the Constitution every citizen has standing to challenge the constitutionality of any law or decree by filing an action directly with the Supreme Court.¹⁰² Constitutional challenges are not as frequent as one might expect given the elimination of normal standing requirements,¹⁰³ but cases are regularly filed by lawyers who make a practice of attacking the party in power for political purposes or on behalf of special interest groups.¹⁰⁴ These constitutional challenges also reinforce the court's image as a relatively autonomous institution with the capacity to limit the exercise of political power.¹⁰⁵

Similarly, changes in the process of selecting judges have increased the apparent independence of the judiciary from the political process. Prior to 1957, the members of both high courts were elected by Congress for terms of four or five years.¹⁰⁶ Each time the party in power changed, so did the composition of the judiciary. The legal system was viewed as one more instrument of power to be used by the party in control of the government.¹⁰⁷

Now the judges of both high courts fill vacancies in their respective benches and they can only be removed from the court by a judicial decision that they are guilty of official misconduct or because they have reached the mandatory retirement age.¹⁰⁸ The members of the Supreme Court appoint all magistrates to the District Superior Courts and they, in turn, appoint all Circuit and Municipal Court judges.¹⁰⁹ All court appointments are independent of any direct political intervention.

The practical impact of such reforms is difficult to assess. As one leader of the bar stated in response to a question about the "rule of law" in Colombia, "the judiciary is now becoming more independent. The court does not change every time the party in power changes, but politics is still important. There are calls from the executive to particular judges saying, 'Look, for political or economic reasons, the court must make the following decision' in a case which is pending. The independence of the judiciary is still more formal than real."

This discussion should not be read to suggest a marked dichotomy between the state and private interests with law and the judiciary as the mediating force. As suggested above, the dominant classes control the political parties and the executive. The state's power is used to enhance their wealth and security, giving them an interest in a powerful executive. The "rule of law" serves the purpose of helping to legitimize political decisions and, thereby, to expand the state's influence. The legal profession partially copes with these contradictory functions of law, in both constraining and expanding state power, by maintaining formalistic modes of reasoning which avoid the need to deal directly with actual social or economic conflicts.

It is interesting that the recent steps taken to make the judiciary appear to be relatively more autonomous from direct political control are not reflected in the relationship between the private bar and the state. The Ministry of Justice is the focal point for most regulation of private practice. There is a weak national bar

association, but few lawyers belong and many do not even know it exists.¹⁰⁰ Respondents overwhelmingly favored a stronger association,¹⁰¹ but they also seemed content to let the Ministry of Justice act as the focal point for the internal regulation of the bar. Over the past few years the Ministry has issued decrees regulating (a) the content of legal education,¹⁰² (b) the criteria for accreditation of law faculties,¹⁰³ (c) the requirements for membership in the bar,¹⁰⁴ and (d) the code of ethics.¹⁰⁵

There are many possible explanations for the lack of concern about government control over the bar, but the major factor may be the extent of identity between the legal profession's leaders and the dominant political figures. Lawyers have always been the largest occupational group in the legislature and they are usually prominent among the political appointments in the executive.¹⁰⁶ Through the political influence of its leaders, the profession has always been able to protect its monopoly without being highly organized. In addition, the lawyers who serve the dominant classes may be in a better position to maintain control over the profession when its leaders are selected through the state political process rather than through an autonomous bar association. Given the current pattern of stratification in the bar and the growth in the number of private practitioners serving the individual clients and small businesses, the internal politics of an autonomous bar association could become complex and difficult to dominate.

In summary, the only part of the original hypotheses supported by the survey results is the tension between high-level government legal advisors and the "*tecnicos*". This tension is more a reflection of law's dual role in both facilitating and constraining state power than any real sense of competition for control over legal jobs and knowledge. No real incentive to alter legal skills or reasoning was identified. The career patterns of lawyers and the vested interests of the legal profession's dominant clientele in existing modes of justifying legal decisions make changes unlikely unless they are needed to serve the needs of the corporate and financial community.

Conclusion

There is a tension throughout this paper between (a) generalizations about the legal profession as an interest group promoting a concept of law and society linked to the needs of a capitalist class and (b) the more concrete analysis of the services lawyers provide on a daily basis. At the latter level, lawyers do not appear as a cohesive interest group committed to a shared set of legal values. The empirical analysis pictures the profession as congeries of subgroups whose interests are partially allied with the clientele they serve at different strata of society.¹⁰⁷ The individual attorney processing attachments for debt collection or handling the estate and family law problems of a middle class individual has little in common with a corporate legal

advisor in a small law firm. The individual litigator may maintain social distance from his clientele to establish his own status and control over the relationship, but one need only observe his working environment, dress, and friends to conclude that he still has more in common with his clientele, and the lawyers who serve them, than he does with the corporate advisor. If the attorney is young and he sees himself as gaining experience for an eventual career serving business interests the identification will be weaker, but the growing number of lawyers and the competition for clients may force more attorneys to develop a career serving lower and middle income clientele.

These observations suggest caution in generalizations about how the profession's economic dependency, class ties, and legal ideology limit the use of legal advocacy to promote the needs of the lower classes. For example, the union attorneys in the sample were outspoken on their ideological commitment to their clientele and on their use of collective bargaining, political pressure, litigation, and advocacy before government agencies to pursue union goals and to seek participation in government decisions affecting union interests. If other cohesive interest groups emerged within the lower class and were able to aggregate resources, there is no reason to believe they could not employ equally dedicated legal advocates.

From this perspective, the inequities fostered by the market allocation of legal services is as much a reflection of the lack of institutional forms for aggregating group interests among the working class as any biases inherent in the profession's structure or in the organization of legal services. If working class groups could accumulate the resources to employ an attorney, there are enough differences between the government's formal commitments to redistribute resources and the reality of government action to provide ample legal arguments for the recognition of basic rights and for a minimal standard of living.¹⁰⁰

On the other hand, a structural analysis of the legal profession from a more general perspective yields a very different picture. Most Colombian lawyers come from the upper-middle class. Their legal education is based on the values of social stability, the protection of private property, the sanctity of contract, and formal equality before the law. The market for legal services has fostered a set of career patterns which channel the most capable individuals to the highest paying clientele in the corporate sector. The organizational infrastructure necessary for aggregating resources and using law to pursue group goals among working class groups is limited to the labor field. The way the profession organizes the services it offers to middle and lower income groups reinforces the tendency to use lawyers only for individualized legal needs.

There is also little reason to believe the judiciary or government attorneys would be very receptive to innovative forms of legal advocacy. Both groups tend to be either young attorneys beginning their legal careers or older lawyers unsuccessful in private practice who are seeking job security. Without a change in career opportunities, they do not have much incentive to make legal decisions fostering more access to public decisions or constraining the government bureaucracy to redistribute resources and recognize new rights.

There is tension between these two views of the profession, but both reflect reality at different levels. The individual skills of an attorney can be used in many ways depending on his clientele and personal ideology, but the structural characteristics of the profession and the legal process inhibit this potential. In a sense, any final conclusions about the roles lawyers play in a particular society is as much a reflection of the researcher's perspective on the profession and legal institutions as it is a product of empirical findings.

Notes

1. The major decrees were included in a codification known as the *Recopilación de leyes del reino de las Indias* encompassing approximately 6,500 decrees divided into nine books regulating the exploitation of land, mines, labor, foreign trade, the obligations of the Catholic Church, the organization of the colonial government and the structure of the educational system. *Recopilación de Leyes de Los Reinos de Las Indias*, Consejo de la Hispanidad (Madrid, 1943) [hereinafter the *Laws of the Indies*].

2. For an interesting description of a sharp conflict over the orientation of legal education in Colombia from 1825 to about 1860 which reflects the law schools' role in the formation of the political elite, see A. Rojas, "La batalla de Bentham en Colombia," 29 *Rev. de Historia de America* 37 (1950). In the case of Colombia, over half the nation's presidents have studied law. For bibliographical information on them, see M. Manual, *Colombia Posesiones Presidenciales 1810-1954* (Bogota, 1954); J. De Mendoza Velez, *Gobernantes de Colombia: 500 Años de Historia* (Bogota, 1957).

3. Decree 320 of 1970 defines the scope of the legal profession's monopoly over access to courts and to government agencies where the applicant seeks the recognition of a claim to property or other legal rights.

4. The most comprehensive empirical study is S. Lowenstein, *Lawyers, Legal Education and Development* (New York, 1970). See also R. Urzua, "Sociedad y Sistema Legal: el papel del abogado," 11 *Cuadernos de la Realidad Nacional* (Jan., 1972); L. Zollezi, "La Profesión de Abogado en Lima" an unpublished paper based on research carried out by the Instituto de Investigaciones Jurídicas de la Pontificia Universidad Católica del Perú (1976). Cf. J. Fuster, *Los Abogados de Puerto Rico: fundamentos para una sociología de la profesión legal* (San Juan, 1974).

5. See e.g., Lowenstein, *supra*; Zollezi, *supra*; and H. Steiner, "Legal Education and Socio-Economic Change: Brazilian Perspectives," 19 *Am. J. Comp. L.* 39 (1971). For an interesting cross-section of Latin American writing on legal education and social change see the collection of papers presented at The Conference on Legal Education and Development in Valparaiso, Chile (April, 1971).

6. At the time of this survey there were a total of eleven law schools in Bogota. Five had only recently begun to offer law degrees. The six included in the sample, are as follows: Colegio Mayor de Nuestra Señora del Rosario [hereinafter Rosario], Pontificia Universidad Javeriana [hereinafter Javeriana], Universidad Externado de Colombia [hereinafter Externado], Universidad Nacional de Colombia [hereinafter Nacional], Universidad Libre [hereinafter Libre], and Universidad La Gran Colombia [hereinafter La Gran Colombia]. These six schools had educated most Bogota lawyers over the three decades prior to this study.

7. A 1967 study of the legal profession had included data on the social origins of lawyers by law school and it provided a basis for the following groupings: (a) Javeriana and Rosario, (b) Externado and Nacional and (c) Libre and Gran Colombia.

8. For the three groupings of the law faculties see *supra* note 7. The two periods were 1950-51 and 1966-67, with the exception of Gran Colombia which had its first graduating class in 1957. A 1957-58 list of graduates was used from that school and combined with the 1950-51 graduates of Libre for purposes of drawing the sample. An effort was made to interview approximately 20 law graduates from the two

different time periods for each of the three groupings of law faculties. The difficulties encountered locating the Libre and Gran Colombia graduates led to the following final distribution of persons interviewed:

	1959-51	1966-67
Rosario and Javeriana	19	20
Externado and Nacional	17	20
Libre and Gran Colombia	14*	13
Totals	50	53

*1957-58 for Gran Colombia.

9. The sample design is biased toward the graduates of the schools serving the upper-class because a similar number of lawyers were interviewed from both the elite private schools and from the schools with large night sections. The latter actually graduate more total students and their alumni make up a larger percentage of the practising bar. For a more detailed treatment of the research methodology see D. Lynch, *Lawyers in a Changing Society: a Case Study of the Colombian Legal Profession* (forthcoming).

10. See *Laws of the Indies*, *supra* note 1.

11. The acts of the colonial government and its relations with private parties were controlled by a legal institution known as the Real Audiencia. See M. Aguilera, *Historia Extensa de Colombia: La Legislación y el Derecho en Colombia*, Vol. XIV (Bogotá, 1965) at 73-74.

12. For an analysis of the major interest groups prior to independence and their economic and political needs see O. Fals Borda, *Subversion and Social Change in Colombia* (New York, 1969) at 39-93; W. P. McGreevy, *An Economic History of Colombia 1845-1930* (Cambridge, 1971) at 19-66; and L. E. Nieto Arteta, *Economía y Cultura en la Historia de Colombia* (Medellín, 1942) at 10-32.

13. A. Tirado Mejía, *Introducción a la Historia Económica de Colombia* (Bogotá, 1971) at 22.

14. See A. Valencia Zea, *Derecho Civil: Parte General y Personas* Vol. I (Bogotá, 1972) at 33-34.

15. *Laws of the Indies*, *supra* note 1.

16. *Id.* Book IV.

17. *Id.* Book VI.

18. *Id.* Book IX.

19. *Id.* Book I.

20. *Id.* Books II and V.

21. Spain's fiscal policy was basically structured around indirect taxes on labor and the consumption of goods. For example, there were taxes on all exports and imports (La Avería), on the internal exchange of goods and property (La Alcabala) on the mining of gold (El Quito Real), on the weight or size of goods (La Sisa), on agricultural production (El Diezmos), and on estates (Las Vacantes Mayores). See Tirado Mejía, *supra* note 13 at 84-86.

22. See Aguilera, *supra* note 11, at 73-74.

23. *Id.*

24. See Rodríguez Cruz, *Historia de Las Universidades Hispano Americanas* (Bogotá, 1973) at 39.

25. *Id.* at 39-46.

26. "Criollo" was the term used for individuals of pure Spanish blood born in Nueva Granada.

27. "Mestizo" was the term used for individuals without pure Spanish or pure Indian blood. The mestizo was prohibited from living in Spanish towns; he could not engage in commerce with a pure white; the marriage of a pure white with a mestizo was prohibited; they were not allowed to study in the institutions of higher education; and it was the basis for a cause of action in slander to call a person of pure Spanish blood a "mestizo." See J. Jaramillo, *Ensayos Sobre Historia Social Colombia* (Bogotá, 1968) at 170-174.

28. Aguilera, *supra* note 1, at 174-76.

29. *Id.*

30. *Id.* at 171-174.

31. Nieto Arteta, *supra* note 12, at 42-48.

32. For a description of the short-lived liberal reforms see Nieto Arteta, *supra* note 12, at 39-81. The specific hierarchy of laws to be applied by the judges of Nueva Granada is described in Valencia Zea, *supra* note 14, at 35.

33. For an analysis of the underlying philosophical conflicts see J. Jaramillo Uribe, *El Pensamiento*

Colombiano en el Siglo XIX (Bogota, 1964) pp. 149-172; Fals Borda, *supra* note 12, at 67-92.

34. See Nieto Arteta, *supra* note 12, at 49-68; Maramillo Uribe, *supra* note 33, at 153.

35. Rojas, *supra* note 2, at 37-39.

36. *Id.* at 40-41.

37. *Id.* at 51-61.

38. England had encouraged the independence movement and even provided credit to finance a part of the new government's public debts. Trade with England was expanding throughout Latin America at this time, but there was not much growth in trade with Colombia until transportation improvements and viable export products from Colombia provided the economic basis. See McGreevy, *supra* note 12, at 33-47.

39. See Jaramillo, *supra* note 33, at 153-55.

40. For different views on this period and the transformation of the Colombian economy, see Nieto Arteta, *supra* note 12; McGreevy, *supra* note 12; I. Lievano Aguirre, *Rafael Nunez* (Bogota, 1944); and Tirado Mejia, *supra* note 13.

41. See Nieto Arteta, *supra* note 1, at 195-234; McGreevy, *supra* note 12, at 97-116.

42. For a discussion of these issues in Colombian politics from 1845 to 1885 see McGreevy, *supra* note 12, at 70-96.

43. See, e.g., Nieto Arteta, *supra* note 12; Fals Borda, *supra* note 12.

44. See, e.g., L. Ospina Vasquez, *Industria y Proteccion en Colombia 1810-1930* (Medellin, 1955); Lievano Aguirre, *supra* note 40; and McGreevy, *supra* note 12.

45. For a discussion of the French and English influence on these three leaders of the Colombian Liberal party see Jaramillo Uribe, *supra* note 33, at 218-55.

46. Lievano Aguirre, *supra* note 40, at 52.

47. Jaramillo Uribe, *supra* note 33, at 246-47.

48. *Id.* at 229.

49. *Id.* at 224-33.

50. *Id.* at 218-245.

51. R. Means, "Codification in Latin America. The Colombian Commercial Code of 1853," 52 *Texas Law Review* 18 at 22 (1973).

52. *Id.*

53. *Id.* at note 16; Aguilera, *supra* note 11, at 287-290.

54. Means, *supra* note 51, at 22-24.

55. *Id.* at 28-29.

56. *Id.* at 35.

57. *Id.* at 25-28.

58. *Id.* at 25-37.

59. *Id.* at 36.

60. *Id.* at 22-23.

61. The Civil Code of Colombia today is basically the same modified version of Bello's Chilean Civil Code adopted by Law 153 of 1887. See Valencia Zea, *supra* note 14, at 33-44.

62. With the adoption of the Bello Code all Colombian law students were required to study the general part and persons of civil law, family law, property, contracts, and extra-contractual obligations. These remain basic required courses in all Colombian Law Faculties today. See Decreto Numero 225 de 1977, *Derecho Colombiano*, No. 183 (March, 1977) at 267-273.

63. See Art. 25-32, *Codigo Civil*, (Bogota, 1972).

64. Art. 8, 25-33, *Codigo Civil*.

65. See R. Dix, *Colombia: The Political Dimensions of Change* (New Haven, 1967) at 31-36; W. McGreevy, *supra* note 12, at 183-340.

66. R. Parra Sandoval, "Dependency and Education in Colombian Underdevelopment," Research Paper No. 51 of the Land Tenure Center at the University of Wisconsin (1973) at 14 citing the population census of 1938, 1951, and 1964 and Departamento Administrativo Nacional de Estadística [DANE], *Boletín Mensual de Estadística*, No. 227 (Bogota, 1970).

67. *Id.* at 17.

68. Over the past decade Colombia has maintained a growth rate of around 5% to 6%. For discussions of the relationship between economic growth, migration and unemployment see the collection of essays in *Empleo y Desempleo en Colombia*, Centro de Estudios Sobre Desarrollo Economico (Bogota, 1968).

69. Oficina Internacional del Trabajo, *hacia el pleno empleo* (Bogota, 1970) at 18.

70. For a discussion of the areas of specialization of practitioners serving individual clients in low income areas see text at note 144 *infra*.

71. See F. Leal Buitrago, *Estudio del Comportamiento Legislativo en Colombia: analisis historico del desarrollo politico nacional 1930-1970*, Vol. I (Bogota, 1973) at 97-193.

72. In 1964 only 10% of the Colombian corporations had taxable earnings of over one million pesos and they earned 85% of the total corporate income for that year. See "Reforma de la Estructura Tributaria de las Sociedades en Colombia: Analisis de los Problemas y de las Propuestas Alternativas para su Solucion," in *Lecturas Sobre Desarrollo Economico Colombiano*, eds. O. Gomez Otalora and E. Weisner Duran, Fundacion Para La Educacion Superior y el Desarrollo (Bogota, 1974) at 527-575.

73. From 1929 to 1966 direct investment from U.S. sources increased from \$124 million to \$571 million. DANE, *Boletin Mensual de Estadistica*, No. 239 (June, 1971) at 76. The members of two law firms serving foreign interests appeared in the sample and the senior partner of another firm was interviewed during early meetings with select leaders of the legal profession.

74. Aguilera, *supra* note 11, at 309-317.

75. *Id.*

76. *Id.* at 283-336.

77. The Conservative and Liberal party leaders agreed to divide evenly the positions in all public elective bodies, executive departments and administrative posts. The presidency was to alternate between the two parties every four years for a sixteen year period. See Dix, *supra* note 65, at 136.

78. For an analysis of the reforms initiated under the National Front Agreement see Leal Buitrago, *supra* note 71, at 151-184.

79. The private university was Rosario and the four public ones were Antioquia, Cartagena, Cauca and Nacional. For a complete list of the universities founded from 1653 to 1967 see G. Rama, *El Sistema Universitario en Colombia* (Bogota, 1970) at appendix, cuadro 4.

80. *Id.*

81. Liberal party leaders founded Externado de Colombia and Universidad Libre and the Conservative party encouraged the Catholic Church to found the law schools at Universidad Javeriana and Universidad Pontifica Bolivariana.

82. Rama, *supra* note 79, at appendix, cuadro 18.

83. *Id.* at appendix, cuadro 4.

84. *Id.* at appendix, cuadro 18.

85. *Id.*

86. See *Hacia el pleno empleo*, *supra* note 69, at 455.

87. They are the Universidad del Valle and the Universidad de los Andes. The latter did found a Law School in 1968 with some assistance from the Agency for International Development and the Ford Foundation. During the first few years the school was controlled by a group of Colombian lawyers who had completed post graduate training in U.S. law faculties. They tried to adapt the U.S. model of legal education to the Colombian context with limited success. See Lynch, *supra* note 9.

88. These observations are based on my experiences working with National Planning and other government agencies as a Ford Foundation Advisor from 1969 to 1972.

89. In 1966 only 4.5% of Colombia's law professors taught full time. This compares with 43.6% in medicine and health related fields, 16.4% in economics, 30% in education, 33% in engineering and 71% in agronomy. DANE, *Boletin Mensual de Estadistica* No. 219 (June, 1969) at 183.

90. In 1974 a Presidential decree was promulgated to change this. Basically the decree increases the cost of opening a law faculty by requiring an adequate physical plant, 20% full time faculty, a 1,000 volume library, a complete student welfare program, and it restricts revenues by limiting class sizes. See Decree 1189 of 1974.

91. The ones founded prior to 1950 are Rosario, Antioquia, Cartagena, Cauca, Atlantico, Nacional, Narino, Externado, Libre, Javeriana, Bolivariana, and Caldas. After 1950 came Medellin, Santo Tomas

in Bogota, La Gran Colombia in Bogota, La Gran Colombia in Armenia, La Libre in Pereira, Santiago de Cali, Autonomia Latinoamericana, San Buenaventura, Autonomia de Bogota, La Catolica, Los Andes, Santo Tomas in Bucaramanga, Libre in Cucuta, Libre in Barranquilla, Inca de Colombia. The information was obtained from the records of the Colombian Institute for Higher Education [hereinafter ICFES].

92. Classes are held from 7:00 a.m. to 9:00 a.m. in the morning and after 5:00 p.m. in the afternoon.

93. "Evolucion de la Matricula en las Facultades de Derecho Durante 1965-1973," a table prepared for the internal reporting of ICFES.

94. Eighty percent of respondents felt the profession had a negative public image and 65% felt its prestige was declining. When asked about the reasons for the profession's declining prestige 30% mentioned the growth of the urban night schools and 44% pointed to the excessive competition and lack of ethical standards. Forty-two percent also felt the decline in the quality of legal education was the bar's greatest problem.

95. See Decree 1189 of 1974.

96. *Constitution of Colombia*, Art. 40.

97. All but one of the leaders of the profession interviewed prior to the sample claimed the "tinterillo" had mostly disappeared, but the private practitioners in the sample who worked in rural areas relied on "tinterillos" to maintain contacts with clients between visits and the litigators representing individual clients complained about lawyers selling their signature to a "tinterillo" for 10% to 20% of his fee.

98. The best descriptions of the Colombian political process can be found in Dix, *supra* note 65; Fals Borda, *supra* note 12; Leal Buitrago, *supra* note 71; J. L. Payne, *Patterns of Conflict in Colombia* (New Haven, 1968); and T. L. Smith, *Colombia: Social Structure and the Process of Development* (Gainesville, 1967).

99. For a description of the party system and the "traditional" style of politics see Payne, *supra* note 98.

100. See Dix, *supra* note 65, at 136 and the description of the National Front Agreement, *supra* note 77.

101. See Dix, *supra* note 65, at 50-55; R. Nelson, T. P. Schultz, and R. Slighon, *Structural Change in a Developing Economy: Colombia's Problems and Prospects* (Princeton, 1971) at 213-235.

102. Nelson, *supra* note 101, at 225.

103. For a political science perspective on these reforms see Leal *supra* note 71, at 151-84. The best historical account is J. Vidal Perdomo, *Historia de la Reforma Constitucional de 1968 y sus Alcances Juridicas* (Bogota, 1970).

104. See *Constitution of Colombia*, Art. 120-122, 208-213.

105. The agreement to alternate the Presidency between the Liberal and Conservative Parties ended with Misael Pastrana's term in 1974. Since this date two Liberal Party Presidents have won the popular elections, Alfonso Lopez Michelsen in 1974 and Julio Cesar Turbay in 1978. For a critical view of Colombia's political situation in 1977 see F. Rojas, *Colombia 1977: La Crisis del Regimen*, Centro de Investigacion y Educacion Popular (Bogota, 1977).

106. The term "tecnico" or technocrat is frequently used to refer to young Colombians, educated in these fields, who became prominent at high levels of government during the Presidency of Lleras Restrepo. Powerful economic interest groups, disturbed by some of the reforms Lleras was advocating, attacked his appointments of "tecnicos" to high level positions. See Leal *supra* note 71, at 153-154. The term has become a way of referring to economists and engineers in particular. It was regularly used in this way by respondents.

107. See D. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development," 82 *Yale L. J.* 1 at 30-31 (1972); R. Unger, *Place of Law in Modern Society* (New York, 1974), at 193-200.

108. *Infra.* at Section IV.

109. The profession's four principal work settings are private practice, government agencies, the judiciary, and private corporations.

110. For a description of Colombia's class structure see Smith, *supra* note 98.

111. *Hacia el pleno empleo*, *supra* note 69, at 455.

112. The average exchange rate from January to June, 1974, during the interviews was U.S. \$1 = 25 Colombian pesos.

113. See DANE, *Encuesta de Hogares* (Bogota, 1970) cuadro 18, at 120. The 1970 income figures given in this table were adjusted by a factor 170% for inflation between 1970-1974 before making the comparison with the monthly incomes of respondents.

114. *Id.*

115. A test of the relationship between the three groupings of the law schools and the level of father's education yielded a Spearman correlation coefficient of .28, significant at the .002 level.

116. A statistical test of the relationship between law school and father's occupation resulted in a Spearman correlation coefficient of .32, significance .001.

117. The Spearman correlation coefficient for law school and current occupation is .41, significance .001.

118. Fourteen of the twenty-one respondents engaged in non-law occupations are graduates of Rosario and Javeriana. Ten of the fourteen are executives in the following types of institutions: financial institutions, three; semi-public corporations, three; a cooperative, one; a private lobbying association, one; a private university, one; and a foreign corporation, one.

119. Of the nineteen litigants from Libre and Gran Colombia, twelve (63%) represented primarily small merchants, employees, small farmers and blue-collar workers. Only one had a corporation as his major client and this was in the labor field. The remaining six had a mixture of individual clients from different strata of Colombian society.

120. Respondents were classified as litigators or legal advisors according to the following criteria: a) if they devoted more than 50% of their time to legal problems involving court litigation, they were classified as litigators; b) if they devoted more than 50% of their time to planning the legal affairs of clients to prevent future legal problems, they were classified as legal advisors; and c) if neither of these functions absorbed more than 50% of their practice because of the time they devoted to settling existing legal conflicts prior to the initiation of court litigation or administrative procedures, then they were classified according to whether their overall practice was more oriented to litigating or legal planning.

121. J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, 1969) at 109.

122. These figures are based on the income information provided by a young judge who was just starting his career and who was interviewed during the pretest and by the Magistrates interviewed as a part of the sample.

123. An indicator of social and economic status (hereinafter SES) was constructed out of a combination of father's education, mother's education and father's occupation. The correlation between the SES variable and current occupation was only .13, significance .089, and when controlled for university there was no relationship. The correlation coefficient between law school and current occupation is .41, significance .001. When it is controlled for the effects of SES, the relationship is reduced to .23, significance .020.

124. Historically, Externado, National University, and Libre have been identified with the liberal party. Javeriana and Gran Colombia are more closely linked to the conservative party. Rosario graduates appeared to be more of a mixture of both parties. During the prior conservative government of President Pastrana, Javeriana was commonly regarded as being very influential.

125. This is the SES variable see *supra* note 123.

126. This variable is based on the three groupings of law schools ranked as follows: 1) Gran Colombia and Libre, 2) Externado and National U., and 3) Rosario and Javeriana.

127. For the ranking of occupations see Table IV.

128. For the methodology used to determine the major clientele served by each respondent see *infra* note 144 and Table IX. For the correlations, the respondent's clientele or employers were ranked as follows: 1) mixture of small merchants, workers and campesinos, 2) mixture of white collar employees and small merchants, 3) mixture of individual clientele and business corporations, 4) unions, 5) medium size business, 6) government agencies, and 7) large business, foreign interests, large landowners, high level executives, and professionals.

129. The rankings for field of specialization from low to high prestige were as follows: 1) generalist, 2) debt collection, 3) criminal law, 4) labor law, 5) general practice only in civil area, 6) administrative and other public law, and 7) commercial law and other business law fields.

130. For a definition of the difference between legal advisors and litigators see *supra* note 120.

131. See L. Mayhew, "Institutions of Representation: Civil Justice and the Public," 9 *Law & Soc'y Rev.* 401 at 404 (1975).

132. *Infra* at Section IV.

133. This observation is based on respondents' answers to a question about the percentage of their clientele's conflicts which they normally settle without initiating any legal action.

134. See Fundacion Para La Educacion Superior y El Desarrollo, "Derecho y Desarrollo Urbano: configuraciones juridicas sobre relaciones de propiedad de terrenos en las urbanizaciones," a report on research in progress (August, 1974); cf. K. Karst, M. Schwartz and A. Schwartz, *The Evolution of Law in the Barrios of Caracas* (Los Angeles 1973).

135. See Article 25 of Decree 320 of 1970.

136. According to Article 25 of Decree 320 of 1970 regulating the legal profession, a non-lawyer can represent himself or someone else in civil litigation or government procedures only as follows:

- (a) when the Constitution or laws grant him the right of individual petition. This is primarily in reference to Article 120 of the Constitution which gives any individual standing to challenge the constitutionality of a law.
- (b) in small claims with a process similar to a small claims court.
- (c) at the court of first instance if it is located in a rural community where less than three lawyers are registered to litigate cases before the municipal judge.
- (d) in labor conciliation procedures.
- (e) in the limited jurisdiction of police inspectors in a community with less than three lawyers.
- (f) in defense to a legal claim which must be filed by an attorney.
- (g) before administrative officials if the purpose is not to obtain the recognition of legal rights or property except in the case of title to less than 50 hectares of unexploited rural land or in a municipality with less than three lawyers.
- (h) in a challenge to a tax assessment.

137. The most powerful private interest groups are probably The National Federation of Coffee Growers, The National Association of Industrialists, The National Federation of Merchants, and The Society of Agriculturalists (large landowners), but there are numerous additional interest associations organized around each type of economic production for the purpose of lobbying and protecting monopoly positions. See Dix, *supra* Note 65, at 322-359.

138. Cf. M. Galanter, "Why The 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Soc'y Rev.* 95 (1975).

139. See *Id.*

140. See D. M. Trubek, "Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America" 13 *Texas International Law Journal* 242 (1978).

141. The clientele were categorized as follows: (a) large Colombian business (more than fifty employees), (b) foreign business, (c) medium-sized business (ten to fifty employees), (d) small business (less than ten employees), and (e) individual clients.

142. The categories were (a) professionals or high level public functionaries, (b) private executives or large landowners, (c) clerical or white collar employees, (d) small merchants, (e) workers, and (f) campesinos.

143. Categories one through six of Table IX are based on the percent of practising attorneys receiving 50% or more of their income from the client group. Categories seven through ten include the private attorneys who earn more than one-half of their income from individual clients. Category 7 is the attorneys who have frequent contact only with upper-class clients. The lawyers in category 8 have frequent contact with both upper and middle-class clients. The lawyers in category 9 have frequent contact with employees and small merchants and they do not have frequent clients from the upper two groupings. Category 10 includes lawyers who serve mostly small farmers and workers. Some of them also have frequent contact with small merchants as clients.

144. A test of the relationship between clientele and field of specialization yielded a Spearman correlation coefficient of .27, sig. .003. For the ranking of clientele see *supra* note 128 and for field of specialization see *supra* note 129.

145. A number of respondents specializing in estate planning and the probate of wills claimed that many of their campesino clients, whose appearance made them seem poor, actually had sizeable estates.

146. See *supra* note 9.

147. According to the statistics kept by ICFES, the government body regulating higher education, in 1973 there were 8,363 students enrolled in eight officially approved law schools located in Bogota. Seventy percent of these students were enrolled in a law faculty with a large night section (Libre, Gran Colombia or Santo Tomas, a Catholic Law School started in 1969). In addition to this, there were at least two more unapproved night schools operating with approximately 2,000 additional students. These estimates are based on data collected by a research assistant who reviewed the ICFES statistics and interviewed the personnel responsible for legal education.

148. Nine of the twenty respondents working for small merchants, white collar employees, small farmers and workers are 1966-67 graduates of Gran Colombia or Libre. All but one had been a judge or prosecutor prior to starting in private practice.

149. Unauthorized practitioners are those individuals providing legal services for a fee who have not obtained a degree from a Colombian law school.

150. One respondent claimed the local Colegio (bar organization) in the city of Medellin did have a suggested minimum fee schedule.

151. The median was selected to keep the high income of one attorney from skewing the results. The daily earnings of an average lawyer were calculated by assuming twenty-two working days in a month and eight working hours a day. These estimated daily earnings were increased by 20% for lawyers serving business to account for their overhead in office space and secretarial services. A figure of 10% was used for individual practitioners and 15% for the group estimates.

152. See DANE, *Encuesta de Hogares* (Bogota, 1970) Cuadro 18, at 120. The DANE data gives the income distribution for seven occupational categories in 1970 prices. They were adjusted upward by an index of 170% to allow for the inflation from 1970 to 1974 and then the median monthly income for each occupational group was derived from the table. Their median daily income was calculated on the basis of 22 working days a month. This figure provides the basis of the estimate of how many days an average person in each occupational group must work to purchase four hours of an attorney's time.

153. See *supra* note 94.

154. See *supra* note 134.

155. During the 1970 Presidential campaign the surprising showing of ANAPO was partially attributed to the efforts of the ANAPO party over the prior two years to use its members in government positions and in public utilities to provide new and improved services to the barrios.

156. Cf. K. Rosenn, "The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implication," 19 *American Journal of Comparative Law* 514 (1971).

157. For a more detailed treatment of Colombian programs to alter the distribution of legal services see Lynch *supra* note 9.

158. See Table X.

159. There was a strong statistical relationship between respondent's classification as a litigator or legal advisor and the percent of time devoted to each task with the exception of the preparation of legal documents. The correlation coefficient (Kendall's Tau C) between the two classifications and each task was as follows: Documents .17, significance .0289; Research .47, significance .0000; Clients, -.29, significance .0006; visiting court, -.60, significance .0000; meetings with administrative officials, .50, significance .0006. Positive value indicates legal advisors primarily perform the task and negative value reflects the importance of the activity for litigators.

160. Fifteen of the 17 legal advisors did receive as much as 20% of their income from private individual clients. Six devoted this time to representing wealthy individuals, primarily in the areas of estate planning and contracts, but they also acted as intermediaries before government agencies in some cases. Eight represented a mixed clientele, but only with private law problems, labor difficulties or tax. One final one, who worked for the unions, represented individual workers in labor grievances.

161. The fifty-six included the Presidency, 13 ministries, 7 regulatory agencies, 5 administrative departments, and 30 decentralized public corporations. Only one respondent, the legal advisor to the Ministry of Defense, refused the interview.

162. The "Introduction to Law" texts used in the first year of law school are examples of the concept of law underlying Colombian legal education. See, e.g., M. G. Monroy Cabra, *Introduccion al Derecho* (Bogota, 1973).

163. On the standards for legal interpretation see F. Gomez Duque, *La Interpretacion del Derecho en Colombia* (Bogota, n.d.).

164. Trubek *supra*, Note 107, at 31.

165. See *Id.* at 29–31; and Unger, *supra* Note 107, at 193–200. Some of the major areas where the Colombian government is using planning and regulatory law to achieve developmental objectives are as follows: foreign exchange and the balance of payments through the Central Monetary Board; the public investment budget by National Planning; the import–export activity through INCOMEX and PROEXPO; the agrarian sector through the institute for agrarian reform (INCORA) and 13 additional decentralized development corporations, credit sources and marketing agents; housing and urban growth by the public housing agency (ICT), the Mortgage Bank (BCH) and municipal planning offices which regulate private urbanizations; twelve public development corporations to administer the implementation of the investment budget; and regulatory agencies charged with the regulation of corporations, banks, cooperatives, and insurance companies. For an overview of the budgetary allocations among these institutions from 1964 to 1973 see *Cifras Fiscales*, Contraloria General de la Republica de Colombia (1974). For a discussion of the limitations the dominant economic groups exercise over public sector planning see Leal, *supra* note 71, at 151–193.

166. This type of response could be characterized as a defense of legal science and the importance of using the universal first principles of law as a foundation for the rules governing public and private activity. It assumes that lawyers trained in legal science should play a central role in orienting and managing government. In response to a question about the legal profession's role in the social and economic development of Colombia, 9% of respondents said they should maintain and protect basic societal values which are the foundation of the legal order, 31% argued that lawyers had the best overall understanding of society and should play a central role orienting the process of development, and 2% emphasized their role in reforming codes. Each of these answers is arguably related to this defense of legal science.

167. In this response lawyers are defining their sphere of responsibility as being basically limited to administering the public court system. One could regard it as an effort to restrict their monopoly to recognized legal roles. This is a more limited concept of the legal profession's role. It could be accompanied by an argument that there are too many lawyers and that access to the legal profession should be limited. Approximately 33% of respondents did express concerns about the excess number of lawyers and the need to limit access.

168. This is the argument that lawyers should adjust their skills to play a "social engineering" role and to act as intermediaries between planners and private interests. Lawyers can disseminate information about government regulations designed to foster certain kinds of private economic actions and help to make the plan work by interpreting and applying legal rules in a form consistent with development goals. These ideas are common in the literature on the legal profession in developing societies. See, e.g., W. Friedman, "The Role of Law and the Function of the Lawyer in the Developing Countries," 17 *Vanderbilt Law Review* 181 (1963); L. M. Hager, "The Role of Lawyers in Developing Countries," 58 *American Bar Association Journal* 33 (1972); Lowenstein, *supra* note 4; Steiner, *supra* note 5.

169. The mean distribution of the time respondents devote to different fields of law was as follows: administrative law, 30%; contracts, 20%; labor law, 20%; constitutional law, 10%; criminal law, 10%; and commercial law, 10%. When the data was classified according to their individual areas of specialization defined as devoting 50% or more of their working time to that field, the results were as follows: generalists with no area taking over 1/2 of respondent's time, 25%; administrative law specialists, 25%; labor law specialists, 20%; general civil law work, 10%; and one respondent specialized in each of the following areas: commercial law, criminal law, agrarian law and constitutional law.

170. One respondent in the health field had been spending approximately 90% of her time in collective negotiations during the months just prior to the interview.

171. Thirty-five percent expressed these views in response to general questions about problems in their work. An additional 20% added their comments when asked directly about their working relationship with other professionals in the government agency.

172. This respondent was involved in programs designed to redistribute land to small farmers. He felt the court system refused to recognize the rights the agrarian reform legislation vested in the campesino groups.

173. The largest percentage of time any government legal advisor devoted to this type of legal work was 50%.

174. The hypothetical question read as follows: Congress delegated to the President the authority to modify by decree the laws governing the taxation of profits earned by foreign companies in order to eliminate both tax evasion and double taxation at the international level. Under the authority of this delegation, the President modified the laws concerned not only with foreign companies, but also their Colombian subsidiaries and the capacity of Colombian companies to make dividend payments abroad. The decree was challenged in the Supreme Court on the grounds that the President exceeded the extraordinary powers delegated to him. How would you decide the case?

175. The second hypothetical was the following: Article 245 of decree 444 of 1967 authorized INCOMEX to "establish special regulations governing imports for the purpose of developing and protecting business in underdeveloped regions of the country." On the basis of this delegation, INCOMEX promulgated a regulation reducing the tariff on items imported by businesses already located in the Choco region. A lawyer filed suit requesting that the regulation be declared void for failing to comply with the objective of decree 444 of 1967. The lawyer submitted evidence proving that in the Choco region the only businesses which could benefit had been operating and earning large profits for a number of years. On the basis of these facts, how would you resolve the case?

176. See Unger, *supra* note 107, at 199-200.

177. See I. D. Balbus, *The Dialectics of Legal Repression: Black Rebels before the American Criminal Court* (New York, 1973); E. P. Thompson, *Whigs and Hunters* (New York, 1975). For an interesting exchange on Marxist contributions to legal theory see D. M. Trubek, "Complexity and Contradiction in the Legal Order: Balbus and The Challenge of Critical Social Thought about Law," 11 *Law and Society Rev.* 529 (1977) and I. D. Balbus, "Commodity Form and Legal Form: an Essay on the 'Relative Autonomy' of the Law," 11 *Law and Society Rev.* 571 (1977).

178. See Thompson, *supra* note 177, at 258-269.

179. See text *supra* at note 122.

180. *Constitution of Colombia*, Art. 214; and Decree 432 of 1969.

181. Decree 432 of 1969, Arts. 3, 31.

182. Parallel to this, Article 216 of the Constitution makes the administrative courts responsible for any constitutional challenge to an executive decree which is not promulgated under the President's emergency powers.

183. Article 214 gives both the Attorney General and the Constitutional Chamber 30 days to prepare their respective opinions on the constitutional challenge and the court an additional 60 days to render a final decision. The provision was first included in the Colombian Constitution of 1910. Since 1969, when the Constitutional Chamber was created, the number of cases filed each year has been as follows: 1969, 100 cases filed and 90 decided; 1970, 106 filed and 73 decided; 1971, 121 filed and 96 decided; 1972, 75 filed and 55 decided. These figures were provided by the President of the Constitutional Chamber during an interview with the author in late 1973. For a useful discussion of the historical development of the Supreme Court's control over the exercise of executive powers see C. Restrepo Piedrahita, *Las Facultades Extraordinarias: Pequena Historia de una Transfiguración* (Bogota, 1973).

184. This observation is based on my review of the constitutional cases decided by the full court and published in *Jurisprudencia al Dia* between 1971 and 1972.

185. For an interesting analysis of the economic and legal issues surrounding a recent conflict between the Court and the President over executive powers see H. Toro Agudelo, *La Intervención Presidencial en el Banco Emisor y el Ahorro Privado* (Medellin, 1973).

186. S. W. Wurfel, *Foreign Enterprise in Colombia* (Chapel Hill, 1965) at 297 citing Articles 136 and 148 of the Colombian Constitution prior to 1957.

187. See *Id.* at 296.

188. *Constitution of Colombia*, Article 148.

189. See *Constitution of Colombia*, Articles, 148, 154, 156, 157.

190. Three percent of respondents said they belonged to a National "Colegio de Abogados," but many respondents also stated there was no national bar association. The Colegio did not have an office in Bogota, and no meetings were held during 1973-74 which the author could find out about. The Academy

of Jurisprudence, a small group of distinguished legal scholars, judges, and practitioners said they often represented the Colombian legal profession at Inter-American Bar Association meetings.

191. Eighty-eight percent favored the formation of a national bar association, primarily to cope with the increase in lawyers and competition.

192. Decree 225 of 1977.

193. Decree 1189 of 1974.

194. Decree 225 of 1977.

195. Decree 320 of 1970.

196. In 1970, nine of the thirteen ministers in the new government of Misael Pastrana were lawyers. Four years later when this study was being initiated the number in the cabinet had declined to six, but lawyers continued to figure prominently among political appointees.

197. Cf. J. S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York, 1976); J. W. Hurst, *The Growth of American Law* (Boston, 1950); and M. Galanter, "The Duty Not To Deliver Legal Services," 80 *University of Miami Law Review* 929 (1976).

198. Cf. Trubek, *supra* note 177.

Jurists in Venezuelan History

The purpose of this paper is to provide a historical overview of the jurists' role in Venezuela beginning with the nation's political independence from the Spanish Empire over 150 years ago. Throughout the paper, jurists are viewed as intermediators or agents within the political and economic structures of domination. They occupy central roles in forms of domination because they are experts in the legal system and because the "rule of law" has been central to the political organization of the country since Venezuela achieved independence.

The term "jurist" is used to distinguish individuals possessing legal knowledge and an understanding of the legal process from persons who combine their legal knowledge with a legal occupation, referred to as "legal professionals." The two have not always gone hand in hand in Venezuela. Jurists are legal experts in the broader institutional sense; they have studied law at one of Venezuela's universities. Legal professionals are jurists who earn their living by working in the legal process such as judges or lawyers.

In the context of Venezuela's political system, jurists are responsible as experts in law for determining when state bodies are acting within their legal competence under the constitution and under the laws delegating authority to state agencies. In the same sense, jurists are in the best position to know when individuals or collective bodies are acting within their rights and are entitled to official protection of those rights. Legal knowledge also enables jurists to aspire to monopolize activities connected with law such as advocacy before courts, drafting documents, or providing legal advice. In this sense, "legal professionals" are jurists who assume roles in the administration of the legal process, in private practice, or in public or private institutions as legal advisors.

The purpose of this research is to look at jurists as a group who have monopolized a body of knowledge, central to the organization of society, and to ask what are the interests served by their monopoly over legal knowledge and what is its value to society. The place of the legal system in Venezuelan society and the control exercised by jurists over the legal process has varied throughout Venezuelan history, making this social-historical perspective appropriate. Without it, one cannot understand the present role of jurists or legal professionals.

One word of caution. The paper is not a summary of research results, but rather an outline of ideas for a research project which is just beginning. There is a basis for the ideas in prior research on the role of legal reasoning in the 19th century by the author,¹ in research currently being undertaken by Jose Rafael Lovera on lawyers

in the 19th century,¹ and in experience gained from an involvement with legal life in Caracas for over a ten-year period. The assertions, however, should be viewed as hypotheses subject to subsequent refinement and, hopefully, to some type of testing.

1. Jurists during Independence and the "Caudillo" Period

This section is concerned with the nineteenth century. Of course, there were jurists in Venezuela well before then. By the beginning of the 18th century there was already a university in Caracas offering a law degree. There was a Colegio de Abogados (bar association) by the end of the 18th century, and located in Caracas was the Real Audiencia, the high court exercising administrative control over the colonial bureaucracy and second in importance only to the King and the Consejo de Indias. The Provincia (later the Capitanía General) of Venezuela enjoyed considerable prosperity in the 18th century due to the policies of agricultural development pursued by the Spanish monarchs, to the interests of the Basques in developing cacao production and trade (the Compañía Guipuzcoana obtained privileges and monopolies), and to the partial liberation of productive forces generated by contraband trade with the Dutch and the British based in the West Indies.

There were also many constraints on the development of legal life. First Spain attached considerable importance to law and to jurists in its colonial efforts, but the separation of powers or the autonomous development of civil society which would promote the relative independence of the legal order did not exist.² Secondly, social regulations imposed severe limitations on who could obtain a legal position. To belong to the Colegio de Abogados, even as a doorkeeper, it was necessary to be a "católico viejo" and of pure blood, that is to say, neither a convert to the Catholic religion nor of Jewish, Moorish, Negro or Indian descent. Thirdly, the level of trade was never high enough to enable private legal practice to become a major source of income for a group of practising lawyers. In other words, law was an important branch of learning handed down to the sons of the Spanish colonialists in order to prepare them to take a post in the colonial administration. At the same time, the senior colonial posts were reserved for the peninsular Spaniards because jurists born in the colonies were prohibited from holding such positions.³

Given these limitations, it is not surprising that most Venezuelan jurists opted for the republican side when the battle for independence broke out. The act of independence, the 1811 Constitution, and the various provincial constitutions all demonstrate the role jurists played in legitimizing the new power as well as the care they took to establish as many guarantees as possible to avoid its arbitrary use and to maintain power in the hands of their social group. The violent war of independence which followed did not deter the jurists from their efforts. As an

example, their expertise was utilized to justify the power of Bolivar's government in 1813 and to emphasize its temporal limitations.⁵

When the war of independence ended, there was an immediate need to found new institutions. Two constitutions were enacted, one in 1821 forming Colombia, comprising present-day Colombia, Ecuador and Venezuela, and another in 1830, separating Venezuela from the above union. From 1824 to 1870 a sizeable body of legislation was also enacted, embodying concepts of economic liberalism which were regarded as appropriate for the nation's economic "progress." Around 1825 codes of judicial procedure and court organization were enacted and beginning in 1840 there were various projects to draft commercial and civil codes. The separation of powers was established with an elected representative assembly and an independent judiciary.

In 1870, the last characteristics of the colonial legal order which had persisted after independence were finally eliminated as Venezuela adopted a complete set of codes based on the most advanced legislation and codification projects in Italy, France and Spain. Appeal by casation was established to guarantee the legality of judicial rulings as were appeal procedures to guarantee administrative legality. The study of law was encouraged and scholarly work and law reviews were published with commentaries on the new codes.⁶ The elite had the illusion of making Venezuela one of "the most advanced countries" by forming a bourgeois nation state with a representative democracy and by integrating the national economy into the world capitalist system. This ideal fostered the founding of institutions based on such a model, but in reality things were different.

The country was a vast, barely populated territory with twice the land area of France. There were only two and a half million inhabitants at the maximum by the end of the century and over 80% of them lived in rural areas. Only a few products of the industrial revolution reached Venezuela and they were consumed by a small group of urban elite. The principal social-economic unit, the hacienda, was the only one producing a surplus. Haciendas were basically self-sufficient except for a few consumption products and some of the instruments of production. The landowner, with the collaboration of the local political authority which he generally controlled, exercised the functions of maintaining order and resolving conflicts.

In the second half of the century, the global expansion of capitalism introduced a few new factors such as the increase in coffee production. Coffee exports initiated the process of Venezuela's integration into a world economic system with an international division of labour. Venezuela's task was to produce the raw materials and the central manufacturing countries were to produce the industrial products, but the incorporation of Venezuela went amiss, because her coffee exports were always small. They did not compare with those of Brazil or Colombia. The capital coffee generated only fostered limited urban renovation in Caracas and, to a lesser degree in Maracaibo, some improvement in the communications infrastructure, and a few modest cultural flourishings such as an expansion in legal education. The country undertook an enormous debt in order to guarantee foreign investments in railways and as a result of its civil wars. The price of coffee fell shortly thereafter and

then production as well. Venezuela was unable to pay its creditors by the end of the century and, in 1902, the principal European powers blockaded the country's coastline and recovered the debts with cannons.

The 19th century has been termed the "caudillo" period. The caudillo was a political-military leader who exercised personal power in an age when there was no national army. He was regionally or locally based, not nationally, which made power pluralistic or exercised through a federation of local caudillos. The most prestigious caudillo obtained and held the Presidency of the Republic, but his position depended on his capacity to please local and regional caudillos who had to be satisfied for him to sustain the presidency.⁷ Power could not be transferred from one person to another through the central government. Given this political structure, there are intriguing questions as to what jurists did and as to why they made such an effort to draft constitutions and codes, to write books and articles, to plan institutions, and to teach law.

First it is important to understand that jurists were the most cultured members of the urban elite which makes their situation central to any analysis of the elite's aspirations. This was primarily a result of the limited alternatives in higher education. Apart from a career in the church, in which Venezuelans have never been very interested, there were courses in medicine, engineering and law. The young elite with a vocation for the humanities or politics saw law as their natural career. The requirement of a university education to become a jurist also meant that only members of the urban elite, normally born into it, could aspire to a jurist's status. The studies required several years at a university, although the low number of individuals who prolonged their studies indicates that the courses were not very academically demanding. The final examinations at the end of a student's studies were difficult, however, and to hold the title of "abogado", the student had to present two examinations in public, one before the Academy of Jurisprudence and another before the Superior Court.

On the other hand, the formal legal system was rarely used and its administration could not yield a stable and adequate income for persons with a jurist's status. The law of April 10, 1834, on freedom of contracts is symbolic of the situation. This law made usury legal and established a cursory procedure for the recovery of debts. It was central to the conflict between the two major power groups in 19th century society, the so-called commercial bourgeoisie and the landowners, because it governed the financing of agricultural activity. The law stirred up a major controversy and even provoked one of the most important works of legal and political philosophy of the century.⁸ Nevertheless, the law was seldom applied which the scholar Toro attributes to the good moral character of Venezuelans. The legal and notarial statistics which we have been able to consult also reveal a limited level of legal activity. It appears that the efforts invested in the modernization of the legal system were not justified in terms of legal system itself, but rather by needs outside the legal order.

The drawing up of documents and the representation of parties in court were in the hands of "procuradores." These were laymen on whom a high court had

conferred the right to practise law. The position did not call for any formal intellectual training but rather practical legal skills. Within the legal system, only the very highest posts such as a magistrate of the Supreme Court or a judge in the high courts were filled by jurists. All the other positions were held by "procuradores" or law students. In summary, while there were jurists and there were people occupied in legal roles, it cannot be said that there was a legal profession because training and employment in the field did not coincide.'

Now turning to the way jurists were employed, we can see that their roles were an integral part of the political system. They occupied high positions in the State or the most remunerative ones such as controller of customs, many of which excluded the simultaneous practice of law. Jurists worked closely with caudillos and especially with those whose prestige was not merely local-based. The nature of their relationship is difficult to explain even if a collobarative relationship can be documented. Jurists are specialists in legality and caudillos are charismatic leaders exercising arbitrary power. In Venezuelan social and historical studies, the phenomena of caudillos and legalism are viewed as opposing and rival tendencies. In reality these tendencies may have been complementary. The more formal and abstract the interpretation of legal rules, the greater the latitude in their meaning. The legalism or formalism of the jurists could be used to mask reality because it excludes from the reasoning process any argument not derived from legal regulations and concepts. This facilitated rather than restricted the caudillos use of arbitrary power."

The caudillos also needed legal justifications for their actions. The religious and traditional legitimation of the Spanish monarchy had been destroyed. There was a need to find a new means to legitimate the authority needed to govern the Venezuelan people and to deal with other nations. Law and the jurists provided this legitimation, and, through their ideological function, the jurists contributed to the caudillo's authority. They also helped to assimilate the caudillos, many of whom had a rural or lower-class backgrounds, into the urban elite. Finally, the continuity of legal studies may have helped to keep the idea of legality as a form of government alive, despite the political reality that legality did not exist in Venezuela until well into the 20th century.

A registry of lawyers in 1894 shows that there were 247 jurists in Venezuela at that time out of a population of approximately 2,400,000. Over half of the jurists lived in the Federal District comprised of Caracas and the port of La Guaira. This area was of limited economic importance and was inhabited by only 3% of the country's population. The Andean states, with 18.5% of the population, produced the greater part of the exportable surplus, which left the country via Maracaibo, and had only 8% of the jurists. It is possible that some of the jurists in Maracaibo and the Andes engaged in law practice, but more of the historical records in these areas will have to be checked to determine whether this commercial activity did provide a limited economic base for private practice."

During the 19th century there were two law schools in the country, one at the university of Caracas and another in Merida in the Andean region. A third school

functioned in Maracaibo for a short period, but it was subject to numerous problems which led to its closure in the early years of the 20th century.

In summary, despite the adoption of a nation state model in the 19th century and of a modern legislative and institutional system, a legal profession did not develop in Venezuela. This is not exceptional in itself; there was no practising bar in Japan at this time¹² in contrast to the United States where a practising bar dates back to the early colonial period.¹³ What is interesting about the Venezuelan case, for purposes of comparison, is that the private practice of law did not develop in a society which had (a) a tradition of legal studies, (b) a favorable attitude towards legal modes of organization and roles, and (c) jurists enjoying high social status. Venezuela was not yet a part of the world capitalist system and the nation lacked sufficient dynamism and surplus in its domestic economy to sustain a private bar.

These observations are consistent with the view that a legal profession oriented toward private practice is primarily confined to societies which are fully integrated into the capitalist system.¹⁴ On the other hand, one might stress the similarities between the jurists' role in Venezuela during the 19th century and the role of the legally trained in Milan during the Renaissance who greatly contributed to the expansion and legitimation of personal power.¹⁵ This analysis could be carried further by comparing both cases with the role played by jurists in more institutionalized oligarchies, such as Renaissance Florence or 19th century Chile.¹⁶ One possible generalization suggested by this line of reasoning is the paramount importance of jurists in the formation of national institutions when capitalism is first introduced.

2. Development of the Legal Profession in the 20th Century

Venezuela's social and economic systems were transformed in the 20th century. During the early part of the century, the country was politically united through thirty-six years of a stable and brutal dictatorship which fostered the formation of a professional army and a state bureaucracy. In the economic sphere, multinational companies began to exploit Venezuela's petroleum beginning in 1915. The extraction of the oil itself did not foster much direct employment, but it provided the State with substantial resources to support political unification, to create a communications network, and to invest in urban services. By 1977, the urban population had reached 80% and Venezuela had become a part of the world capitalist system as one of the richest nations on the periphery as a result of her petroleum exports.¹⁷

These economic developments caused radical changes in the nation's economic system, the orientation of the state and the legal system, and new roles were assumed by jurists. To facilitate the analysis of these changes the remaining part of the century is divided into two parts. The first covers the period up to the 1950's, and

the second from 1950 to the present. This division has only heuristic aims since there were no radical breaks, and the primary emphasis will be on the present period. There are only brief comments on the changes which occurred during the first half of the century.

The private practice of law began to take on the characteristics of a profession beginning at the turn of the century. The first practising lawyers appear to have been associated with foreign investment interests involved in the exploitation of Venezuela's mineral resources and in commercial activities in the import-export sector."

Of course the petroleum industry provided the most significant economic demand for legal services. The foreign oil companies, contending for concessions, used Venezuelan jurists extensively for advice and representation in their negotiations with the government and with Venezuelan nationals. The lawyers' role was not so much to guide the foreign interests in disputes as to build a legal framework suitable for the exploitation of petroleum without government interference. Venezuela already had legislation governing mining, which had been derived from traditional Spanish law, and it was difficult to make petroleum exploitation fit within the framework of that legislation. The North-American and British investors and their lawyers were disoriented when faced with Venezuelan law. There was a general lack of legal literature on comparative law, and the legal principles and regulations governing mining were totally different in Venezuela than in common-law countries. Venezuelan jurists offered expertise in these areas as well as excellent political contacts, and the ones employed by the companies undertook the task of modifying the legislation to make it suit the interest and needs of their employers. These same lawyers soon assumed important roles within the Venezuelan subsidiaries of the petroleum companies.

The growth in commerce and urbanization also fostered new demands for legal services. Law school graduates became more interested in the private practice of law; they sought a change in the legislation to protect their monopoly by prohibiting the conferring of new titles of procurador. By the middle of the century there were virtually no procuradores left and jurists or law school graduates monopolized the private practice of law. Positions in the legal system were also filled by jurists, with a few exceptions in the minor provincial courts, but there was still no judicial career or security in judicial positions.

These changes attracted more students to law, and all the universities, of which there were six by the middle of the century, offered law studies. Most law graduates became individual practitioners. In a few cases they shared offices and expenses, but never clients. The "Colegio de Abogados" or national bar association, which had disappeared after independence, had become active again by the end of the 19th century. It exercised some ethical control over the profession and initiated the publication of a regular law journal.

Jurists still held central roles in the nation's political order. They were no longer assisting caudillos because power had been centralized in the national government, but lawyers were still agents of this central political power. Jurists continued to be

the 'letrado', a sort of general administrator who is an expert in communicating decisions in a written and spoken form using terminology derived from law and the rhetoric of the times.

Our impression is that the demand for legal knowledge in the political system remained high, and, if our hypotheses are correct, jurists continued to be the principal occupational group at high levels in government ministries, as state governors or secretaries, in the National Congress, in state assemblies, or in other equivalent posts.¹⁹ This will be particularly true if one compares the total number of jurists in such positions with the percentages of persons from other disciplines occupying high level government positions.

Around 1950 there was a peak in the jurist's influence followed by a crisis in his image in Venezuelan society. Two more law schools had been founded, and legal education was in the process of being reorganized to make it more technical and rigorous. There was a brief attempt to introduce a case-method approach to teaching combined with more practical instruction, but it failed. These efforts, however, reflected a need for greater specificity in advanced legal training which undercut the image of the jurist as the educated generalist of Venezuelan society. These developments were complemented by new degrees and careers in economics, business administration, sociology, psychology, philosophy, history, and literature. For the first time, jurists began to face competition from persons trained in other disciplines and at the same time the demand for legal skills in the private sector was being transformed. The result was significant changes in the judiciary, in legal education and in legal practice.

First, the professionalization of the judiciary should be emphasized. All judges and, in many cases, the clerks of the courts are now law graduates, as are most public prosecutors, public defenders, clerks of records, notaries, etc. There is now a judicial career which guarantees tenure in judicial positions and an established promotion system. A judicial career is less prestigious than private practice, but its importance has increased, and often young law graduates with excellent opportunities in a university career or in private practice opt for the judiciary.

During the sixties the role of the law professor became more prominent. There was an explicit policy in the national universities of encouraging the brightest graduates or young professors to specialize, normally in a prestigious foreign university, and to accept full-time teaching contracts with limits on their ability to practice law on the side. This new type of professor is slowly replacing the traditional law professor who was a prestigious private practitioner devoting a few hours a week to law school lectures.

Private practice has also changed radically with the shifts in the profession's primary clientele. The second half of the century has been characterized by (a) the wholesale penetration by multinational firms of the petroleum and iron industries,²⁰ manufacturing, and, services; (b) the formation of large state enterprises, normally governed by private law; (c) growth of Venezuelan entrepreneurial groups who frequently collaborate with foreign capital, but also have their special interests; and (d) the multiplication and expansion of State agencies responsible for the regulation

of economic activity.* These developments have generated a demand for a wide variety of legal services. For example, there is now a need for regular consultations. In contrast with the individual entrepreneur in a semi-industrial society who occasionally required legal services to settle a dispute or to draw up a document, enterprises are engaged in constant business relationships requiring continual legal advice. Much of their legal work is routine and suited to regular procedures, but some aspects are extremely complex calling for highly specialized legal skills. The growing intervention of the State in the control of business is fostering a complicated body of government regulations and is forcing the regulated businesses to use legal experts at the initiation of a business relationship and not just if some conflict develops. The capital intensive nature of these corporations also makes a large investment in regular legal services more economical and critical to the protection of the capital.

A law practice of this type is both more demanding and more remunerative. It involves a greater emphasis on the prevention of disputes rather than litigation. It is also encouraging different ways of organizing legal practice including large law firms and in-house legal counsel.

Big Venezuelan law firms are not merely a joint professional practice. The number of lawyers working together is also not as important as changes in the way legal services are delivered. Clients purchase the services of the whole firm rather than the work of one lawyer and the fees are paid to the firm and divided among the members according to a formula established by the partners. In this way the firms are able to achieve economies of scale in their support services resulting in more office space, good information systems on changing government regulations, efficient secretarial, copying, and communication services, etc. By their nature, the firms encourage specialization among the numerous partners and associates, but again, it is not the number of lawyers working together which makes the difference. It is the way they organize the delivery of their services."

The corporate clients are looking for the advantages which flow from the coordinated delivery of high quality services on a continuous basis from a group of specialists rather than from the traditional solo practitioners. Most of the firms in Caracas were originally formed by one or more of the individual practitioners who had been serving business clients and were in a position to recruit other qualified attorneys or to train their own young associates. The large firms are a far cry from a Wall Street law firm in terms of size and structure, but their form of organization is the same." The basic fixed costs are high and the firm model requires a constant clientele providing a sizeable volume of regular legal business to succeed. In this sense, their recent growth is a reflection of the expansion of large corporate interests. The corporate law firm is becoming the most prestigious type of legal practice, even though many of the most distinguished lawyers are still individual

*Ed. Note. These developments also suggest a marked change in the demand for legal services in the public sector and in the orientation of government legal roles.

practitioners. In total, there are now about twenty such firms in Caracas, including a branch office of one North American law firm.

A second new development is the legal departments within private corporations and within public bodies to provide in-house legal advice. Their work appears to differ from the work of an individual lawyer primarily in that they have only one client and the legal work is carried out on the client's premises. These distinctions are, however, very significant because they are contrary to the ideal of an independent legal professional. Often an in-house legal department will include several lawyers and a supporting staff working in a hierarchical relationship with functional specializations. The lawyers regard themselves as a part of the institution and they normally enjoy considerable prestige within it. The principal lawyer and his primary assistant often have a close working relationship with the Board of Directors and they play a part in policy formulation and decision-making.

As is the case with the law firms, legal departments are more involved in the prevention of disputes than litigation, but they also handle the corporation's routine legal business. If a situation raises unusual legal questions, important for firm policy or posing a serious threat of litigation, the corporation will also consult outside legal counsel.

The following is an example of the kinds of collaboration one observes among types of professional practice. It is not meant to be a paradigmatic or typical description, but it is a useful example:

Company A controls the subsidiaries A1, A2 and A3. Each company has a legal department which deals with everyday matters and works in collaboration with the company's management. The legal departments also work with a law firm; one of the partners in the firm is a member of the company's board of directors. The law firm is consulted on important decisions relating to investments, and the formation, acquisition, or sale of companies. If the company needs representation before a government agency, a partner in the law firm will normally handle the negotiations. If one of the companies does become involved in litigation, it will be handled by the law firm, or by a well-known and distinguished litigator who has cases referred to him by the law firm or by the corporate legal department.

Among individual practitioners, there are major differences between the working environments of lawyers who have acquired a good reputation, normally through litigation, and those who are struggling for survival. Among the latter group there are frequent violations of the code of ethics and sometimes they commit blatantly dishonest acts which contribute to the profession's negative public image. The appearance of this professional 'proletariat' is a relatively recent phenomenon and it has grown over the last few years. In summary, the professionalization of legal roles is occurring, but not as unitary profession. This is common in many civil law countries. Careers in private practice, in the judiciary, in state entities, or in legal education tend to be relatively autonomous with a common university training as their principal link." The only phenomenon in Venezuela which is different than other civil law jurisdictions has been the rapid diffusion of the North American large law firm model. This is a reflection of North American foreign investment and the lack of any long established traditions among the private Venezuelan bar.

3. The Political System and Professional Roles

The first part of the paper described the political roles of Venezuelan jurists during the 19th century and the second part dealt with the professionalization of legal roles as Venezuela has been incorporated into the world capitalist economy in the 20th century. This final section examines the hypothesis that the general influence of lawyers in the political system is decreasing as their more narrow professional roles are expanding.

In the first half of the century, jurists were still the most prominent occupational group in the political system in their role as agents of the central power. During most of this period the exercise of power was neither democratic nor subject to the rule of law.^{*} The only president elected by universal suffrage held office for less than a year (R. Gallegos, 1948) and only one is known for his adherence to legality (Gral. Medina, 1941–1945). Jurists were influential in politics because of their status as members of a non-specialized and highly educated elite and because of law's role in the legitimation of power.^{*} The Venezuelan elite grew substantially in absolute terms during the first half of the century, and the law schools provided a natural setting for the education and recruitment of this elite through relationships between professors and students and among students.

Jurists' roles in the legitimation of power during this period are much more complex. The Venezuelan dictators yielded tremendous personal power and they were free to use it arbitrarily, but they normally expressed considerable respect for established legal procedures. For example, when Gomez was in power (1908–1935), the national constitution was amended several times in a fashion consistent with all the necessary formalities to make it reflect his desire to be the President or to control the selection of the President. The principal legal codes were all amended to incorporate changes in European doctrine or legislation or to adapt them to changing social conditions in Venezuela. The legal opinions of the Supreme Court improved technically, and positive legal sociology flourished and was used ideologically to strengthen the political dictatorship.

Since about 1958 there appears to have been a decline in the prestige of law as a field.^{*} One indication of this trend is in higher education. In 1958 there was an expansion of higher education as more universities and institutes of higher learning

^{*}Ed. Note. This is a common theme in the recent literature on legal professions in Latin America. It reflects the point emphasized in this article that law is no longer the basic training for the society's generalists. A combination of factors including the diversification of higher education, the creation of prominent government roles for specialists in fields other than law, and the growing importance of technocratic bodies of knowledge in government planning have combined to make lawyers appear less prominent in the public sector. At the same time, the influence of lawyers in the private sector is expanding with the growth of industry and commerce. Finally, the expansion of higher education has made it possible for persons from the middle and lower-middle classes to study the law making the profession heterogeneous. The concept of the profession's prestige depends on the perspective from which one is viewing lawyers.

were founded than during the whole prior history of the nation, but not one new law school was established. As a result the relative number of law students has declined markedly, even though the absolute number has increased.²⁴ In addition, jurists hold fewer important government positions as other professionals have demonstrated their competency. It is interesting that these changes have been occurring over the last 20 years in Venezuela while representative democracy and rule of law have become the predominant form of political organization.

These trends are connected with a new phase of capitalist development which has been labeled "transnational". After the Second World War the multinational corporations began to expand. They no longer confined their activities to the exploitation of natural resources in the peripheral countries but invested in manufacturing, agriculture and services.²⁵ They employ a capital intensive approach to development based on technological innovation which originates in the United States or in Northern Europe.²⁶ Domestic corporations either adopt the manufacturing and management styles of the multinationals or face the possibility of being relegated to a second level of importance and prestige or being absorbed by the multinational.

A new form of legitimation also appears to be emerging out of this emphasis on science and technology in the production process. Politics is becoming a type of social engineering based on the detection of social and economic problems or obstacles to development and their solution through the one "best" scientific method. Jurists and politicians join with technocrats to manage society. Economists, engineers, planners, and other specialists hold important positions in the formulation and implementation of public policies. It is an age of technocracy with efficiency as its principal value.²⁷

New technologies and the complex organization of production modes have generated a demand for greater technical training in higher education. Fields outside of law are attracting more students and the graduates now compete with jurists for important positions in the public and private sectors, but more is needed to explain fully why law has lost so much influence.

In a technocratic or scientific mode of legitimation, law is regarded as being more concerned with means than ends. To put it another way, law is not concerned with the solution of problems, but with whether the problems are solved without contravening established procedures and without going beyond delegated authority. Accordingly, from the technocratic point of view, law is more of an obstacle creating formalities which must be overcome to deal effectively with social problems.²⁸ Secondly, lawyers are seen as masters of compromise. Their goal in situations of conflict is to seek a solution which satisfies both parties, or if such a solution eludes them, to identify the result favorable to the party acting consistent with the law. This approach does not necessarily achieve a result consistent with the greatest production of wealth, or, to paraphrase Bentham, the greatest amount of collective happiness (development?).

This change in the process of legitimation, combined with the related phenomena of specialization in higher education and the emergence of other

professional careers, provides a context for understanding the relative decline in the prestige of jurists in the public sector. At the same time, their declining influence should not be over-exaggerated. The interests of an important segment of the legal profession are closely linked to the dominant economic groups and so long as these groups remain in control of Venezuelan politics, jurists will play a prominent role in the political system. Their relationship with dominant economic interests is more significant than any structural advantage, or shared attitudes and ideologies.

In addition, law practice is political and the court system is a part of the power structure. The interpretation of legal norms is not free from specific value judgments. Thus a political content is inherent in decisions about which types of disputes the courts adjudicate and which they refuse to hear, in the way the judges resolve the disputes, and in the way some types of disputes are prevented and not other types.¹¹ Lawyers primarily study and seek solutions to disputes involving the upper strata of society, in particular investment interests, since these groups have the ability to provide them money and prestige.

In synthesis, the roles occupied by legally trained individuals in Venezuela have been transformed in the twentieth century. Lawyers are no longer the cultured generalists of Venezuelan society. They are engaged in more specifically professional roles facilitating business relations, preventing and settling disputes, and acting as intermediators between foreign investors and Venezuelan interests and between government regulatory interests and the business and financial community. They may still occupy positions as important political figures, but as an occupational group, their central function is to facilitate relationships between the political and economic elite. The context of the work differs, but lawyers are still engaged in integrating and solidifying the forms of domination just as their 19th century colleagues were.

Notes

1. See R. Perez Perdomo, *El formalismo juridico y sus funciones sociales en el siglo XIX Venezolano* (Monreávil, 1978).

2. See J. R. Lovera, "Rol de los abogados en el siglo XIX en Venezuela," work in progress.

3. J. M. Ots Capdqui, *Manual de historia del derecho espanol en las Indias* (Losada, 1945).

4. H. Parra Marques, *Historia del colegio de abogados de Caracas* Vol. I (Caracas, 1945).

5. See G. Carrera-Damas, "Algunos problemas de la formacion del Estado en la Segunda Republica Venezolana", in *Tres Temas de Historia*, Universidad Central de Venezuela (Caracas, 1961).

6. See Perez Perdomo, *supra* note 1.

7. See R. Gilmore, *Caudillism and Militarism in Venezuela, 1810-1910*. (Ohio University Press, 1964); and D. Urbaneja, "Caudillismo y pluralismo en el siglo XIX venezolano", in *Politeia*, No. 4, Universidad Central de Venezuela (Caracas, 1975).

8. See, F. Toro, *Reflexiones sobre la ley del 10 de abril de 1834* (Caracas, 1845).

9. Lovera, *supra* note 2.

10. Perez Perdomo, *supra* note 1.

11. Based on the historical documents which have been checked, the first jurist of note to practise law on a permanent basis was Ramon Feo at the end of the 19th and the beginning of the 20th century.

12. See T. Hattori "The legal profession in Japan: its historical development and present state," in *Law in Japan*. A. von Mehren (ed.) (Cambridge, 1968).

13. See J. W. Hurst, *The Growth of American Law: The Lawmakers* (Boston, 1950); L. Friedman, *A History of American Law* (New York, 1973).

14. See R. Luckham, "The Political Economy of Legal Professions in the Third World," *infra*. One case which does not appear to fit into Luckham's framework is that of the Roman Empire in the time of Justinian. The advocatus and jurisprudente were combined in a single personage and their services were compensated. However, there is not sufficient information on Roman law and its social context to develop this theme further.

15. See L. Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968).

16. See E. Fuenzalida, "The role of legal experts in the process of development: the case of Chile" an unpublished paper presented at the September, 1976, workshop on legal professions in the Third World sponsored by the ILC in New York.

17. See A. Cordova, *Inversiones extranjeras y subdesarrollo: el modelo primario exportador imperialista*, Universidad Central de Venezuela, (Caracas, 1973); J. A. Silva Michelena, *Crisis de la democracia*, Universidad Central de Venezuela, (Caracas, 1970).

18. Several important cases early in the century illustrate the economic importance of legal arguments. One of the more notorious examples is *Dibbs v. Ramia* where the litigants actually consulted the most respected French legal scholars.

19. The data on the percentage of lawyers holding such positions is in the process of being examined. 20. Both the petroleum and iron industries were recently nationalized.

21. The large firms normally have luxurious offices in the best buildings. Recently, they have been locating outside of the city center in the eastern part of the city where the large corporations have also been setting up offices.

22. Cf. E. Smigel, *The Wall Street Lawyer* (Indiana University Press, 1969).

23. J. H. Merryman, *The Civil Law Tradition* (Stanford, 1969).

24. The concepts of "democracy" and "rule of law" involve value judgements about which there is little agreement in Venezuela today.

25. Cf. R. Dahrendorf "Law faculties and the German upper class", in *Sociology of Law*, A. Vilhelm (ed.) (Penguin, 1969).

26. For example in the oldest and largest law school at the Universidad Central the number of law students increased by 320% from 1953 to 1972, but the percentage of all university students enrolled in law decreased from 15% to 6.6%.

27. As well as influencing modes of manufacturing and consumption throughout the world the multinationals are changing life styles including work settings, eating habits, and leisure activities.

28. See O. Sunkel and E. Fuenzalida, "The Effects of Transnational Corporations in Culture," (Unesco Mimeo, 1976); and Sunkel and Fuenzalida, "Transnational Capitalism and National Development" in *Transnational Capitalism and National Development*, J. J. Villamil (ed.) (Harvester Press, forthcoming).

29. See M. García Pelayo, "Burocracia y tecnocracia," *Politeia*, No. 2, Universidad Central de Venezuela (Caracas, 1973).

30. See A. Brewer-Carias, *Derecho y Desarrollo*, Universidad Central de Venezuela (Caracas, 1971); R. Maspétiol, "Breves reflexions sur la regle de droit en tant qu'obstacle ou stimulant du developpement economic et social", in *Archives de Philosophie du Droit*, No. 14 (Paris, 1969).

31. F. De Trazegnies, "El rol politico del abogado litigante", in *Derecho*, No. 32, Pontificia Universidad Catolica del Peru (Lima, 1974).

Imperialism, Law and Structural Dependence*

The Ghana Legal Profession

Introduction

At the broadest level almost everything about the contemporary African scene may be viewed as a manifestation of the historical dependence of Africa upon Europe, of the profound historical conditioning undergone by African societies over the past two or three hundred years as a result of imperialism and the international expansion of capital. Messianic religions, legal systems, chieftainship, armies, literature and even revolutionary movements can none of them be understood without reference to the historical matrix of colonialism and capitalism. Such a perspective – dependence as an ongoing historical legacy – is useful because it reminds us of the continuity between present dependence and past exploitation. Yet we must be careful about the inferences we draw from such a legacy for dependence or otherwise. Political independence from Britain or France was characterized precisely by the rupturing of the superstructural arrangements by which colonial control was exercised, by a deliberate break in legal continuity. Because this left in operation a legal system, an educational system, a language or an army which was transferred to the African continent a hundred years ago or more, we cannot assume that those who use it are still in any meaningful sense 'dependent' upon the institutions of the metropolis. In order to demonstrate this one would need to show either:

(i) That the institutions or relationships concerned still depend for their survival in their present form on resources acquired from the metropolis. Educational institutions in African countries still import teachers, armies military equipment, legal systems follow the authority of the judgements and copy the statutes of the metropolis. To be sure, these institutions are also sustained by local resources. But the key question is whether or not they can do without foreign support. If they cannot, then they can be manipulated by those who control the external resources. The legal system is of particular interest, however, because it does not involve much dependence in this sense. In Ghana indeed a great deal of care was taken after independence to establish a break in continuity with the imported British legal tradition. To the extent that the colonial legal heritage remains powerful it is mainly

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because of the multiplex linkages between the law, rural property relations, the class structure and the activity of the legal profession as a pressure group rather than because of direct foreign support.

(ii) That the inherited institutions help to maintain other channels of external influence, even in those cases where they themselves are no longer directly supported from abroad. English and French, for example, are in certain respects national languages in many African countries, in the sense that they are taught by African teachers in local institutions, that they are capable of a degree of autonomous semantic and literary development and that their diffusion to the mass of population is self-activating, requiring little further support from the metropolis. Yet there is a multiplicity of ways in which use of a transferred language makes a country more open to external influence: by facilitating its integration in particular spheres of political influence (Anglophone and Francophone Africa); by helping to create markets for the products of the metropolis; and by helping to create more favourable conditions for the expansion of capital into the periphery (for example by ensuring the availability of an English or French-speaking labour force). Dependence is *structural* in the sense that: (a) what counts is less the direct influence still exercised by the metropolis than a whole range of external relationships which the inherited institutions help to keep in operation. It will be argued below, for example, that in Ghana the legal system has been crucial in creating and reproducing the kinds of property relationships which favour the penetration of the international economy. While it is questionable whether there is any such thing as legal dependence, the legal system is a crucial aspect of economic dependence. (b) Once embarked on, key elements in the institutional pattern are difficult to reverse, dependence being in this sense self-reproducing. Consider the vested interests behind a language, for example, and the social economic costs that would have to be incurred to replace it. Or the disturbance to property and class relationships that would have to be faced if major structural alternations in the legal system were to be undertaken.

Not only however, may institutions keep in operation existing historical patterns of dependence, but they may also provide the conditions for new types of dependence to emerge. The transnationalization of state superstructures in the colonial period has to some extent been replaced by the internationalization of the relations of production themselves through the expansion of the scale of operations of transnational corporations in the Third World. In many countries the law – and particularly international economic law – has played an important role in facilitating these new developments. In Ghana, however, I shall to the contrary argue that the close historical association between the legal system and agricultural commodity production for the world market has meant that lawyers have played only a relatively marginal role in the penetration of transnational capital. The historical legacy of one kind of dependence has not been an appropriate instrument for the new forms of dependence.

This is also a reminder not to be excessively preoccupied by the pathos of history. When any and every historical change is interpreted in terms of the inexorable

improvement in the mechanisms for the extraction of surplus from the periphery ('history as rip-off') the end result is an analysis which is deeply static and ahistorical leaving one with little way of distinguishing dependence from non-dependence or of taking account of the contradictions generated by imperialism and the international expansion of capital – to which, after all, the granting of formal or political independence from the metropolis was a response. And without an analysis of the contradictions disrupting the smooth surface of the past, there is no praxis, no possibility of action to remove that legacy. Historical forces there are but they must be specified with enough rigour to keep open the possibilities both for empirical analysis and for political action.

The legal system is of interest because it is particularly closely associated with the conversion of economic surpluses and power into enduring social relationships, with securing the stability of what is by making it the basis of what ought to be. Dominance and subordination and the various modes of economic penetration are immensely more powerful because they are hedged about with binding normative prescriptions. Yet it is also the normative character of the legal system which means it can be used to articulate the major contradictions present in a social formation and in its relations with the outside world. In Ghana, as this paper will suggest, legal conflict has expressed in a particularly concrete way both the major contradictions associated with political domination by colonial rulers and their African successors; and those set up by the penetration of the economy by international trade and capital.

I shall try to delineate both the continuities by the legal system and its contradictions by presenting some empirical findings from research I have carried out on the origins, structure and role of the Ghanaian legal profession. The research from which these findings derive was based on a combination of interviews with a sample of 321 Ghanaian lawyers and historical materials on the legal system between 1890 and 1970 collected for the most part in the Ghana National Archives. It is worth bearing in mind that the interviews were carried out in the first stages of research, the purpose being to ascertain how professional roles are transferred to a developing country. It was only after this stage was over that I realized that certain of the results were difficult to interpret adequately without more understanding of the economic and political history of lawyers and the legal system. I now begin by looking at the historical background. But it is worth bearing in mind the tension between the logically ordered presentation of findings and the way the research was actually carried out.¹

It is useful to begin with a case, or rather a whole series of cases, the Asamankese dispute of 1921–36 between the two chiefdoms (or stools as they are called) of Asamankese and Akwatia (the latter being a sub-stool of the former) and their 'paramount' stool of Akim Abuakwa, because it demonstrates in microcosm the key place of the legal system in the colonial legacy.

I shall then move to a general discussion of five major contradictions around which lawyers' roles in a post-colonial society such as Ghana are defined; each of which arose in one form or another in the course of the Asamankese dispute. To

anticipate the argument which I shall develop below:

(i) lawyers were both intermediaries between the colonial government and the peoples exposed to their political domination; and they were the group which gave the earliest expression to nationalist reactions against that domination; (ii) lawyers were the original compradors or intermediaries of external capital; and at the same time were closely associated with the local economic interests called into being by the accumulation of surplus from trade and cocoa production in rural areas; and were agents both of the old and (to a lesser extent) new forms of external economic penetration; (iii) lawyers (like others in 'transferred' roles) represented in certain respects the externalization of the class structure and yet were also closely connected in their social origins and economic functions with the emerging national bourgeoisie; (iv) the organized legal profession has both helped to introduce reference groups and standards of professional conduct from abroad and has acted as an instrument for the protection of lawyers' economic and status interests in relation to the domestic buyers of their services; (v) lawyers have both put external legal traditions to service in pursuing domestic interests and have modified indigenous traditions of customary law to suit the requirements of external penetration.

The Asamankese Case

The background to the case is a massive penetration of the rural Gold Coast by the world market which gave rise to conflicts over the control of landed property. Between 1890 and 1910 the Gold Coast became the World's largest producer of cocoa: a crop which was produced almost entirely by indigenous farmers, a large proportion of them not sedentary 'peasants' but migrant rural capitalists who grouped together to buy large tracts of forest land which they shared out among themselves.² Akim Abuakwa and its subchiefdoms were in the area of the most intensive development of cocoa production.

Simultaneously, foreign entrepreneurs were busy negotiating concessions for gold, diamonds and timber. It was estimated that by 1910 the area of concession options granted by chiefs exceeded the Colony's total land area.³ Diamonds were located in Akwatia in the early 1920s and concession agreements were rapidly concluded with the African Selection Trust.

The massive alienation of lands by its sub-stools began to alarm Akim Abuakwa as early as 1901-1902, though little was done about it until 1913 when Nana Ofori Atta I, an educated man of considerable ability became the Omanhene of the paramount chiefdom. He initiated a series of legal and administrative measures to regulate sales of land by his sub-chiefs and to ensure the paramount stool received the tribute of one-third he alleged was 'traditionally' due to the paramount stool from sales of land, rent and royalties.

The dispute broke out between 1919 and 1921 when the chiefs and elders of Asamankese and Akwatia stopped attending meetings of the Traditional Council of

Akim Abuakwa. With the advice of their lawyers they petitioned the Governor for permission to secede from the paramount stool, but met with no success. In 1922 they sued five senior colonial officials for conspiracy to coerce them to accept the authority of the paramount stool. They lost again, but appealed all the way to the Privy Council in 1927, where the appeal was abandoned on advice of their British legal counsel.

Soon after this Akim Abuakwa began a legal counter offensive. In 1927 Nana Ofori Atta brought an action against Asamankese and Akwatia to establish the interests of the paramount stool in the diamond concessions they had negotiated with the African Selection Trust. He won the action, but appeals continued up to the Privy Council where an appeal was filed, but was dropped pending the outcome of an arbitration of the dispute in 1929. The arbitration arose out of the attempts of the paramount stool to harrass the chiefs and elders of Asamankese at Akwatia. For in 1928 and 1929 a number of leading citizens of the two sub-stools were arrested and tried in the Akim Abuakwa traditional courts. They were released after application was made to the colonial courts for writs of habeas corpus. They subsequently began proceedings against Akim Abuakwa for damages in compensation for their illegal arrest and assault.

In 1929, legal counsel for both sides agreed to put the entire dispute to arbitration. The arbitrator found in favour of the substools regarding the detentions of chiefs and elders, but against them on the more central issues of the political subordination of Asamankese and Akwatia and their obligation to pay a proportion of their mining royalties and rents to the paramount stool. In response, the lawyers for Asamankese and Akwatia went to court and yet again attempted to have the award set aside, their appeal being dismissed with costs in Privy Council 1932. Within one month they began a new action which was set aside by Chief Justice in 1933, who said in his judgement that it was 'vexatious and a deliberate effort to harass the Omanhene and the State Council of Akim Abuakwa.' Further litigation ensued, only to end after the government enacted special legislation to bring Asamankese (and the stool revenues from which the litigation had been financed) under direct colonial control.

It is estimated that the entire rents and royalties paid by the African Selection Trust were consumed in this litigation. The cost of the litigation to all parties was estimated at somewhat more than two hundred thousand pounds, the biggest part of which had to be paid by the two sub-stools.'

The Contradictions of Legality

1. Law as an instrument legitimizing the domination of those controlling the state superstructure/law as a vehicle for the articulation of the contradictions of that superstructure.

Perhaps the single most important fact about the Ghanaian legal system is that it was first fashioned as an instrument of colonial domination. The instruments of domination available to the colonial power fall into four main categories: (i) force: which was crucial in their imposition of colonial rule, but was limited by constraints

of cost and effectiveness; (ii) mobilization of popular consensus: which was in the nature of colonial rule limited if not entirely precluded, except in very special circumstances, as when ethnic rivalries could be used to secure the loyalty of some groups which relied on the colonial administration to protect their interests against others; (iii) reliance on pre-colonial social formations: the policy of Indirect Rule; (iv) the establishment of ideological hegemony over colonial subjects through their acquiescence in rules of the game by which their disputes could be settled and property relations regulated (the legal system), by which access to state-provided services could be determined (the bureaucracy) and by which rules for social mobility could be established (the educational system).

In the Gold Coast the British were quick to see the potential of the legal system. Judicial assessors began adjudicating disputes in wide areas outside the colonial forts well before formal colonial rule was established, and a class of 'mandated solicitors' emerged to practise before these courts in the mid 19th century. The legal system was particularly important in incorporating pre-colonial social formations in the colonial framework. The arguments put forward by the lawyers in the Asamankese case illustrate clearly, for example, how military and political relations between the traditional states were transformed by the legal system. They turned on whether Akim Abuakwa had conquered Asamankese two hundred years ago in the aftermath of the decline of Akwamu Empire. What had been settled then by force was now argued by lawyers before a colonial Judge. Force was reduced to law, international relations to domestic juridical relations, clashing political interests to technical arguments about jurisdiction.

While decolonization ended the formal supremacy of British law, it had relatively little effect on the actual shape and content of the legal superstructure through which state domination continued to be exercised. This was all the more remarkable because power was taken over by a new ruling class which displaced not only the British but also the local groups – chiefs, merchants and lawyers – which the British had originally seen as their chosen successors. The rise to power of Nkrumah was as much based on the mobilization of popular support against these groups as against colonial rule itself. The structure of indirect rule was largely dismantled by his government. Lawyers suffered a decline in influence. Although they had dominated the early nationalist movement, relatively few were influential in the CPP. Yet the legal system was left very largely intact. Nkrumah was sensitive to the need for legal continuity, all the more so after the atrophy of his CPP grass roots party support. He respected the form (though not always the substance) of legality. He rejected proposals to reduce lawyers' influence by flooding the market with legal paraprofessionals; to do away with wigs and gowns; and to turn Bar Association into a wing of the ruling party. His dismissal of the Chief Justice and other judges after an unfavourable verdict in the 1963 trial of some of his former Ministers for alleged treason was his first and only direct attempt to influence the machinery of justice, even though the judiciary was already subjected to other more subtle pressures.

Neither of the two post-Nkrumah military regimes (1966–1969; 1972 to the

present) has been able to rely on force alone to govern. Both have attempted to broaden the base of their rule by establishing coalitions with the civilian bureaucracy, the lawyers and other members of the professional classes. Lawyers played a more important role than any other group in the transition to civilian rule in 1969 (they were, for example, more than 30 percent of membership of Constituent Assembly; and took up more than 50 percent of its speaking time). They were the single largest group in the Cabinet and Parliament of the civilian regime led by Dr Busia during its brief tenure of office from 1969 to 1972. And yet they were also relied on by the National Redemption Council (subsequently Supreme Military Council) military government after it seized power back from the civilians in 1972. The only civilian member of the Council during its first three years of office was the former President of the Bar Association who was made Attorney General, and until recently its leading representative abroad was a barrister (Joe Appiah) who was a leading political opponent of Nkrumah's and held office as President of the Bar Association after the 1966 coup.

Law and lawyers have thus been consciously manipulated to institutionalize the domination of those controlling the machinery of state, be they colonial rulers, nationalist politicians or military men. All of these ruling groups have relied on forms of domination which are hierarchical, bureaucratic and – hence the importance of the legal system – rule bound.

Yet legal rules are a Janus-faced instrument of domination. Rules introduced to extend the powers of the State can sometimes be turned against it. Rules introduced to protect liberties can also be used to limit them.

The Asamankese case offers some interesting insights into the way nationalist lawyer/politicians could use the legal system to articulate the contradictions of the colonial state. The main lawyers for Asamankese were prominent in nationalist politics: T. Hutton-Mills (the first President of the National Congress of British West Africa) and his son T. Hutton-Mills Jr.; W.E.G. Sekyi (the leading figure in the Aborigines Right to Protection Society after the mid-1920s); Kojo Thompson (the dominant figure in a leading Accra political faction, the Mambii Party and member of the Legislative Council). Sekyi in particular was active behind the scenes in coordinating the protests of Asafo Companies – the youngmen's associations which were later to be a source of grassroots support for Nkrumah – to disrupt the authority of chiefs who cooperated with colonial authorities.

Nana Ofori Atta I, on the other hand, was the leading Gold Coast supporter of Indirect Rule. He was largely responsible for steering the Native Authority Ordinance (the major piece of colonial legislation rationalizing Indirect Rule) through the Legislative Council between 1922 and 1927, when the Asamankese litigation was in full flood. Yet it was by no means a question of chiefs on one side of the dispute and lawyers on the other. The Akim Abuakwa lawyers, particularly K.A. Korsah (later Nkrumah's first African Chief Justice) and J.B. Danquah (later Nkrumah's leading political opponent) also took a prominent role in nationalist politics. The latter was half brother of Nana Ofori Atta I and wrote a number of scholarly works on the traditional religion, law and social structure of Akim

Abuakwa. It is characteristic of lawyers that they articulated the opposed sides of a major social contradiction, rather than taking a single position as a group.

Sekyi and his associates consciously used litigation – when one case was decided, slapping down a new set of injunctions to start the whole process again, a sort of guerrilla warfare by litigation – to paralyse the operation of the colonial and native administrations in Akim Abuakwa. And they did so with considerable success. When the Attorney General was asked if the colonial administration could assist Ofori Atta's messengers to enter private premises to arrest his opponents he advised: 'Candidly this is too frail a bark in which to permit Government officials to voyage. The local Bar is very active to assert the rights of persons who are found in opposition to a most unpopular Native Authority, and the Supreme Court is vigilant to see the law is strictly observed.'

In the final analysis Sekyi and Asamankese were defeated. Sekyi's comments on the whole affair illustrate the close coordination he saw between the machinery of justice and the power of the colonial state:

In this case the issues are profound and we must not mince matters. The judges are very human and have always an eye to promotion, involving a possible knighthood and a fat pension. Although in theory they are appointed by the Crown, yet, since the time at least of Sir Gordon Guggisberg when, as in the case of the Asamankese case, a suit for damages for conspiracy and false imprisonment a Paramount Chief and his supporters, namely the Colonial Secretary, the Secretary for Native Affairs, the Commissioner of the District, a high flattering report and reference concerning the case was found officially to reflect favourably on the learned Chief Justice who non-suited the Plaintiff . . . one cannot help feeling that the judges are, as to some of them, at any rate, not above considering the possibility of deserving more such reports and references or 'mentions in despatches'.

Similar contradictions have grown up around the legal system in post-colonial Ghana. Many of Nkrumah's leading opponents were lawyers, who did not hesitate to use litigation for political purposes. The post-Nkrumah period also saw a series of important political cases in which the courts were put to service to articulate major conflicts. Two of these, the Sallah and Kofi Badu cases, were particularly crucial in undermining the legitimacy of Dr Busia's government between 1969 and 1972. In the course of the first of these cases the government discredited itself by bringing a motion before the Court of Appeal in which it made (unsuccessful) allegations against judges who were hearing a major constitutional case against it, and by subsequently repudiating the Court's decision in the case with much publicity. Shortly after this case there was a further outcry in which the Bar Association joined because certain of the Judges who had heard the Sallah case were conspicuously absent from the list of appointments made to the new Supreme Court established under the 1969 Constitution. In the Kofi Badu case the government prosecuted for seditious libel a newspaper editor who had alleged that the government had taken steps to rig these Supreme Court appointments. He was convicted and fined a nominal amount, but the judgement was reversed on appeal after the 1972 coup.

The belief that in these and other instances the government had overstepped the bounds of legality was one of the factors making the overthrow of Dr Busia's civilian

government by the military in 1972 seem in some senses a legitimate action against a regime that was becoming more and more arbitrary. Yet it was not long before the members of the Bar were embattled against the new military regime headed by Colonel (now General) Acheampong. They became strong critics of military rule and of military justice, including the redefinition of several existing offences and designation of several new ones as 'subversion', the establishment of military tribunals to try them and the conferral of powers of arrest and search on military personnel. They were (after the suppression of the last remnants of a free press) virtually the only body of organized public opinion that was able to voice such criticisms in public.

Matters came to a head after complaints were made about the manner in which a military tribunal disposed of a case against a former army officer for treason (the Tsikata case) during which the latter alleged that confessions had been obtained from him under torture. As a consequence of this case and other similar incidents members of the Bar collectively refused to continue representing clients before military tribunals. At its Annual Conference of 1976 the Bar Association called for the abolition of the tribunals and the return of the country to civilian rule. When in 1977 a political crisis developed after student demonstrations which led to the closure of the Universities, the lawyers played a prominent role in helping to bring together a coalition of the country's intelligentsia – the students, university teachers and professionals – and in organizing the July 1977 strike of the members of Professional Bodies. In this strike the members of the professional classes directly attempted to force the soldiers back to the barracks, although in the final analysis they were outmanoeuvred by the government into going back to work before their demands were met.⁵

It is important to note, however, that there were certain rather special preconditions for this use of the legal system and of professional skills to develop the contradictions in the political framework. Not only did it require a highly developed sense of legality, but it also required that there be a solid material base from which lawyers could operate. The Gold Coast lawyers were an elite group with a source of livelihood independent of the colonial government which even Nkrumah was unable to cut off. They could afford to be independent because there was a market for their services which the government could not fully control; and this in turn resulted from the way in which the legal system was associated with the maintenance of property relations in a capitalist economy. Yet this at the same time established definite *limits* to the influence they could exercise. Neither they nor any other professional group has been able to develop a truly popular power base. The professionals' strike of 1977 was inconclusive because neither the trades unions nor any other organized group of workers was in the final analysis prepared to give support to a group whose class commitments they did not share. Lawyers and other professionals played a role in the final demise of General Acheampong's government in July 1978 by articulating publicly a number of widely-shared grievances; but it was Acheampong's own military colleagues who delivered the *coup de grace*. Members of the Bar have, to conclude, been very much better at

securing their own professional interests and at bringing political crises into focus in the Courts than at resolving these crises or turning their effectiveness as a pressure group into a broader base for political power.

2. Property law as an instrument of the penetration of external trade and capital/as an instrument of indigenous groups and classes attempting to control and take advantage of this penetration.

During the 19th century the primary function of the law administered from the colonial forts along the coast was to regulate the commercial exchanges between British merchant capital and indigenous middlemen through a rough and ready enforcement of commercial contracts and debts. The subsequent development of gold, diamonds, timber and cocoa brought about a shift in emphasis towards other legal relations. Above all there was a development and restructuring of the customary law of the land: which developed a contradictory character as a vehicle for both the assertion of indigenous rights in land and for the reorganization of rights in property to facilitate the penetration of foreign trade and capital. The position was lucidly expressed by J.E. Casely-Hayford, the leading Gold Coast lawyer and nationalist, as follows:⁴

The opinion is current in certain quarters that West African intelligence is incapable of grasping the danger of economic pressure which the influx of European capital into the country must produce. It is even assumed that such intelligence would willingly minimize the evil for pecuniary gain. A greater mistake could not be made. Indeed, no one can understand the nature of the problem better than West Africans themselves. . . Now what is the crux of this land question? Is it, in the main, that the land shall belong to the indigenes and not to foreign capitalists; or that, in the last analysis, neither the foreign capitalist, nor the indigenes, but Government shall own it? To state the problem in another way, is it that the people shall be free to till the soil in their own right and sell the produce thereof to merchants abroad, the Supreme Court protecting the rights of contractor and contractee in common; or that Government shall step in and control private rights on the assumption that parties are incapable of managing their own business? . . . There is a proper and a natural relation of the Government to the West African peoples. It is one of mutual trust and confidence. A trust that will promote reliance on the Supreme Court to adjust the relations between capital and native land-owners; a confidence that will ensure that Government shall not take advantage of artificial conditions and acquire overlordship; or ownership of the people's lands. Back to the land, say all forward movements. It suggests a condition in which the cultivator will really and truly be master of the soil. Such security is ensured by the native system. At least, it is so on the Gold Coast. Why disturb it? Why introduce measures which will assuredly shake their institutions to the very foundations, and break up their social organizations?

One could almost have left the quotation to speak for itself. Without doubt the lawyers who made use of the contradictions of the colonial system often had good material interests for so doing. The Public Lands Bill of 1897 and the subsequent colonial legislation about which Casely-Hayford was writing would have vested unutilized land in the control of the colonial government which under customary law had been controlled by Chiefs on behalf of their subjects. The legislation purported to protect indigenous interests in land by restraining the Chiefs from rushing into concession agreements and selling land on unfavourable terms to foreign capitalists. Yet it was opposed by a coalition of Chiefs, indigenous merchants

and lawyers who argued that under customary law the Chiefs 'owned' all unused land on behalf of their subjects, suspecting that the abridgement of customary rights might open the way to large-scale expropriations of land of the kind which had taken place in other colonies. They created the first nationalist movement, the Aborigines Rights Protection Society. The success of their opposition in keeping lands in hands of Chiefs meant the latter could grant concessions to foreign capitalists and sell land to indigenous cocoa farmers, relatively unhindered by the colonial government, though subject to the supervision of the courts. The assertion of customary property rights thus probably hastened the massive commercialization of land, of which the Asamankese case was but one consequence.

Lawyers became brokers between foreign capital and indigenous merchants and landowners. Casely-Hayford himself made considerable sums of money from concessions. Sometimes he acted on behalf of the Chiefs and sometimes on behalf of prospective foreign concessionaires. Usually, however, it was the former, for most of the foreign firms made use of the one or two partnerships of British solicitors which operated in the colony. The senior partner in the leading British partnership, Giles Hunt, in 1913 estimated in evidence before the *Committee on the Tenure of Land in West African Colonies and Protectorates* that he had represented the foreign concessionaires in about 80 percent of the concessions negotiated in the colony between 1900 and 1913. Sometimes foreign capitalists preferred not to deal with lawyers at all, relying on the legal expertise available at their metropolis head office and their favoured access to the colonial administration to achieve the results they wanted. The African Selection Trust, for example, had a standard form of lease, which they prevailed on the Chiefs and elders of Asamankese and Akwaita to sign without taking legal advice. It was only when the latter's lawyers entered the picture and began to challenge the terms of the lease that the AST referred the matter to a local firm of British solicitors. The state of the law thus interested foreign capitalists less than propertied indigenous groups attempting to ensure they secured some advantage from the external penetration of the economy.

Despite the scramble for concession options in the early part of the century – the majority of which were not taken up – the direct role of foreign capital in the Gold Coast's economic expansion was limited. The dynamism was rather provided by indigenous producers growing cocoa for the world market. Large-scale sales of forestlands by chiefly stools and sub-stools to migrant farmers took place. Substantial surpluses and accumulations of capital were generated in rural areas. Although to start with the majority of the land sales took place without formal conveyancing⁷ the courts were of utmost importance in recognizing transfers of property rights when they were disputed. The commercialization of land greatly increased litigation. Land cases became the bread and butter of lawyers, the material base of law practice.

The reconstruction of landed property relations was virtually all achieved within the framework of customary law: new substance within old forms of legitimacy. In the Asamankese Arbitration of 1929, for example, the Judge ruled that he saw no

reason why customary obligations which in the past applied to 'treasure trove, gold and snails' should not now apply to 'diamonds, tolls and proceeds of the sale of land'. By and large customary law was interpreted to permit almost unrestricted sales of land and individual control over the use and sale of land, even if the final 'ownership' remained in theory with families or stools. Nevertheless, the land tenure situation was extremely confused and gave rise to almost endless litigation over succession to property, the validity of land sales and boundaries between stool and family lands.

There is little evidence that the uncertainty of tenure had any adverse effect on agricultural expansion or on the activity of foreign capital. The Courts indeed developed safeguards to ensure that the latter did not suffer. The African Selection Trust was able to extract diamonds all through the period of the Asamankese dispute, for example, because the disputed royalties and rents were diverted to a suspense account controlled by the Court until the litigation was disposed of.

Foreign capital did not move directly into the agricultural sector, being largely confined to mining and the import-export trade. It seldom clashed directly with local farmers and merchants until the 1930s, when the monopoly position of foreign merchant capital was consolidated by the establishment of the association of West African Merchants (AWAM). In 1930-31 and again in 1937-38 the producers of cocoa withheld their produce from the world market in protest at the establishment of this monopoly and at the low world prices that prevailed. On the second of these occasions, the strike persisted until the colonial government appointed an official inquiry (The Nowell Commission) to look into the matter.⁸ Lawyers supported the cocoa hold-ups in a number of ways and were active in the negotiations between the farmers and the government. One or two of them like W.E.G. Sekyi actually took a more active part in the attempt to break the AWAM monopoly by trying to establish contacts for the direct sale of cocoa in Europe, bypassing the colonial combines. The recommendations of the Nowell Commission were never put into effect, partly because they were superseded by the outbreak of World War II. Instead, a comprehensive regulation of the import-export trade 'froze' the monopoly of the colonial combines by setting up quotas based on 'past performance'. There was relatively little lawyers could do to challenge such regulations directly, although an opportunity of a rather limited kind was provided by two official inquiries after the war into allegations of corruption against colonial officials responsible for the administration of the quotas. Among other things it was alleged that the Greek entrepreneur, A.G. Leventis, had used improper influence to secure an enlargement of his allocation. Leventis' legal adviser – who did much of his legal paper work, but was not permitted to appear for him before the Commissions of Inquiry – was Dr J. B. Danquah, who had been one of the counsel for Akim Abuakwa during the Asamankese case and had played an important role in the negotiations with the government during the 1937-38 cocoa hold-up. The second Commission – conducted by Ignacy Sachs, a British QC – though not completely clearing Leventis of all the allegations against him, found fault with the earlier Commission's handling of the evidence and the fact that the large firms had helped the colonial CID to secure evidence against Leventis. And it strongly

criticized the way that quotas were allocated.

Nevertheless, after the war lawyers and cocoa farmers once again confronted those who controlled the terms on which cocoa was sold in the world market. Rather than the large firms, however, it was the State which regulated the market through Marketing Boards which took over the external sales of cocoa and other commodities; though the firms still participated in the internal marketing of agricultural commodities as the Boards' main Licensed Buying Agents.

The ostensible purpose of the Boards was to protect producers from price fluctuations and to use commodity surpluses to develop agricultural production. In reality huge surpluses were built up as a result of rising world prices. Initially these accumulated in London as sterling balances held on behalf of the Gold Coast government; in effect subsidizing the post-war recovery of the British economy. Later, as decolonization took place, these funds were redirected for quite different purposes: for the industrialization of the economy, for the expansion of social services (many of them in the urban areas) and for an increase in the size and power of the various party and State bureaucracies themselves.

This redirection of cocoa surpluses was carried out after 1951 by a government controlled by the populist Convention People's Party (CPP) under Kwame Nkrumah which had displaced the party of the professional and merchant bourgeoisie, the United Gold Coast Convention (UGCC), led by Dr J. B. Danquah, from leadership of the nationalist movement. This extraction of cocoa surpluses diminished the regime's popularity in many rural areas and brought about a regrouping of the opposition, in the Ashanti-based National Liberation Movement and subsequently in the United Party, around a refurbished alliance of lawyers, merchants, chiefs and cocoa farmers. For like the groups with which they allied themselves, many lawyers had a material interest in retaining surpluses in the rural sector and in consolidating the landed property relations under which they were produced and distributed. They were thus aligned with the maintenance of the country's historic links with the world market through agricultural commodity production and against the new forms of state and industrial capital towards which the Nkrumah government was redirecting the process of accumulation.

This opposition to the regime and its economic policies was only overcome by recourse to the coercion and patronage available to the government through its control of the state machinery. The Chiefs in particular were deprived of their economic independence by a series of measures which took away from them their control over the disposition and management of stool lands' (which incidentally also reduced the scope for lawyers to make money by litigating over these lands).

In the early 1960s there was a major shift in economic policy from industrialization based on an 'open' economy with inflows of foreign private capital (which had largely failed to provide results) towards greater state control of the economy and massive government investment in large-scale industrial and agricultural projects. Rather than displacing foreign capital from the economy altogether, however, these changes hastened its reorganization around new forms of incorporation in the world economy. In 1961 both foreign and local Licensed

Buying Agents were legally excluded from the marketing of agricultural produce which was taken over by the party-controlled United Ghana Farmers' Council (UGFC).¹⁰ The export-import houses were also partly displaced from the import trade after Nkrumah bought out Leventis in order to establish the state-run Ghana National Trading Corporation. Foreign firms reorganized themselves accordingly and increasingly took their profits from the supply of equipment, technology and specialized marketing and management services to the growing state sector.

The legal arrangements most characteristic of this phase of state capitalism were of two kinds; those creating an institutional framework for public enterprise through the state holding companies and the public corporations;¹¹ and those – tax regimes, supply and management contracts, joint enterprises, licensing arrangements etc. – regulating the terms on which foreign capital entered the country. Though both were legal in form they depended relatively little on the skills of lawyers, being operated largely through bureaucratic procedures, informal political contacts or straight corruption. During the early 1960s small number of lawyers came to act as brokers between foreign firms seeking import licenses and contracts with the government.¹² But they were by no means the only people to carry out such brokerage and it had little to do with their more overtly 'legal' functions. One or two firms of CPP-linked lawyers benefitted from the patronage of the state corporations, which farmed out their legal business to them. Most of the larger state enterprises subsequently acquired their own counsel, but these were relatively small in number and had little discernible effect on the nature and organization of the country's external economic transactions, at least until the strengthening of the Attorney General's Department in the mid-1970s.

After the overthrow of Nkrumah part, but by no means all, of the apparatus of state capitalism was dismantled. Some of the State's industrial ventures were sold to foreign and local capitalists, others were abandoned on the grounds of their alleged unviability. The massive cocoa surpluses had been exhausted and were never again to be harnessed by the State for the process of accumulation in as systematic a fashion as under Nkrumah. The marketing monopoly of the UGFC was dismantled, and the internal purchasing of cocoa on behalf of the Marketing Boards was handed over to local Licensed Buying Agents – Ghanaian entrepreneurs incorporated with a network of government patronage – rather than to the foreign firms which had dominated the cocoa trade before independence. The Ghanaian economy remained largely dependent – as before – on its exports of cocoa, timber and diamonds to the world market.

The way the present-day legal system operates is still deeply conditioned by this historical legacy. Indeed it was the sample survey data collected on present day law practice which suggested that the manner in which law practice is organized and that lawyers make a living had to be explained in the light of the profession's economic history from the early colonial period onwards. Land and customary law has remained the most important source of income for the majority of lawyers up to the present day (Table 1). This has significant effects on the structure of law practice which is organized around small chambers of one or two practitioners

Table 1. *Working Time Given by Private Practitioners to Each Main Area of Practice (% of all Private Practitioners Giving Stated Percentage of Working Time to Each Area)*

	Less than 20%	20-40%	More than 40%	Total	N =
Land and Customary Law	22.1	32.6	46.3	100%	95
Commercial and Company Law	77.4	8.6	14.0	100%	93
Civil Injury	57.0	25.8	17.2	100%	93
Criminal	46.8	34.0	19.1	100%	94

Notes: (1) Tables 1-3 and 5-12 are based on interviews with a sample of 321 Ghanaian lawyers in all branches of practice. This was made up of a simple random sample of all lawyers, plus small additional stratified samples, increasing the representation of certain categories - the more senior lawyers, those in the public sector, and those practicing outside Accra.

(2) Table 1 is based only on the private practitioners included in the simple random sample.

working independently of each other, rather than bureaucratically in large law firms. Such a pattern of organization is especially characteristic of lawyers who specialize in land matters, whose practice is usually kept going through elaborate personal networks with individuals and local communities.¹³ Such networks are not only important in securing work but are also turned to good account by lawyers who move into politics.

The allocation of prestige, power and resources within the legal profession is strongly shaped by such economic realities. Specialists in land law are on the whole more senior in enrolment at the Bar, practice in higher courts, have a more stable clientele, are more active in the Bar Association, and own more cars and houses than other practitioners.¹⁴ Yet while this linkage with the rural sector explained the dynamism of the profession in the early part of this century it now is a major factor in its decline in earnings and influence. An ever increasing number of lawyers scramble to secure a share in rural surpluses which are themselves dwindling because of the stagnation of the economy as a whole and of the decline within it of the cocoa sector in particular.

This picture has been relatively little altered by industrialization and the expansion of foreign investment in Ghana in the post World War II period. There is a small sector of lawyers who specialize in company and commercial law transactions, many on behalf of foreign companies. Yet these lawyers do not match those who specialize in land in numbers, wealth or prestige.¹⁵ The reasons for this are various. In the first place, the expansion of industry and of foreign capital in Ghana has declined since the early 1960s. And although foreign investors have to find their way around a plethora of legislative enactments, regulations, licenses, agreements and contracts, they often prefer to steer their way through them by direct contacts with members of the government and the bureaucracy rather than by manipulating the legal system. Such legal work as they require can often be

Table 2. Career Patterns of Lawyers Beginning as Private Practitioners Compared with those Beginning in Government Employment

	Lawyers who begin their Careers in Private Practice			Lawyers who begin their Careers in Government Employment	
	Date of Enrolment Up to 1960 1961-1970			Date of Enrolment Up to 1960 1961-1970	
Remain in private practice	47.9	77.5	Remain in government	25.0	52.2
Move between private practice and government	12.8	10.3	Move between government and private practice	35.0	37.6
Move between private practice and judiciary	34.0	11.2	Move between government and judiciary	35.0	5.8
Move between private practice, government and judiciary	5.3	0.9	Move between government, private practice and judiciary	5.0	4.3
Total	100% (N = 94)	100% (N = 107)	Total	100% (N = 20)	100% (N = 69)

Note: Table is based on the simple random sample of lawyers.

handled by their metropolis head office, leaving only the more routine work (e.g. disputes over employment contracts) to be handled by their local lawyers. And finally the lawyers themselves on the whole fail to provide the large firms with the mixture of business and technical as well as purely legal advice that they need, doing less well in this regard than other professionals like the accountants with whom they compete for business.

Nor has the expansion of the economic activities of the State and its greater regulation of the activities of foreign capital had as much effect on legal roles as one might have expected. Law is a public profession. Yet the careers of lawyers and their attitudes are biased in the direction of the private sector. The ideal-typical lawyer makes his money and his reputation in private practice and moves on in later life to the Bench; though many are content to remain in practice without being tempted into the judiciary. Table 2 shows that the proportion of lawyers who began their careers in bureaucratic employment and have remained in government service is markedly less than the proportion of lawyers starting their careers in private practice who have continued there. Public sector lawyers tend – if not promoted to the Bench – to move out into the private sector as soon as they have acquired enough experience to stand on their own feet. The effect of this on lawyers' commitment to their present work in the different branches of the profession may

Table 3. *Ideally Preferred Employment by Present Employment*

Actual Employment	Private	Preferred Employment		Total	N =
		Judiciary	Government		
Private Practice	88.2	10.1	1.7	100%	119
Judiciary	31.3	68.7	—	100%	32
Government	53.7	14.6	31.7	100%	41

Note: Table 3 is based on the simple random sample of lawyers, plus a small additional sample of public sector lawyers.

be seen in Table 3. When interviewed, more than half the lawyers in public employment said they would prefer to be private practitioners. On the other hand, 88 per cent of the lawyers practising privately said they would prefer to remain in private practice. Because the public sector finds it difficult to attract good recruits and retain them after they have acquired experience, there is a visible disparity in expertise between public and private sector lawyers in the Courts; as well as between government legal advisers and their counterparts in the multinational firms and foreign governments with whom they conduct international negotiations."

Lawyers' roles in sum have been strongly shaped by the historic links of law and capitalism. The forms of economic activity created by the penetration of the world market at the turn of the century keep lawyers busy today. Maintaining rural property relationships is still their most important source of business despite the tendency since the 1930s for surpluses to be shifted out of agriculture. Had more of these surpluses been retained in the rural sector, however, one might have seen the growth of a more powerful rural bourgeoisie and with it of a legal profession that continued to grow rather than decline in earning power, status and political influence.

3. Law as an embodiment of formal principles of rationality and equality before the law/as a mechanism of class formation, institutionalizing the advantages of those best able to make use of these principles within a given framework of economic and social organization.

The discussion so far already suggests that a process of class formation has taken place behind the legal system. Although lawyers do not directly participate in production, their activity has supported class formation by reproducing the property relationships around which production takes place and on the basis of which class interests crystallize. Similarly, although lawyers are often to be found in politics, this is not strictly speaking part of their legal function. Yet the legal and constitutional rules they operate are constitutive of the political system as a whole, creating the normative framework within which political organization and conflict takes place.

Lawyers, in sum, have played a critical role both as the plumbers of the economy and as the masons of politics.

The distinctive contribution they make to economic and political relationships is their articulation of them in terms of legality: by applying normative principles to specific problems by reasoned argument. Yet the very idea of legality in this sense is itself a historical product, which cannot be disentangled in a post-colonial society like Ghana from the imposition of British law and legal institutions. Nor has the acceptance of legality as a method of ordering social relationships predetermined to which substantive issues it would be applied; nor by or on behalf of whom. Normative principles have undoubtedly had considerable independent influence on the structuring of Ghanaian society. But the use made of them has been conditioned by the modes of economic production and of political dominance with which they have been historically associated.

The precise extent to which lawyers and the principles they argue in the courts has helped to consolidate the class structure is, however, difficult to assess. Three interrelated questions have to be answered. First, to what extent has the activity of lawyers actually contributed to the accumulation of rural and merchant capital? Second, to what extent has it assisted in the conversion of the surpluses made available through this accumulation into lasting social inequalities based on the ownership of land and other productive resources? And third, to what extent has this facilitated the lawyers' own consolidation as a significant fraction or ancillary of Ghana's rising national bourgeoisie?

On the one hand, it may be argued that lawyers contributed to the process of accumulation by assisting the transformation of land into a commodity which can be bought and sold, by consolidating property rights in rural areas and by bringing about the settlement of disputes which would otherwise have disrupted agricultural production. On the other hand, it might equally well be suggested that litigation made rights in land less rather than more certain, and that the presence of an active class of local lawyers, in other words, might be viewed as almost the prototypical form of unproductive labour, at best making no contribution to the process of accumulation and at worst diverting existing surpluses from more productive uses into litigation and lawyers' fees.

The latter view was favoured by many colonial officials and by several influential chiefs like Nana Ofori Atta I. Naturally it was vigorously contested by members of the legal profession themselves. Nor did it go unchallenged within the ranks of the colonial administration. During a debate which took place in the late 1920s and early 1930s about whether lawyers should be admitted to practise in Ashanti (from which they had previously been excluded) many colonial officials (including R. S. Rattray, the government anthropologist) took the view that the advancement of cash crop production would inevitably increase litigation whether or not professional advocates were allowed in the Courts.¹⁷ In these circumstances, it was argued, the admission of lawyers would at least ensure that such litigation would be conducted in an orderly manner. However it was not until a public outcry had arisen in Britain over the Knowles case – in which a British doctor had been condemned

to death by the Ashanti Provincial Commissioners' Court for the alleged murder of his wife, without the benefit of counsel or of trial by jury" that lawyers were in 1943 finally admitted to practice in both Ashanti and the Northern Territories.

Even if, like colonial officials, one were to take the view that lawyers were parasites upon the rural chiefs and people, one could nevertheless still maintain that they played a crucial part in facilitating the deep penetration of the world market into the Gold Coast's rural areas. Litigation, as several colonial reports emphasized, was responsible for a substantial proportion of stool debts, and often led directly to sales of land by stools or families in order to pay off these debts. Law itself assumed a commodity form – in that access to the authoritative decisions of the Courts through skilled intermediaries (the lawyers) was something that chiefs, heads of families and wealthy farmers in the Gold Coast became increasingly accustomed to pay for – and it assisted in the transformation of land itself into a commodity.

In practice, as Polly Hill has emphasized," land sales had become common in the Colony as early as the late 19th century. Community control over land remained, however, the dominant ideology, both of the lawyers, merchants and chiefs and of the colonial administration and judiciary (even though they might dispute between themselves how and by whom such control was to be exercised). For the former it had since the Lands Bill agitation of the late 19th century become the rationale for their control over resources in the rural sector; and the latter regarded it as the jurisprudential corollary of the policy of Indirect Rule. Yet as Asante has convincingly demonstrated," community control was gradually eroded from within by a series of judicial decisions which increasingly conceded individual rights to use and dispose of land while never overtly abrogating the ideological principle.

This historic mission of lawyers and the courts in restructuring pre-colonial social formations and property relations to assist commercial production in rural areas is now, however, at an end. Ghana's rural communities are firmly inserted into the circuits of the world economy. And the pattern of rural expansion to which lawyers' activities were linked has (since the 1960s) become one of rural underdevelopment.

Broadly speaking, research on rural communities in Ghana has supported the view that the wealth acquired from commodity production and trade has tended to find its way into the hands of a relatively narrow stratum of prosperous farmers, brokers, traders and Chiefs," even though the effects of this are modified by the redistributive mechanisms which operate in rural communities. There would seem to be a good *prima facie* case for arguing that the pattern of litigation has reinforced this concentration of property. Yet to establish whether or not it has had this effect would require further evidence on three points. First, that there are significant numbers of people who are unable to pursue or defend claims to property in the Courts because of their lack of resources – a point for which research I have reported in another article" offers a measure of indirect support. Second, that access to counsel *in fact* increases a litigant's chances in Court, for which there is again some rather fragmentary evidence." Third, that court cases have in consequence tended to consolidate the rights of those with substantial property holdings as against those with less, for which there is little evidence one way or the other. (For if litigation were

Table 4. *Enrolments of Lawyers, Compared with Value and Price of Exports, 1880–1960*

	No. of lawyers Enrolling	Values and Price of Exports (5 years averages)		
		Cocoa Value (£m)	Price Value (£m) (1953 = 100)	All Exports
1881–1890	3	—	—	—
1891–1895	4	—	—	—
1896–1900	7	—	—	—
1901–1905	11	0.1	16	0.9
1906–1910	10	0.6	18	2.3
1911–1915	19	2.3	19	4.4
1916–1920	13	5.4	20	7.5
1921–1925	9	6.5	15	8.4
1926–1930	15	9.8	19	12.2
1931–1935	5	5.0	9	8.1
1936–1940	6	6.4	10	13.1
1941–1945	9	4.2	9	12.3
1946–1950	14	31.4	56	44.6
1951–1955	42	63.8	123	91.8
1956–1960	137	59.9	103	99.3

Notes: (1) Source for the number of lawyers enrolling is *The Role of Lawyers at the Supreme Court of Ghana* (excluding a small number of British lawyers on the Roll). (2) Export figures recalculated from G. B. Kay: *The Political Economy of Colonialism in Africa* (Cambridge University Press, 1972), 334–337.

entirely concerned with disputes *between* large property owners, unequal access to the law might conceivably have no effect at all on the distribution of property between this class and the remainder of the population.)

It is much easier to be specific about the way the wealth accumulated by export production was used to consolidate the lawyers' own position as a significant fraction of the nascent bourgeoisie. Cocoa surpluses provided the cash for legal education at the Inns of Court in England. (Indeed, one of the allegations made by the Asamankese Chiefs against Nana Ofori Atta was that he was using stool revenues to pay for the education of lawyers who would fight Akim Abuakwa cases in the Court.) And land litigation made the investment a profitable one. This may be illustrated by comparing the 'output' of Gold Coast lawyers from the Inns of Court in the first half of this century with the value of exports, especially those of cocoa. In Table 4 it may be seen that the number of lawyers entering practice not only rose with exports but also declined during the economic recession of the 1920s and 1930s, in accordance with the availability of cash to finance legal education²⁴ or pay for litigation.

Recruitment into the profession prior to World War II was almost exclusively from the ranks of chiefly, merchant, professional (sons or nephews of pastors, civil servants, doctors and lawyers) and to a lesser extent large farming families.²⁵ A number of the major chiefly families took good care to establish what almost amounted to legal dynasties – the Ofori Attas of Akim Abuakwa (for despite his criticism of the professional elite Nana Ofori Atta I encouraged his half-brother Dr.

Table 5. *Occupations of Fathers of Lawyers Qualifying 1961–1970, Compared with Working Population 1960, Fathers of VIth-formers 1964, and Fathers of University Students 1964*

	Working Population 1960	Fathers of Lawyers qualifying 1961–1970	Fathers of VIth-formers 1964	Fathers of University of Ghana students 1964
Professional-Managerial	0.8	25.5	28.3	15.3
Entrepreneurs	3.8	18.2	8.2	3.7
White collar	6.1	13.1	29.5	32.8
Blue collar	25.2	2.4	6.8	6.4
Rural (small farm and rural petty bourgeois)	62.8	38.2	24.5	39.7
Other (including soldiers and police)	1.3	2.7	2.7	2.1
	100.0	100.0	100.0	100.0

Notes: (1) Figures for fathers of VIth-formers and University students 1964 from G. E. Hurd: 'Education', in W. Birmingham, I. Neustadt and E. N. Omaboe: *A Study of Contemporary Ghana*, Vol. 2, *Some Aspects of Social Structure* (London: Allen & Unwin, 1967), recalculated to exclude 'No answer/don't know' category. These figures are juxtaposed to those for fathers of lawyers qualifying 1961–70 (rather than fathers of all lawyers) to ensure a degree of comparability.

(2) Figures for fathers of lawyers qualifying 1961–70 based on simple random sample of lawyers.

(3) Occupational background of working population over 21 based on 1960 census.

J. B. Danquah to become a lawyer; and two of his sons later joined the profession), the Prempehs and the Asafu Adjays of Ashanti (sons and nephews of the Asantehene and Adontenhene of Kumasi respectively). Even those who originated in the merchant and professional families of the coastal towns, like Sarbah, the Casely-Hayfords, the Hutton-Mills, the Bannermans, the Quartey-Papafios, and Sekyi were usually linked by descent or marriage with chiefly families and sometimes took pains to secure themselves office within the traditional hierarchies.

Although the direct link between accumulation of rural (and merchant and professional) surpluses and legal education was broken in the 1950s-60s, when the government stepped in to provide scholarships for legal education, the pattern of recruitment into the present-day profession is still deeply influenced by this legacy, as may be seen by the results of the sample survey set forth in Tables 5–10. To summarize:

(i) The data on lawyers are broadly comparable with other findings on social mobility in Ghana (Table 5) in that they suggest classes are still in process of formation rather than fully crystallized. The chances of the son of a professional man becoming a lawyer are much greater than those of a clerk, still more of a worker or a farmer.²⁴ Yet the occupational structure is still 'open' in the sense that sons of professionals are a minority of entrants to the profession, and a substantial proportion still come from rural backgrounds.

(ii) This 'open-ness' of class structure does not, however, hang in the air: being

Table 6. *Occupations of Lawyers' Fathers (Percentages)*

Small Farm	14.3	
Small farm (mixed or unspecified)		5.5
Small cocoa farm		8.0
Fisherman		0.8
Rural Petty Bourgeoisie	20.1	
Large farm (mostly cocoa)		13.5
Chief		3.5
Other office bearer		3.1
Entrepreneur	18.8	
Craftsman		0.8
Petty trade		1.6
Trader/businessman		16.4
Urban Blue Collar Employee	2.3	
Unskilled worker		0.8
Semi-skilled or skilled worker		1.6
White Collar Employee	19.9	
Clerk		3.9
Executive grade		6.3
Policeman		2.7
Teacher (non-graduate)		3.5
Sub-professional		1.6
Professional-Managerial	24.3	
Lawyer		5.5
Pastor		3.1
Civil Servant (administrative grade)		9.0
Other profession		4.7
Manager		2.0
Unclassifiable	0.4	0.4
		100%
		N = 256

Note: Based on simple random sample of lawyers.

linked to accumulation and class formation in the rural areas. The data suggest that lawyers from rural backgrounds have tended not to be mere 'sons of farmers' but sons or nephews of men of substance – large cocoa farmers, brokers, transporters and chiefs (Table 6). Here one can see the transformation of rural surpluses into modern occupational position very clearly.

(iii) Nevertheless, the widening of the base of the educational system under Nkrumah and provision of law scholarships have produced some broadening of recruitment into the profession (Tables 7 and 8): more sons of small farmers and fewer sons of professionals becoming lawyers; more lawyers who have illiterate fathers and so on.

(iv) What distinguishes these data from other findings on intergenerational mobility in Ghana is that lawyers tend (Table 5) to be more heavily recruited from

Table 7. *Occupation of Lawyers' Fathers by Seniority (percentages)*

Father's Occupation	Date of Enrolment at Bar		
	Up to 1950	1951-1960	1961-1970
Small farm	6.2	11.8	18.3
Rural petty bourgeois	18.7	18.6	19.9
Entrepreneur	25.0	19.6	18.2
Urban employee	18.7	29.4	18.2
Professional or managerial	31.3	20.7	25.5
Total	100%	100%	100%
N =	16	92	165

Note: Based on simple random sample of lawyers, plus a small additional sample of senior lawyers.

Table 8. *Father's Education, By Age of Lawyer (percentages)*

Date of Birth	Percent of Male Population of Father's Generation Never at School	Father's Education				Total	N =
		None	Primary	Secondary	University		
Before 1920	91	27.0	43.2	21.6	8.1	100%	37
1920-29	85	29.2	40.4	22.5	7.9	100%	89
1930-39	83	32.7	31.6	25.5	10.2	100%	98
1940-49	82	40.7	22.2	22.2	14.8	100%	27

Notes: (1) Figures for percent of male population of Father's generation never at school based on 1960 population census, age groups 65 +; 54-64; 45-54 and 35-44 in 1960 respectively.

(2) Figures for education for lawyer's fathers based on simple random sample of lawyers.

entrepreneurial and rural bourgeois backgrounds – as one might expect from the nature of the connection between the legal system and the development of merchant and rural capital. It is notable also that the professional education of substantial numbers of lawyers from rural bourgeois and entrepreneurial backgrounds was privately financed abroad even after the introduction of law scholarships and locally provided legal education in the late 1950s.

(v) There are interesting ethnic and regional variations. For example, lawyers from the coastal areas of early colonial penetration (the Fantis, Gas, Adangbes) tend to be recruited from long-standing professional families or urban white-collar groups (Table 9). In the areas of cocoa heartland, especially in Ashanti where penetration by the world economy was more recent, the recruitment pattern exemplifies a more direct transition from cocoa and trade into law. Furthermore, lawyers from Ashanti tend to become and remain private practitioners (thus maximizing the return to their investments), in contrast to lawyers from other areas

Table 2. *Class Origins of Lawyers by Ethnic Group of Origin (percentage)*

Group	Small Farm	Rural Bourgeois	Entrepreneur	Urban Employee	Professional-Managerial	Total	N =	% already having lawyers or other professionals in family when beginning law training	N =
Ga Adangbe	3.1	3.1	26.5	30.6	36.7	100%	49	79.6	54
Ewe	9.0	13.6	19.4	22.6	35.5	100%	31	73.7	30
Coastal Akan*	14.2	4.7	18.9	26.4	35.8	100%	53	73.6	55
Ridge Akan**	33.3	16.7	10.9	26.0	14.0	100%	50	58.2	55
Ashanti***	17.2	51.6	27.1	0.0	4.2	100%	48	33.6	51
Northern	100.0	—	—	—	—	100%	4	50.0	n4

Figures based on simple random sample of lawyers.

Notes: * Fanti and other Akan-speaking groups in the Central and Western coastal belt of the country.

** Akims, Akwapims and other groups located in or near the Akwapim Ridge in the Eastern Region. This is to the interior of the country from Accra, and was the area in which much of the expansion of cocoa production took place in the early part of this century.

*** Ashanti and Brong-Ahafo: the regions in which cocoa was brought into production from the inter-war period onwards. Now the richest cocoa and timber producing region of the country.

Table 10. *Propensity of Lawyers from Different Ethnic Origins to Enter and Remain in Private Practice*

	Lawyers enrolled up to 1960				
	Ga- Adangbe	Ewe	Coastal Akan	Ridge Akan	Ashanti
% entering private practice as first legal job	76.0 (N = 25)	69.2 (N = 13)	83.3 (N = 30)	89.5 (N = 19)	85.7 (N = 21)
% remaining in private practice all through career	46.2 (N = 26)	30.8 (N = 13)	43.3 (N = 30)	21.1 (N = 19)	47.6 (N = 21)
	Lawyers enrolled 1961-70				
	Ga- Adangbe	Ewe	Coastal Akan	Ridge Akan	Ashanti
% entering private practice as first legal job	54.3 (N = 35)	52.4 (N = 21)	54.8 (N = 31)	51.3 (N = 39)	82.4 (N = 34)
% remaining in private practice all through career	39.5 (N = 38)	52.2 (N = 23)	46.9 (N = 32)	35.0 (N = 40)	61.8 (N = 34)

Note: Based on simple random sample of lawyers plus a small additional sample of senior lawyers.

of the country who seem to be less reluctant to take up judicial or bureaucratic careers (Table 10).

This diversion of cocoa surpluses into the production of lawyers was a significant part of the process of class formation in its own right, especially during the colonial period. At the same time it reflected other aspects of the transformation of the classes structure. First, it paralleled the transfer of resources through taxation and the Marketing Boards from production in the rural areas into the burgeoning state superstructure, a process which gathered momentum during the late colonial period and accelerated under Nkrumah. Second, to the extent that it diverted funds from peasants, traders and chiefs into transferred occupational roles it brought about a certain internationalization of the class structure, subjecting the latter to external principles of organization and status: an argument I shall discuss in greater detail in Section 5 below.

4. The professional responsibilities of lawyers as guardians of individual rights and equality before the law/professionalism as a way of collectively defending lawyers' status and economic interests by controlling the market for their professional services

The lawyers' preeminence during the colonial period largely arose from their role as intermediaries: in transactions with the colonial government; between foreign and domestic capital; and between local landed interests. Furthermore, theirs was one of the few 'elite' occupations not controlled by the colonial government. As a practitioner formerly prominent in the nationalist movement said to me in an interview, 'it was about the only outing we had in those days'.

The profession's market was guaranteed by its monopoly of representation in the higher courts, conferred by the Supreme Court Ordinance of 1876. At the same time the Bar has always been active as a pressure group to defend its interests. In the 1920s, for example, the Bar Association sponsored legislation to prevent letter writers and other paraprofessionals from drawing up legal documents. This was duly opposed before the Legislative Council by Nana Ofori Atta I on the ground that it would make the legal system less accessible to ordinary rural people. The Bar Association was active in pressing the government to open Ashanti courts to lawyers in the 1930s; and to open the lower (formerly 'native') courts to them in the post-War period. Both the colonial and the Nkrumah regimes were wary of permitting lawyers to practise before the lower courts, and they were not allowed to do so until a new Courts Act was brought in by the military regime after Nkrumah's overthrow in 1966.

Geoffrey Bing, who was Nkrumah's first Attorney-General, at one time proposed reducing the status and power of lawyers by flooding the market with trained paraprofessionals. But the profession (including one or two lawyer members of the Nkrumah government) were able to resist his efforts.²⁷ When lawyers were under attack in the last years of the Nkrumah regime (1963–66), the Bar Association resisted pressure to elect a new slate of officers favourable to the regime by ceasing to hold any more formal meetings. In the post-Nkrumah period there have also been a number of episodes in which lawyers have successfully defended their interests, as in 1968 when the Bar Association sued the Chief Justice after he attempted to exclude lawyers who had not obtained certificates of payment of income tax from practice before the courts.

As already remarked earlier, the profession's ability to sustain operations as a pressure group has partly depended on the fact that lawyers in private practice have an economic base which is independent of government control: in that major structural changes in the economy and property relationships would be required to deny them an independent livelihood. But at the same time this imposes certain limitations on the Bar's activities. The organization of the profession reflects, in its decentralization and lack of bureaucratic coordination, the economic organization of law practice in a rural society.²⁸ The Association has had as much difficulty collecting professional dues from lawyers as the latter have in collecting fees from their clients. It has been able to mobilize support very quickly when interests of profession have been directly at stake. But it has generally been less capable of mounting really sustained campaigns around matters of professional or legal principle. (The campaign against military tribunals in 1976–77 and the Bar's participation in the strike of 1977 aimed at bringing down the military government, which I referred to earlier, might seem to be an exception, but in the last analysis it was other factors and discontent in the army itself which brought the Acheampong regime down).

Let us now examine some of the tensions between the manner in which lawyers defend their interests and privileges and the professional ideology by which these privileges are legitimized, especially in the Code of Ethics which has been largely

transferred from the corresponding regulations of the British solicitors. From the point of view of lawyers themselves the primary function of this ideology is to reconcile the two sets of principles under which they work. On the one hand, the principles of the market place under which their services are sold like commodities. On the other hand their responsibilities as guardians of justice and the rule of law.

The Code of Ethics resolves this contradiction by establishing a number of prohibitions against malpractices which are justified in terms of the protection they afford to clients at the same time as they strengthen the organized profession's monopolistic control over its market and the conditions of work of its members. The prohibition against 'touting' or the use of intermediaries bringing in clients, for example, is usually argued for in terms of the need to give members of the public protection against the more unscrupulous members of the profession and their hustling intermediaries. At the same time it offers established lawyers protection from price cutting and other forms of 'unfair competition' from their less established colleagues. Yet the prohibition is largely unrealistic in the Ghanaian context, various arrangements with intermediaries (who are not necessarily paid)" being a well accepted feature of law practice. Indeed, touts and other intermediaries may well make the services of lawyers available to a broader stratum of potential clients than would otherwise have access to them. As one prominent lawyer put it in his interview:

There are the self-appointed touts who do that – insurance agents, ex-local court clerk types and letter writers too. . . . One can find someone of this type in every village – a sort of village solicitor, who is very helpful to everyone concerned. They are people who have a certain amount of specialized knowledge. A cocoa farmer in Brong Ahafo, for instance, will go to a letter writer in his village, and he will discuss his case with him and will advise him to take it to a lawyer and will direct him where to go.

Very few cases of touting ever come before the Disciplinary Committee and even these are generally not dealt with harshly unless outright dishonesty is also involved. Yet there has never been any serious question but that the practice should remain forbidden under the Code. And the great majority of lawyers interviewed said they 'disapprove' of it. One might be tempted to write this off as another example of meaningless foreign cultural imposition. Yet at the same time this and other rules of professional ethics seem at least to symbolize an aspiration that many lawyers share: to secure a degree of control over their own market and conditions of practice that has thus far eluded them.

It is precisely this kind of inconsistency which made the way lawyers responded to questions about their ethics an interesting index both of the ideological function of the Code and of lawyers' adherence to imported cultural standards. Lawyers were asked to react to a number of hypothetical cases illustrating infringements and their responses were summed up in a composite index." Support for the Code of Ethics was found to be closely associated with the work situations of lawyers and their relative wealth and power within the profession, as can be seen in the correlations tabulated in Table 11. Enforcement of the Code was more strongly supported by lawyers in the public sector than by those in the private sector – which is as one

Table 11. *Ideology of Lawyers Correlated with Indices of Professional Stratification*

	Ethics ^a
Work in Public Sector/Private Practice at Bar	.19
Seniority	.13
Court Appears in (Low/High)	.10
Stability of Clientele ^b	.18
Property ^c	.18
Activism in Bar Association ^d	.23
Time on Land Cases	.03

Notes: Based on simple random sample of lawyers. Correlations significant at 0.05 level are italicized.

(a) Ethics index based on responses to questions asking lawyers how they would react to a set of six hypothetical infractions of the code of ethics.

(b) Stability of Clientele index based on responses to a question asking whether most clients were new or had previously been clients.

(c) Property index based on number of houses plus the number of cars each lawyer owns.

(d) Activism in Bar Association index based on frequency of attendance at Bar Association meetings and tenure of office in the National or Regional Executives of the Association.

would expect, as it is against the latter that its provisions would be enforced. It was also upheld more strongly by the senior members of the profession: those with a stable clientele, those who practiced in the higher courts, those who had accumulated more property and those who had held office in the Bar Association; those, in other words, who had the strongest vested interest in maintaining the profession's ideology and public image.

5. Lawyers as members of a transnational legal culture, associated with external economic and political penetration/as exponents of the national interests, traditions and values crystallized in the legal system.

Legal cultures have often been associated with the expansion across national boundaries of economic and political relationships, sometimes even preceding them as in medieval Europe. Yet at the same time there is a strong counter-tendency towards parochialism, in contrast with more universal intellectual traditions like that of science. For legal cultures are closely associated with the conflicts and stresses of particular social formations, be they at the national, the tribal or even the village level. In modern nation states this parochialism often includes, for example, prohibitions against the practice of law by lawyers coming from outside the same jurisdiction.

In a post colonial society like Ghana such contradictions are particularly acute. The entire legal system bears the marks of the imposition of an alien legal culture, not only in terms of the 'reception' of law, but also in terms of the creation of professional institutions. When the Gold Coast Bar Association was formed in 1904 the members wrote off to the Inns of Court for advice on how to establish their association and were referred to the rules and regulations of the Bar Association in Trinidad. This, like the use by Gold Coast colonial officials and judges of draft

legislation or judicial precedents borrowed from other colonies, illustrates the fact that the transferred legal culture was not merely that of Britain. Rather it was a selective adaptation of the latter's legal culture and institutions for the purpose of exercising dominance over colonial subjects, creating something that might be described as an *imperial* legal culture.

Yet this imperial legal culture was itself modified to suit local circumstances and took on new meaning when Gold Coast chiefs, farmers, merchants and lawyers began to use the courts to secure their own political and economic interests. Arguments about the extent to which particular forms are or are not imported tend to be somewhat sterile. Ghanaian lawyers still wear wigs and gowns in court, but primarily because these symbols increase the status they have in the eyes of their own more humble, countrymen rather than because they might impress professional colleagues abroad (though the fact that such symbols are still potent tells us something about the degree to which the class structure as a whole is oriented towards imported symbols of status). What matters is less the particular form but the use made of it in a particular economic and social matrix.

The same may equally be said of indigenous or 'customary' law. We saw earlier, for example, that in leading resistance to the Lands Bill of 1897 the lawyers protected the material interests of African chiefs, merchants and professional men by putting forward certain principles of indigenous customary law ('there is no land without an owner') which had the effect of vesting unutilized lands in the chiefs. Yet there was, at least temporarily, a coincidence of interests between these local groups and foreign concessionaires who also preferred to negotiate their concessions with a minimum of interference from the colonial government. Indigenous law has been reinvigorated to suit the requirements of external political and economic penetration; just as much as much imported legal culture has taken root because it sustains many aspects of the national state, economy and class structure.

This makes it difficult to assess the real meaning of steps taken during the process of decolonization to create a more 'indigenous' legal system: by, for example, making judgements of the British courts have persuasive rather than binding authority upon the Ghanaian courts; by ensuring that most entrants to law practice qualify at the University of Ghana rather than at the Inns of Court in London; and by engaging on programmes of law reform. For such measures come up against a strong historical legacy: a great deal of British law already being subsumed in the judgements of the Ghanaian courts on which Judges must rely for precedents, in the curriculum at the University of Ghana and in the legislation that law reform attempts to consolidate. And even if formal breaches are made in the legacy it is often not at all clear what they mean in terms of any real break with the economic and political structures of dependency.

This ambiguity was fully reflected in the findings of the sample survey on the attitudes of lawyers to imported legal culture. Two main indicators of dependence on foreign models of legal culture were used: an index of the proportion of foreign relative to local law journals and law reports which lawyers make use of; and an index of the extent to which they saw law reform as requiring the large-scale

Table 12. *Indicators of External Legal Dependence Correlated with Class Origins and Professional Socialization*

	Index of Dependence on foreign legal literature ^a	Attitudes to law reform (Indigenization or Importation) ^b
Attitudes to Law Reform (Indigenization/Importation)	.00	—
Seniority	.08	.06
Father's occupational status	.09	.11
Professional connections of family ^c	.12	-.14
Secondary school (Non-Elite/Elite)	.23	-.15
Professional training (in Ghana/abroad)	.19	.11
Professional visits abroad	.14	-.21
Present employment (Private/Public Sector)	.17	-.21

Notes: Based on responses of random sample of lawyers. Italicized correlations are significant at the 0.05 level or more.

(a) Based on the proportion of foreign relative to the total number of legal journals a lawyer reads.

(b) Based on responses to a question asking lawyers what they considered to be the main priorities in law reform, coded according to three categories: outright preference for replacing imported by indigenous law; blending of indigenous and imported; preference for rationalizing legal systems on lines of foreign precedents.

(c) Based on whether these were professionals (1) in lawyer's extended family, (2) among his parents or siblings, at time he enrolled.

replacement of foreign law, the blending of foreign and indigenous law; or the modernization of the legal system along an external pattern.

In the first place there was no correlation (see Table 12) between these two indices themselves, mainly it should be said because *both* the lawyers who read local law journals *and* those who read foreign journals tended to prefer 'indigenous' strategies of law reform (cancelling each other out in the index¹¹). Secondly, the two indices correlated in quite different ways with the same social background and professional socialization variables. Lawyers who came from professional families, who went to elite secondary schools, who had their professional training abroad, who had made professional trips abroad and who worked in the public sector rather than private practice tended (as one might have expected) to read more foreign than local legal literature. And yet on the other hand they tended to argue against, rather than for, law reform strategies based on the reshaping of the law on imported models.

These findings suggest that intensity of exposure to some kinds of external influence (including readership of foreign legal literature along with professional training abroad) may actually stimulate strong cultural reactions *against* external dependence. There are precedents in other cultural spheres such as literature and politics for the same sort of reaction: for instance, the effect of intense French cultural penetration in stimulating the ideology of Negritude in the former French

African countries. Nevertheless, the overall pattern is so uneven as to underscore the ambiguities produced by external cultural penetration and the great difficulty of isolating them for the purposes of empirical analysis.

Conclusion

It is now exactly a century since the official reception of British law in Ghana and the transplantation of an imported court structure and professional institutions. These are reinforced by professional contacts abroad, flows of legal literature and the tendency of Ghanaian judgements and legislation still to be influenced by legal developments in Britain. Yet I have argued that such influences are far less important than the close alignment of the courts and legal profession with the national state, economy and class structure. The mere fact that institutions transplanted in the past are still in operation does not justify one in still talking about dependence in any direct and simple sense. What is crucial is the role of these institutions in reproducing political and economic arrangements which keep the country open to external penetration. Such historical patterns, however, may sometimes clash with new forms of penetration: witness the conflict of interest described above between the rural commodity producers with whom lawyers have been historically connected and the coalition of state and transnational capital on behalf of which the Nkrumah took surpluses out of agriculture. The interaction between external forces and the structures of national production and power is complex; and has continually reinforced the contradictions around which lawyers' roles are organized.

Notes

1. For a more detailed exposition of this point and a description of my research methods, see Robin Luckham: 'The Ghana Legal Profession: A Natural History of a Research Project', *African Law Studies*, 13 (1976).

2. See Polly Hill *Migrant Cocoa Farmers of Southern Ghana* (Cambridge: Cambridge University Press, 1970) *passim*.

3. That is, the southern half of the Gold Coast, excluding Ashanti and the Northern Territories. See the *Draft Report of the Committee on the Tenure of Land in West African Colonies and Protectorates* (Colonial Office, 1917). The reason that concession options exceeded the colony's land area was that there were numerous disputes over the boundaries of the traditional areas. Furthermore relatively few of the options were validated by the courts; and still fewer were finally exploited.

4. According to the *Report of the Commission of Inquiry into Expenses Incurred by Litigants in the Courts of the Gold Coast and the Indebtedness Caused Thereby* (The Havers Report; Government Printing Office, Accra 1945). This estimate was, however, contested by W. E. G. Sekyi, the lawyer for Asamankese.

5. Although the lawyers had played a particularly important role in articulating the grievances which led to the strike, it was the doctors who nearly brought the government to its knees by refusing to treat patients (the withdrawal of lawyers' services being something the government could contemplate with much more equanimity). The government outmanoeuvred the professionals by engaging them in negotiations and then persuading them to go back to work after reaching an interim agreement which was never fully honoured.

6. J. E. Casely Hayford, *The Truth About the West African Land Question* (2nd edition, Frank Cass and Co. Ltd. London, 1971, first published in 1913), 1–2.

7. Though even in the early years some sales took place with written conveyances, and this has now become the practice in the majority of sales, even though such conveyances are no more than evidentiary and are still subject to customary law. See Hill *Migrant Cocoa Farmers*, 160.

8. *Report of the Commission on the Marketing of West African Cocoa* (HMSO Cmnd 5845 of 1938). There had also been an earlier (but less successful) boycott in 1930–31.

9. These measures are too complex to be discussed here. For useful summaries see William B. Harvey, *Law and Social Change in Ghana* (Princeton: Princeton University Press, 1966, Chapter 2, and S.K.B. Asante, *Property Law and Social Goals 1844–1966* (Accra: Ghana Universities Press, 1975).

10. For an interesting account of the political economy of cocoa and the UGFC monopoly see Björn Beckman, *Organizing the Farmers: Cocoa Politics and National Development in Ghana* (Scandinavian Institute of African Studies: Uppsala, 1976).

11. See Robert C. Pozen, *Legal Choices for State Enterprises in the Third World* (New York University Press, 1976).

12. For details see, for example, the *Report of the Commission on Irregularities and Malpractices in the Grant of Import Licenses* (the Ollenu Commission) Accra, 1967.

13. A detailed treatment of these survey data is to be found in Robin Luckham; 'The Economic Base of Private Practice' in *Review of Ghana Law*, VIII, 2 and 3 (1976).

14. *Ibidem*.

15. *Ibidem*.

16. Partly redressed, however, by efforts made in the past decade to strengthen the negotiating skills available in the Attorney General's Chambers.

17. See the Secret Correspondence Relating to the Admission of Lawyers in Ashanti and the Northern Territories (Ghana National Archives, Adm. 12/5/116).

18. The verdict was, however, reversed on appeal to the Privy Council in England.

19. Hill, *Migrant Cocoa Farmers*.

20. Asante, *Property Law*, chapters 2 and 3. He suggests that there were three main periods. In the first, colonial judges on the whole acquiesced in the disintegration of the traditional scheme of interests in land; in the second from the 1920s they attempted – at the same time that the colonial government was attempting to rationalize the system of Indirect Rule – to reassert the principle of community control; in the third, after the colonial period, they attempted to bring about a fusion of customary and modern conceptions of land analysis. He argues, however, that the underlying trend of the erosion of community in favour of individual rights over the actual control and use of land was present in the decisions of the courts through all these three periods.

21. See among others Hill, *Migrant Cocoa Farmers*; Beckman, *Organizing the Farmers*; Maxwell Owusu, *Uses and Abuses of Political Power: A Case Study of Continuity and Change in the Politics of Thana* (Chicago: University of Chicago Press, 1970); John Dunn and A. F. Robertson, *Dependence and Opportunity: Political Change in Ahafo* (Cambridge: Cambridge University Press, 1973).

22. Robin Luckham: 'The Market for Legal Services in Ghana', *Review of Ghana Law*, VIII, I (1976), 14–21.

23. In M. J. Lowy: 'The Ethnology of Law in a Changing Ghanaian town' (University of California, Berkeley, unpublished Ph. D. Dissertation, 1971).

24. During the colonial period education was financed privately by families or stools. It was not until the 1950s that the government itself began to redirect cocoa surpluses into scholarships for (among other things) legal education.

25. Though of course the families of chiefs, merchants and even professional men were connected with agriculture through the ownership of land, trading of cocoa or family links in rural communities.

26. The relevance of father's education or occupation in matrilineal Akan societies might be questioned. Yet data on the finance of lawyers' education suggest that even in these matrilineal societies it is fathers who pay for education more often than maternal uncles. Furthermore, the findings on recruitment by paternal origins shown here are broadly consonant with other data on the number of professionals in lawyers' wider circles of extended family relationships, including matrilineal links.

27. See Geoffrey Bing, *Reap the Whirlwind* (Macgibbon and Kee, 1968), 315–316.

28. See Luckham, 'The Economic Base of Private Practice', where this argument is developed in more detail.

29. Payment is the usual criterion for distinguishing between touting and more 'legitimate' uses of intermediaries, though the distinction is a somewhat theoretical one, being very much blurred in practice.

30. Lawyers were shown these hypothetical infractions of the Code and then asked what action they would take if it came to their attention that a colleague had committed them and whether they would report him to the disciplinary body.

31. Suggesting in this particular instance that it was readership of journals *as such* that is the important variable; though the same problem did not affect the other variables. A fuller analysis is planned than that provided here, using multivariate techniques to deal with some of these problems.

Women Lawyers in Ghana

Introduction: Hypotheses and Methods

The study reported here began as part of a larger project to gather data on women in Ghana undertaken by a group of female lecturers at the University of Ghana in 1974. Data gathering was to center around documentation of the position of women in different occupational groups in the country, their perceived problems, their needs, and their perspectives on the work situation of women. The underlying question¹ was whether traditionally independent West African women are being pushed into the second class status in society usually associated with Western women as the modern sector of the Ghanaian economy expands? The reason for studying women lawyers is to see to what extent women have been able to move into a profession which is part of the modern sector and to secure a place for themselves in it; or conversely to what extent they were prevented from doing so and assigned to an inferior status within that profession. Thus the major focus of the data gathering for this paper was the position of women in the field of law in Ghana, not the impact of women on Ghanaian law or law reform, although the strength and credibility of the female presence in the field would have a bearing on this, and I shall touch on it.

Two contrasting hypotheses about the position of women in Ghanaian law may be put forward: on the one hand (a) because of the nature of the field of law itself and the nature of women professionals' commitments to dual statuses, the problems of women in the field of law in Ghana are of much the same nature as those of American or British women lawyers; on the other (b) because of the traditional independence of Ghanaian women, their position in the field of law is considerably better than that of their Western colleagues.

There is much to argue for the first position. Law is a profession which, at least in its present form, was imported into Ghana. The socialization of the founders of the field, and of many Ghanaian lawyers up to the present, has been in Britain; the structures and traditions of the profession are British, and one would expect the traditions of exclusion of women from the profession, and prejudices against women, thus to be carried over into the Ghanaian context as well.²

The kinds of problems encountered by women seeking careers in law in the United States are documented by Epstein.³ To begin with, women must compete with brothers for scarce family resources allocated for education. Where, as in law

or medical schools, one cannot easily work while studying, women are at a disadvantage in financing professional education. Professional schools have at least sometimes maintained informal quotas favouring women and minority groups.⁴ Once through training, however, women have at least in the past been at a disadvantage in the informal protégée system as it operates in most professions, whereby one's mentor guides and assists one's career. A man is less able to conceive of a woman replacing him, and taking into account the prejudices of colleagues, he is less willing to present women to them as people with potential in the field. Where women do gain entrée into professions they tend to take the path of least resistance into sex-typed areas; women doctors tend to go into pediatrics despite the fact that this is one of the most demanding specialties, because of the mother role implied in that speciality. Women in law tend to get into legal aid organizations in part because of the supposed greater "humanitarianism" of women, and the quasi-social-work nature of legal aid work, in spite of the fact again that the desertion, divorce, delinquency, and family law cases which they thereby handle are among the most sordid and emotionally difficult ones in the field. They are less apt to get into more lucrative and less wearing aspects of law, which also carry higher prestige. Women tend to move into government work and out of private law firms; not only are hours and schedules more regularized, but universalistic criteria are applied, and work is judged on merit.

Women tend to be at a disadvantage in keeping up socially with colleagues, although the latter is valuable not only for continued socialization in the field but in making contacts and being "noticed". This is partly because of the "men's club" atmosphere of the profession. If a woman can't force herself into all-male groups and show that she can keep up with them, she loses out. If she does these things, may cause male resentment because their freedom of informal speech is restricted, or she may be defined as playing an inappropriate sex role and be ostracized nonetheless. The fact that the professional world is a man's social world works against women in other ways too for women do not have the natural entrées through golf, through clubs, lodges, and men's activities to social contact with potential clients.

The second group of reasons for assuming that the problems of a woman lawyer will be universal have to do with sexual status and role. Sexual status is a highly salient status for a woman, usually more salient than her status as a professional. The demands of that sexual status tend to peak at the same times that the demands of professional status peak: at the level of entry to professional training, which is also an age when pressures for serious dating are strong; at the level of entry into the profession, by which time, the woman would be in her late twenties or early thirties and under pressure to marry; and at the point, after several years in the profession, when male colleagues would be beginning to establish themselves, the woman is under heavy pressure to bear children.⁵ Child-rearing constitutes a second major commitment alongside the commitment to career demanded by professions. Despite movements to the contrary in contemporary American society, child care or the overseeing of it is still considered the woman's responsibility, and cannot be

delegated easily, especially when the child is ill. All of these interfere with a woman's ability to perform at maximum commitment and efficiency in her professional role.

Epstein also argues that sex role socialization puts women at a disadvantage in careers requiring independence and assertiveness. In early childhood, women are assigned traits which make crossing into men's occupational worlds a very difficult transition. They are taught passiveness and dependency, or if they do learn to be independent and self-sufficient, they learn to mask it. This again gets in the way of both having and following ambition. Without role models it is difficult for women to conceive of themselves in top positions in their careers. They tend to choose other women outside their professions as reference points rather than male colleagues, blunting their ambition with comfortable comparisons. Women tend to be less afraid of failure or second-rate careers, since the alternative status of full-time housewife is readily available to them.

This brief summary does not do Epstein's work justice, nor does it cover all its subtleties. But it points to important areas of inquiry and raises the questions whether similar obstacles obstruct women's careers in Ghana.

Our knowledge of Ghanaian society indicates that this may not be as true of Ghana as of the Western context. Ghanaian women traditionally have held very different positions from women in the West. They have had a strong economic role through agriculture and marketing activities.⁶ While neither totally independent of husbands nor of male relatives, women do not always live together with their husbands.⁷ And the maintenance of separate wealth in the traditional sector and separate bank accounts in the modern sector is a long-standing feature of Ghanaian marriages. Thus, women should be expected to be more independent, and able to make a transition to a male profession more easily in terms of qualities of self-sufficiency and assertiveness. Further, women have had a stronger and more institutionalized political role in Ghana than in the West. Among the Akan, *obaa panin* advised male elders, and the queen mother both nominated the new chief and articulated women's perspectives and demands in the traditional society. According to some informants, women, in effect, sat on judicial panels in the traditional sector;⁸ and the role of lawyer therefore had traditional antecedents which should provide models to Ghanaian women not available to their counterparts in the West.

On the other hand, women in Ghana are valued highly, if not primarily, because of their ability to bear children, to perpetuate the woman's own lineage in the matrilineal Akan societies or the husband's lineage among the patrilineal peoples. A woman is expected to and does bear upwards of five children during her lifetime; and much larger families are not exceptional. The status of mother is therefore again both a highly salient one and potentially disruptive of women's careers.

Let us turn to the data to see which of these two contrasting hypotheses is supported. These data were gathered in 1975 and 1976, in and about Accra. The 1975 sample consisted of seven out of eight women chosen to represent both a junior and a senior woman in four major areas of law employment, namely private practice, the Attorney-General's department, the judiciary, and a public corporation. A senior woman in a public corporation could not be obtained in the

Table 1. *Number and % of Persons Entering Bar by Year. Population Versus Sample*

	Population				Sample			
	Women		Men		Women		Men	
		%		%		%		%
Prior to 1950	2	2.2	35	3.7	1	5.8	1	5.9
1950	1	1.1	11	1.2				
1951	0		9	0.95				
1952	0		7	0.7				
1953	0		7	0.7				
1954	0		8	0.8				
1955	0		16	1.7				
1956	0		15	1.6				
1957	2	2.2	22	2.3				
1958	0		24	2.6				
1959	3	3.4	36	3.9				
1960	5	5.6	43	4.6	1	5.8	1	5.8
1961	2	2.2	48	5.2				
1962	4		49	5.3	1	5.8	1	5.8
1963	3	3.4	37	4.0				
1964	3	3.4	60	6.5				
1965	3	3.4	48	5.2				
1966	2	2.2	41	4.4	1	5.8	1	5.8
1967	5	5.6	51	5.5	2	11.7	2	11.7
1968	6	6.8	46	4.9	1	5.8	1	5.8
1969	10	11.3	50	5.4	4	23.5	4	23.5
1970	11	12.5	61	6.6	1	5.8	1	5.8
1971	1	1.1	8	0.8				
1972	9	10.2	38	4.1	2	11.7	2	11.7
1973	7	7.9	45	4.8				
1974	4	9.5	44	4.7	2	11.7	2	11.7
1975	4	4.5	55	5.9	1	5.8	1	5.8
	88	100%	922	100%	17	100%	17	100%

time available, and is thus missing from the sample. These women were interviewed intensively (around six hours each) about their attitudes to their careers as well as about their domestic arrangements and their personal lives. This sample was chosen in a non-random fashion, proceeding from contact to contact.

In 1976, a 50% sample of all women lawyers on the Attorney-General's Roll of Lawyers admitted to the Ghana Bar was matched with a sample of men on the basis of their approximate date of entry to the Bar, in order to compare male and female career patterns and progress, and to compare attitudes to the profession and family arrangements. One-quarter of this sample (12 pairs) was selected for personal interview. All others were sent a mailed questionnaire with stamped return envelope. To date 16 out of 66 of the latter have been returned, a rate of 24 per cent yielding, between the questionnaire and interview returns, 17 usable male-female pairs.⁹

In addition, in both years other figures in law were interviewed to gain more

Table 2. *Occupation of Parents of Women Lawyers. 1976 Sample*

Occupation of	Mother	Father
Professional	0	5
Teacher, Civil Service, Nursing	4	3
Business (large scale)	0	2
Artisan	2	1
Trader (petty)	6	0
Farmer	1	2
None	1	
Unknown	3	4
	17	17

general information: the Judicial Secretary, the Law School Dean's secretary, and one of the most senior women in Ghanaian private practice.

The segment of the sample actually interviewed was selected by taking every fourth woman in the sample, and reflects the year of entry distribution of women in the entire list. The remaining five women were self-selected, being among those who bothered to respond to the questionnaire. Thus, the sample used here is unrepresentative of the population of lawyers in Ghana in terms of the point reached in career in 1976 (See Table 1). Insofar as we are comparing matched males with females, this is no problem, but it means that this sample, younger on average than the population, cannot be used to talk about overall female achievement.

The men in the matched pairs average 3.7 years older than women. This seems mainly to reflect the relatively higher social origins of the women. Data on social backgrounds of the men were not collected, data for women (Table 2) indicate origins in families which could afford secondary school and (prior to the establishment of Legon's Law Faculty) legal training costs.

The Structural Position of Women in the Field of Law in Ghana

The percentage of women in the field of law reached a high of 8.86% in 1974 (Table 3); since then there appears to have been a slight decline because of a slight fall in the number of female graduates and female entrants into law school. This figure stands between a low of 0.7% for women in the field of law in India and a high of 36.0% in U.S.S.R.; percentages for the U.S., U.K., Japan and Italy are between 2.8 and 3.8%, and for West Germany and Sweden between 5 and 6%." Thus for a developing country, in fact for any country outside the Communist Bloc, the Ghanaian profession contains a fairly high proportion of women.

Table 3. *Cumulative Percentage of Women in Law by Year*

Year	Women			Men		Men and women	
	Annual No. Added	Cumulative Total	Cumulative, % Women	Annual No. Added	Cumulative Total	Annual No. Added	Cumulative Total
Prior to							
1950	2	2	5.40	35	35	37	37
1950	1	3	6.12	11	46	12	49
1951	0	3	5.17	9	55	9	58
1952	0	3	4.62	7	62	7	65
1953	0	3	4.16	7	69	7	72
1954	0	3	3.75	8	77	8	80
1955	0	3	3.12	16	93	16	96
1956	0	3	2.70	15	108	15	111
1957	2	5	3.70	22	130	24	135
1958	0	5	3.14	24	154	24	159
1959	3	8	4.04	36	190	39	198
1960	5	13	5.28	43	233	48	246
1961	2	15	5.06	48	281	50	296
1962	4	19	5.44	49	330	53	349
1963	3	22	5.65	37	367	40	389
1964	3	25	5.53	60	427	63	452
1965	3	28	5.56	48	475	51	503
1966	2	30	5.81	41	516	43	546
1967	5	35	5.81	51	567	56	602
1968	6	41	6.27	46	613	52	654
1969	10	51	7.14	50	663	60	714
1970	11	62	7.88	61	724	72	786
1971	1	63	7.92	8	732	9	795
1972	9	72	8.55	38	770	47	842
1973	7	79	8.84	45	815	52	894
1974	1	80	8.86	8	823	7	903

This achievement is in spite of the fact that women in Ghana have a handicap in the educational system, more serious even than in the West. Where there is a choice of supporting a son or daughter (or niece versus nephew) through school, the male will be given the education, since his advancement into a job, civil service, or profession will yield the family potentially more return. Ghana Teaching Service statistic for 1973-74,¹¹ shown in Table 4, indicate that females constitute nearly half of the primary and middle school enrolments. But at the secondary or teacher training level, they drop to around one third, except in technical schools where they are even fewer (being mostly in catering or related areas). And finally, women make up only 13-14 per cent of university enrolments.

Once women are into university, they seem to be able to get into law school in the same proportion as they get into university. Griffiths' figures indicate that for 1973, 15% of law students were women.¹² That the cost of legal education discriminated against women can be inferred from Table 3. Prior to the establishment of the

Table 4. *Girls as a Percentage of Enrolments in Schools and Institutions of Further Education, 1973-1974*

Primary school	43.54%
Middle school	41.18%
Teacher training	36.28%
Specialist teacher training	27.10%
Commercial	31.26%
Technical	11.28%
Secondary	27.67%
University	13.51%

Ghana Law School and finally the Law Faculty at Legon, very few women undertook the expensive and lengthy U.K. training; but after the opening of law training in Ghana, the number of women in law grew rapidly. Another prejudice which may have kept families from educating women for law careers was voiced by two informants, one a student, another a bachelor lawyer: that girls with too high professional qualifications might have difficulty in finding husbands or in keeping them. No females reported that their parents were unhappy with their choice of law for that or any other reason, ten of the seventeen female lawyers in my sample were unmarried, of whom four had broken out of previous traditionally or legally sanctioned marital relationships. By contrast, only one man was single and one divorced but not remarried.

Entry of Women into the Field

While Epstein argues that women are at a disadvantage in entry into the field of law in the United States because of lack of the support from professors or mentors enjoyed by men, interviews with the Judicial Secretary as well as my data do not indicate that this is much of a factor in Ghana; if anything, it works the other way. It did not appear that recommendations from and pushes by students' law professors were as much a factor in being accepted into chambers for practical training or ultimately as juniors as in the United States or Britain. In part this is due to the tightness of the market. Students coming out of law school have to "peddle themselves" from chambers to chambers according to the Judicial Secretary, until they find a place where they are accepted. Others may find places through the intervention of family or family friends, or may actually find places in the chambers of family members or friends. Several informants indicated that in this process women have a kind of edge. Seniors in chambers will look more carefully at a man's area of specialization than a woman's, and scrutinize him much harder as a long term prospect. Women are taken in much more readily and with less scrutiny since it is believed that they will leave within one or two years at the most. Getting good or lucrative cases once they are in, however, is another matter.

Specialization of Women

It is not possible to say reliably from these data whether women tend to specialize in any particular content area of law, as there were only two women in my 1976 sample who remained in private practice. Combining the four women in private practice from the 1975 and 1976 samples, two had specialized in solicitors' work, operating entirely out of their offices and never going to court, this in spite of the overall lack of differentiation between solicitors and advocates in Ghana. Of the other two, one has since gone into government employment, and the other is unmarried and just entering on her career. Only two Ghanaian women in private practice have outstanding reputations as advocates. One, whom I interviewed, professed not to specialize.¹³

What is reflected here is the overall tendency for women to get out of private practice, and to prefer bureaucratic employment, either in the Attorney-General's Department or in a government department or public corporation, or in a private corporation's legal department (See Table 5). Asked whether they would consider leaving their present positions for any other positions, and if so for what, men tended to be satisfied with private practice or to seek it as a long-term career goal, after they had gained experience and had made contacts in bureaucratic employment. A few men sought the bench. No women sought to be in private practice who were not already in it. Only one sought the bench, and that conditional upon her not being liable for transfer outside Accra. The remainder were satisfied with jobs in the bureaucracies, or would be satisfied with them conditional upon more advancement or higher pay (see Table 6). These differences in the sectors of employment chosen by men and women, and the preferences of the two for different sectors, are fairly clear-cut. That the data are relatively accurate, at least with respect to the latter point, is corroborated by Luckham's data¹⁴ which also indicate that men prefer and aspire towards private practice. We need to examine some of the reasons for this rather large difference.

Table 5. *Women Versus Men in Different Areas of Legal Employment, 1976*

	Men		Women		% difference
	%		%		
In private practice	38.6	17	15.8	7	-22.8
Attorney-General's Department	9.1	4	15.3	7	+ 6.7
Public corp. or govt. agency	29.5	13	34.0	15	+ 4.5
Judiciary	6.8	3	9.1	4	+ 2.3
Private business	4.5	2	9.1	4	+ 4.6
Unknown	11.3	5	15.8	7	+ 4.5
N =		44		44	
% =	100		100		

Source: The Attorney-General's Roll: correct positions and current addresses were obtained for the entire sample and individuals were assigned to categories on the basis of these.

Table 6. *Would You Leave Present Job and if so For What?*

	Men	Women
No – satisfied with present job in private practice	3	2
seek private practice	4	0
satisfied with present job in judiciary	1	1
seek bench	3	1 ^a
satisfied with present job in bureaucracy	1	4
seek bureaucratic job	1	1
seek higher status in bureaucracy	0	5
other, N.A.	3	3
N =	17	17

^aconditional upon no transfer

First, women see their chances as being better within the bureaucratic setting where pay is on the basis of seniority and merit, calculated on fixed scales. Our data indicate that this is realistic. Figures on salary are admittedly tricky. Lawyers in private practice tend to deflate salary figures if they answer questions on income at all;¹⁴ however, government officers who have tax deducted at source have nothing to hide, and answered readily with figures which cross-checked with those given by others at the same level of employment. A further problem in these data is the very small number of women in private practice whom we can compare with men; only one of those available answered the question on income. However, there are some statements we can make, however tentatively. Men and women in the public sector receive equal pay for work in positions of equal level. If the figures for the one woman in private practice – who made approximately 38% less than her male counterpart who entered the bar in the same year – are at all typical, women and men with the same number of years in private practice do not. Furthermore, she made less than her colleagues (male or female) in the public sector who had entered the bar in the same year. This suggests why a career in the public service might be more attractive to a woman, particularly as she would also gain benefits like maternity leave, child allowances and so forth which would not be available to her in the private sector.

Furthermore, the prospects for equalitarian advancement are relatively good in the public sector. While I do not have figures on promotion for men and women matched by year of entry into, for example, the Attorney-General's Office, one can gain some clue from the figures for the judiciary: women are represented at each level of the judiciary in the same proportion, roughly, as they are represented in the field of law as a whole (Table 7). Two women in the sample complained of discriminatory promotion in the public sector, but it is difficult to verify to what extent the claims were justified.

It is not only pay or advancement, however, which leads women to prefer public sector employment where men do not and to fail to aspire beyond it. Private law

Table 7. *Numbers and Percent of Women in the Judiciary, 1976*

	Men		Women		Total
	N	%	N	%	
Court of Appeal	10	90.9	1	9.1	11
High Court and Acting High Court	22	91.7	2	8.3	24
Circuit Court	14	87.5	2	12.5	16
Magistrate	35	91.9	3	7.9	38
Total	81	90.1	8	9.9	89

Notes:

1. In comparison to the data for the judiciary above, the cumulative per cent of women in the legal profession as a whole is 8.9%.
2. I am very much indebted to Dr Yaw Saffu, Department of Political Science, University of Ghana, Legon, for provision of these data.

practice, as it exists in Ghana, has rigours and frustrations beyond the capabilities of anyone who has no wife or servants who can handle household details. The court day is between 8:30 in the morning and 2:00 p.m. without break; those who are senior on the Roll of Lawyers can ask to have their cases heard before their scheduled turn; when cases do come up, they are frequently adjourned for lack of a witness, defendant, files or opposing lawyer. Male lawyers in the sample voiced the feeling that women were incapable of standing the frustrations of such a life (although most women who had been in private practice spoke of its excitement nostalgically).

The second factor preventing most women from remaining in advocacy, is that of travel. An attorney may have to take on, or be assigned cases in distant parts of the country for which he or she may have to leave at daybreak, return after court, and still hold office hours and prepare cases for the next day. Apart from the physical exhaustion involved, pressure from families tended to stop women from this kind of activity. One junior woman in the 1975 sample spoke of her family forbidding her to take out-of-town cases after she was in a taxi accident while pregnant and the senior attorney in her chambers assigned her in-city cases for the duration of the pregnancy. Another woman spoke of her fiancé driving her to and from out-of-town cases at the expense of his own work, which put heavy pressure on her to seek government employment. Even the foremost (and unmarried) female advocate does not usually accept cases out of Accra.

One of the factors frequently cited by both male and female lawyers as a further reason for women staying out of private practice is the number of hours' work which a private practitioner must put in. For the private practitioner, court goes from 8.30 to 2.30; private practitioners then go to a local restaurant for lunch and beer and informal review of cases; office hours may go from 4.00 until 6.00 or 7.00, and cases for the next day must be researched, either at the office or at home. This makes an 8.30 to approximately 6.30 day, plus evening research and catching-up. The day for

the public sector, however, is not that different, the workday being 8.30 to 5.30, with evening work and catching-up. Comparing males in the public and private sector, both spend an average of just over two hours working in the evenings.

The problem for women here is not just the hours, but the distribution of them, and the venue. Office work is less strenuous, and the schedule is predictable. One does not have to have the flexibility to stay for late office hours. Women in the public sector do not need to return to the office at night as some male attorneys in private practice do. Where extra work needs to be done, many do it over their lunch break and do not take work home in the evenings. The unpredictability of private practice and the flexibility demanded by it constitute more of a strain for married women and especially mothers.

Woman's Role

This would seem a useful place to look at the sexual status of women in Ghana and what their role entails to see to what extent the structure of the law profession works hardship on them. Traditionally, among all Ghanaian groups, the woman contributed heavily to the household, which is seen primarily as her responsibility. The woman traditionally farmed, contributing agricultural produce to her household, while the husband provided meat, or among the coastal peoples, fish. The woman was responsible for part of the provision and all of the preparation of cooked meals. In the modern sector, this means earning cash income and purchasing. Fiscal separation of husbands and wives is virtually complete, with the woman providing for her own needs and roughly half of those of her household and her children. Among the traditional matrilineal peoples, maternal uncles provided part of the upkeep of children; increasingly in the modern sector, fathers are providing school fees and other benefits for their children, and children are inheriting from him. But the child's ties, particularly among the matrilineal peoples are with his mother, and child's care is the responsibility of the mother.¹⁴ Traditionally, the woman shared household burdens by cooperation with female kin, spreading out the responsibility of her own farming, trade and child care. Husbands were not involved in these activities. In the modern sector where women and their husbands live in urban areas apart from kin (and in conjugal households which are not as open to kin), women still cannot call on the help of female relatives, the tradition of male aloofness from household running dies hard. Thus, women have all the burdens of running a home (except for the provision for major maintenance of the house), as well as the burdens of career. Women do have help; far more than in the West, female help is available for housework. This may be obtained through a kind of fostering arrangement by which a child of a distant (usually poor) relation comes to live in the household and do housework in return for maintenance and the supposed advantages of being with a wealthier family. It may also be obtained by hire on the open market. In most cases, however, the household help is poorly educated (if at all) and generally less capable and responsible than the woman herself would be. Particularly in the area of child care it is a constant source of worry. Overseeing of work, planning the purchase of food,

provision of clothing, overseeing of child care and most handling of medical emergencies is still the job of the woman, frequently requiring as much time as doing the work herself. The wealthier and more established woman can afford better and more complete help. The burden of housework and child care falls hardest on the young woman professional whose salary does not permit the kind of help she would like."

That these patterns still prevail among women lawyers can be seen from our data. While the typical male lawyer spends between one and two hours a day and one weekend day with children, the typical woman lawyer reported spending three or more hours a day plus all weekends. Apart from three cases where the servants did it, all women reported doing most or all of the food shopping for their families personally. Men reported doing none or some; the latter generally meaning the purchase of foodstuffs by the roadside when returning from "trek" (out-of-town cases). The only two men who reported doing all their own shopping were a bachelor and a husband who was living on his own. Presented with a list of household chores which regularly have to be done, only one married woman reported a husband doing more than paying bills and providing for car maintenance; the husband of the woman in question helped get his children ready for school in the morning. Thus, along with an eight to ten hour workday, the woman has virtually the full burden of the household to maintain as well, restricting the amount of time she can spare for the extracurricular aspects of her career.

Status Conflicts

It is precisely this lack of "extra" time to put in on a career, and the commitment to career which it implies, however, for which women lawyers are most heavily criticized. Both male and female lawyers were asked whether they thought women made worse, equal, or better lawyers in comparison to men, and, all other things being equal, whether they would have a male or a female lawyer defend them in a case. One-third of the men (none of the women) said they thought that women made poorer lawyers. Ten of the seventeen men (as opposed to four of the seventeen women) said they would choose a male to represent them. Among both men and women who would choose a male attorney to defend them, the reason most frequently offered was that men spend more time and would be less apt to have to adjourn the case because a child in the family was ill. None argued that women were less intelligent or that they analyzed or argued cases or did work less capably, but only that their minds were divided. "They'd rather go home in the afternoons and make tea for their husbands." Men, especially, perceived women as always being sick or being away.

The latter appears to be a matter of folk wisdom rather than reality, at least as reflected in these data. The number of men and women (both in the public and private sectors who reported having had to miss work for a family emergency in the least two months was almost exactly equal. However, it does appear that women are less apt to take work home from the office, or if they do, to spend long hours at it. Women average an hour less a day on work done at home, and four women,

as opposed to no men, reported never taking work home. All of the women who reported doing three to four hours' work at home were either single or living apart from their families, and three of the four reporting never taking work were women with children.

Socializing with Colleagues

A further reason for the perceived lack of commitment of women to the field has been their relatively poorer visibility and integration with male colleagues. As with the issue of women not putting in extra time, and being absent from work because of responsibilities to children, this is a mixture of myth and reality. To a certain extent their sex and alternative responsibilities as well as their location in the profession do seem to hold women back from socializing with male colleagues; on the other hand, it is males more than females who perceive this most, and it appears to be older and more established men who perceive women as marginal more than younger lawyers and women themselves.

The foci of socializing in the profession in Accra have been the "Bar Canteen" in the High Court Building and the restaurants near the courts. Speaking of the Bar Canteen, one older and more prominent male informant said, "of a crowd of twelve in there, rarely would there be one woman, and it would usually be For example at recess, if there is a woman prosecutor and it is a juicy case, or if the jury rises, the men will be in there discussing the case; if she goes at all, you'll find her drinking Coke and looking cross (waiting for the case to resume), while men drink beer and pull each others' legs and critique each others' presentations." That women lost from not having these informal interactions is suggested by the same informant: "Lawyers learn strategies from each other in the restaurants in the High Court area. . . You can tell a male colleague what you think of him in a restaurant over beer afterward. There is no woman there. You can't tell her off. Cases are hashed and rehashed. Strategies are previewed." As a consequence, "at big gatherings you find that women find that old cases are news."

Several male lawyers established in the profession commented on this and the reasons for it. Mens' and womens' social spheres in Ghana have been traditionally separate, men keeping company with men and women with women. Further, lawyers interviewed reported that male lawyers are ambivalent about women being among them. Many men in Ghana, particularly in professions which allow them to afford it, maintain extra-marital relationships. These are jocularly discussed in all-male company, and the presence of female lawyers is therefore a source of discomfort, restricting male conversation. One male lawyer alleged that the divorce rate among lawyer-lawyer marriages was extremely high because of women getting to know from colleagues of their husbands' extra-marital affairs. Women are thus less than welcome.

However, this again may be a matter of male perception and particularly older male perception. First, the divorce rate among lawyer-lawyer marriages, as checked by going through the Attorney-General's roll with an informant widely acquainted with the legal profession, is 29% – five divorces out of seventeen lawyer-lawyer

marriages, with one additional woman who divorced one lawyer and married another. Secondly, informal discussion with female informants indicates that women do not feel excluded from informal interaction, even at the Bar Canteen, especially the younger women lawyers who have sought involvement in the profession. Further, attempting to check on the differential involvement of men and women in socializing with colleagues, I found little overall difference: three hours a week for women and four for men. However, it would appear from the activities mentioned that both men and women in government departments counted consultation with colleagues in the office and visits over bag lunch or in the evenings with other lawyers as socializing, where lawyers in private practice counted only hours over restaurant lunch or in the evenings with other lawyers as socializing. Both men and women in the public sector are less visible and probably less integrated than those in the private sector, but it would take further research to determine whether men in the public sector are at as much of a visibility disadvantage as women.

Intersex socialising is done in more formal contexts, for example, the Bar Association. Up to and including the period in which this research was done, the center of gravity of the professional socializing was largely, however, in the informal contexts. Few men or women at that time reported more than minimal involvement with the Bar Association, the Association being perceived by both men and women as being for older and more prominent lawyers. Apart from two women – one who had been a Bar Association treasurer and one who aspired to office in order to represent womens' interests – no other members of the sample said they had ever held office in the Bar Association. Only the more established male practitioners aspired to Bar Association office. That this may, however, be changing is indicated by recent discussions with women informants. Women have been pushing for offices in the Bar Association and are obtaining more than token posts as regional treasurers. Part of this may be due to the more activist position of the Bar Association in politics in 1977–78, and in the planning and sustaining of the lawyers' strike. It may be argued that this has raised the Association to greater prominence in professional matters, than reducing the relative importance of informal in-court contact.

Women do have their own legal organization, F.I.D.A., (Federación Internacional de Abogadas) an organization which originated in Latin America, though its headquarters are in New York City. This organization appears to address itself to specific issues and topics such as the reform of marriage and inheritance law. This does not provide the kind of socialization through discussion of cases and strategies which might be obtained in mens' informal gatherings. However, they are becoming something of a force, presenting to the Attorney-General position statements on needed areas of law reform which would aid women, and taking up womens' cases. Discussion with lawyers indicates that involvement in F.I.D.A is one element leading to greater participation of women in the Bar Association, in that it is realized that to represent womens' interests, one must work through established institutions as well as single-sex ones.

Social-Psychological Impediments to Careers

There are three kinds of problems raised by Epstein here. First, in the West women are trained to think in terms of the alternative of homemaking as a career, and are more apt to accept a second class career or to drop out of a career altogether. Second, women take inappropriate reference groups – non-professional women rather than colleagues – thus limiting the scope of their ambitions. Third, the qualities which are selected and rewarded in women are inappropriate to the professional role and to professional advancement.

The first of these does not apply directly in Ghana. There are almost no women in Ghana who do not work in some capacity. A very small percentage of even the urban elite wives report only being "housewives". Most at least have some craft or line of petty trade. Thus, the Ghanaian woman lawyers' role models, while they might not be professionals, would not be non-working housewives. The option of not working and retiring to the protection of a husband and the raising of a family is not open as an option, and lesser careers, like teaching or nursing, are far less lucrative than even the least lucrative law job." Given the expectation noted above that women provide for their own personal needs, and part of their childrens', women in law would thus not have the psychological option of withdrawal which the Western woman would have.

Neither do these women take non-professionals as reference groups. Asked to name and give the occupation of their closest friends, all women who reported having close friends were friendly with other professionals, six of them with other lawyers, five with other university trained professionals.

Neither the data nor personal experience in Ghana permit statements about what qualities are rewarded and selected out in female children in Ghana, nor about the qualities Ghanaian women perceive themselves as having; thus we cannot, as Epstein does, draw direct contrasts between enculturated traits and traits the profession demands. One can, however, working especially from the in-depth 1975 interviews, make statements about the difference between expected professional behavior and behavior expected in the conjugal home.

First, the law profession expects and rewards with some prestige, assertiveness, "toughness", and a combination of qualities which might be grouped under the general rubric of "command of the situation", such as logical presentation, ability to be heard, coolness, evidence of having done one's homework, and "presence". Six women were frequently mentioned as having or having had these qualities: "Oh, you should talk to. . . ., she's one of our best. She is smart and tough as any man." Male lawyers do not believe women in general, however, to have these qualities. Most prominent among the other reasons offered in answer to the question of why men would not want a woman lawyer to defend them, is a statement like, "She can't make herself heard"; "Women get emotional and irritate the judge"; "not if it's a case where I want to collect money; she'll be too easily swayed by the other side". It was alleged by some non-sample informants that defendants facing long sentences would not risk having a female attorney; that insurance cases do not go to women because they are not forceful enough in bargaining; and that women prefer the

bureaucratic context situation where they would do a piece of work for a boss and are praised by him or not for their performance – to being in the courtroom situation where they have to enter into open competition.

These allegations are not necessarily true. Women are employed as prosecutors by the Attorney-General's office and are generally successful. They are employed and are successful in negotiating cases for the State Insurance Corporation. The last assertion, that women do not prefer the rough and tumble of court, is an inference from woman's place to woman's qualities. However, the fact that all three are part of the folk wisdom, and are repeated with disapprobation, indicates what qualities are ideally expected of a woman lawyer.

On the other hand, in the conjugal home, both independence and assertiveness appear to be negatively valued qualities in a woman.²⁰ Why this is so has to do with questions of power in the conjugal unit. Where a woman is educated and has relatively high income earning ability, she has more power in the conjugal relationship.²¹ Being educated, and therefore somewhat westernized, and generally far from her kind, she is apt to expect more out of the marital relationship and is in more of a position to insist on her expectations being met. Here, we have no systematic data, since husbands of women lawyers were not interviewed. However, spontaneous discussion of the point was provided by two male lawyer informants. Said one, "Women lawyers know their 'rights' under ordinance marriage and insist on them, but husbands simply won't be bound". According to him, a man's expectation is that he should provide for the woman's household and in return have his freedom. In the past this has been expressed in polygynous relationships or in keeping mistresses in the modern sector where ordinance marriages do not permit polygyny. While women lawyers have greater possibilities of sustaining themselves in the event of a marital break-up than their less well-employed sisters, their possibilities of remarriage are much lower than those of their spouses. There is in any urban area a readily available pool of secretaries, clerks, nurses, and so forth, who would be interested in entering into a relationship with a relatively well-to-do man on either a permanent or impermanent basis, whereas the pool of educated males is small, and shrinks as the age cohort matures. Thus the woman loses in lack of alternatives what she gains in financial leverage. The very financial leverage itself and the woman's ability to sustain herself in the event of break-up seems to be a threat *per se*. One of the male lawyers, in remarking on women lawyers said: "Rich women get uppity. Some of our Makola market women say, 'for what do I need a husband?' Men in Ghana don't like that." Corroborating this, among the 1975 sample marital tension seemed to be higher in those couples where equality was greatest, that is where the couples were closest in age, income and job status. Women tended to avoid quarrels assiduously, as men tended to walk out, leaving women to worry what they had driven the men to.

Thus the woman lawyer has three choices in what amounts to a no-win situation: to generalize her assertiveness and risk her marriage; to generalize to the work and the home situation qualities of dependency and deference, in which case she violates the norms of the work situation; or to try to change masks between work

and home, which is at best a difficult task and one which may placate neither audience. Her best alternative is to marry an older, well-established man of higher income than she, who has ceased to have outside affairs. This possibility is however exceedingly small.

Problems and Prospects

In summary, women in Ghana defy educational barriers and the prospect of status conflicts of a fairly difficult sort to enter law in greater proportions than in the West. However, once in the field, they are pushed by those status conflicts into public sector positions which are much less prestigious²¹ and less lucrative than private advocacy where the social center and nerve center of the profession seems to be. Even in the public sector, they are taken less seriously by male colleagues not because of their basic ability, but because they are perceived, rightly or wrongly, as being less committed, and spending less time on the profession. Supposing that women do want to be taken seriously and accorded full status as professionals, and that law practice in the public sector is not going to be collectively redefined as a comfortable bureaucratic career compatible with the talents of women (as medicine has been redefined in the U.S.S.R.), and assuming that women wish to make an impact as professionals in the upgrading of the position of women in Ghana through the use of law, what are the prospects of women for success?

These prospects rest on several things. The first would be the maintenance of the numerical strength of women in the field. There is some evidence that the female law enrolments have been dropping since 1974. The reasons for this need to be investigated further. This relates in part to the perceptions of potential female law students of chances for employment once through school. Private practice is relatively saturated, and the continued downward movement of the Ghanaian economy is undercutting the livelihood of those who are already in the field. It is less likely to appeal to anyone, but far less likely to appeal to women, given its already difficult problems of competition and the difficulties women have in giving the competitive race all their energies. The traditional haven of women, public sector employment, may not be indefinitely elastic either. There has been a tendency over the past several years for many of the public corporations and departments to establish their own legal sections to avoid having to go through the delays inherent in going to the Attorney-General's staff, and perhaps not finding anyone with requisite expertise. Inland Revenue, the Passport Office, Highways, Lands, and other departments now have Legal Officers seconded by or equivalent to State Attornies in the Attorney-General's department. GIHOC (the Ghana Industrial Holding Corporation) also has a legal department. These have given employment to many coming out of Legon both as job seekers and National Service students, but this expansion is finite, and as public sector employment closes off, so will the haven which women have had. The only other open door would be further specialization of women as solicitors.

Part of the problem of being taken seriously in the field may right itself with the maturation of an age cohort. The first Legon women are only ten years into the field

now, and given their propensity to bear numbers of children (the average is three for women in my sample with children) many are just now, in their late thirties and early forties, past childbearing age, with their completed families in school. Older women in the field are generally respected for their contributions. The ones who predated the Legon graduates have attained relatively high positions. To the extent that others reach the same level of partners or seniors in chambers, chief legal counsels to public or private corporations, or high positions on the bench, women on the whole may benefit from a corporate redefinition of their status and potential. As women have their families comfortably settled, they may have more time for involvement with their professions – for Bar Association activities and for work outside the office – and can be more involved in career and visible activities. Two things may work against this however. First, many are now in relative “backwaters” in civil work or drafting in the Attorney-General’s or Registrar-General’s departments or in other government departments where they do not go to court and are not seen, whatever their contributions. Second, in some of the legal departments their contributions may be small. Several lawyers in the departments, both women and men, felt they were underemployed. Under these circumstances both the potential contribution to the field through one’s job and the motivation to make such a contribution may be severely reduced.

Another important variable here is the ability of F.I.D.A. to establish an image as something more than a ladies’ association. One prominent informant, prefacing his remarks with the phrase, “the ‘girls’ in F.I.D.A. are good friends of mine”, went on to voice his appreciation of the ball F.I.D.A. had given for the centenary of the High Court, but felt it was a contribution which was “more characteristic of ladies than of lawyers”. In part this is unjust. F.I.D.A. does work in the area of women’s rights, discussing draft legislation in the area of marriage and inheritance law, and in sending its members to women’s groups to talk about women’s rights under law. However, this same official felt that rather than going to the Chief Justice or the Judicial Secretary with complaints when a violation of women’s rights is discovered, F.I.D.A. should organize itself and get members to initiate cases in court to give specific help to injured parties and establish precedents. The Ghana National Council on Women and Development sees a role for F.I.D.A. in giving legal advice to the Council and to women’s groups – not just in court cases, but in disputes which might end in out-of-court settlements, and in preventing discriminatory administrative decisions which are contrary to law.”

That this is beginning to happen in F.I.D.A. I have indicated above. It appears that greater involvement at this level is a stepping stone to greater Bar Association participation and to greater leverage.

Conclusion

On the whole, therefore, women lawyers in Ghana are in an advantageous position relative to both their counterparts in the West and their sisters in other occupational

groups in Ghana. Their numerical strength in their fields is greater than in the West, and unlike their Western counterparts they still have relatively available household help at relatively inexpensive rates. Boarding school education at the secondary school level virtually removes the burdens of child care after the youngest child is over eleven or twelve years of age. Marital relations may be more strained in the home of the female lawyer due to relative lack of change in male attitudes towards the home in comparison to the West, where men are to a greater degree shifting into an equalitarian home role. However, in comparison with her Ghanaian sisters, the woman lawyer is more able to cope with the consequences of marital dissolution.

In the field of law, however, in comparison with male colleagues, women are in a disadvantaged position due to the pressures of the wife/mother role which demand that extra time be given to the home instead of the career, and the consequent perception of women as "not serious" about their work. Women thus are pressured out of private practice. While their talents are used in public sector positions and their actual work may be comparable to that of men (for example, prosecution, civil work in the Attorney-General's office, insurance case settlement in the S.I.C.) the rewards in money and prestige for it are not as great. Public sector work may, however, also be in out-of-the-mainstream areas which do not bring women, or the male lawyers in the same positions, into contact with the courts and the social center of the profession.

The ability of women to change this will depend on their numerical strength, their length of service in the field, and their ability to make an impact through their own organization.

Notes

1. A. Wipper, "The Roles of Women: Past, Present and Future," *Canadian Journal of African Studies*, 6 (1972), pp. 143-6; A. Smock, "Development and the Education of Women: The Case of Ghana" - paper presented at International Division Meeting on Support of Education, Ford Foundation, September 1975; C. Oppong, C. Okali and B.D. Houghton, "Woman Power: Retrograde Steps in Ghana," *African Studies Review*, December 1975.

2. One Ghanaian woman lawyer who qualified for the Bar in Britain in the 1950's along with six other women reported that none of the seven could get into chambers. She got a position through a ruse, in which one of her professors recommended her to a colleague using only the initials of her first name. Even so, the duped solicitor sought to refuse her a position on the grounds that his offices had no female toilet (from personal interview).

3. C. Epstein, "Encountering the Male Establishment: Sex Status Limits on Women's Careers in the Professions," *American Journal of Sociology* Vol. 75, No. 6 (1970), pp. 965-982. See also C. Epstein, "Women Lawyers and their Profession: Inconsistency of Social Controls for Professional Performance" - paper presented at the 64th Annual Meeting of the American Sociological Association, 1969; also in A. Theodore, *The Professional Woman* (Cambridge: Schenkman Co., 1971).

4. *Ibid.*

5. A. Theodore, "The Professional Woman: Trends and Prospects" in A. Theodore (ed.), *The Professional Woman* (Cambridge, Mass.: Schenkman, 1971).

6. J. North, et al, *Women in National Development in Ghana*, prepared for U.S.A.I.D., Ghana, April 1975.
7. M. Fortes, "Kinship and Marriage among the Ashanti," in *African Systems of Kinship and Marriage*, Radcliffe-Brown and Forde (eds.), (London: Oxford University Press, 1950), pp. 252-283.

8. Interview with one of Ghana's leading female legal practitioners, Akua Asaabea Ayisi. See also M. Greenstreet, "Social Change and Ghanaian Women," *Canadian Journal of African Studies* Vol. II, pp. 351-355.

9. The data gathering was typically difficult. The Attorney-General's Roll of Lawyers admitted to the Ghana Bar, although revised to October 1975, failed to reflect even quite old changes of chambers of many private practitioners. The current addresses of only the largest chambers were available through the telephone directories; locations of many of the persons in the sample had to be obtained through the Secretary to the Bar Association who culled them from memory, letterheads, and files, and from friends and secretaries in the course of two interviews with him. Nobody else, including the Judicial Secretary, had extensive enough contacts to produce the addresses and locations of the lawyers on the roll, and no current compendium of contacts was anywhere written down. This becomes interesting when one considers that some referral of potential clients to attorneys is done by the Judicial Secretary, who operates on a fairly narrow range of contacts. It certainly reflects the great informality and personal contacts basis of the profession.

Further, neither the Attorney-General's list nor the lists within government departments (e.g., the Attorney-General's department) reflected the current state of who worked where; several persons sought at the Attorney-General's office in the Ministries area had been seconded for more than a year to, for example, the Lands or Income Tax Departments.

The actual refusal rate for interviews was nil, though one interview was lost through a last minute time misunderstanding. The amount of refusal to answer questions was virtually nil, there being only two cases of any kind of resistance.

10. Epstein, *op. cit.*

11. From Smock, *op. cit.*

12. J. Griffiths, "On Teaching Law in Ghana and Related Matters," *Law Center Bulletin* (New York University), 21 (1), pp. 4-8.

13. Information from male lawyers, however, indicated areas in which women did not specialize. Insurance cases, which tend to be highly lucrative, are handled primarily by men. Many of these are settled out of court, and both men and women believe that women are too apt to be sympathetic to the other side, and not tough enough bargainers. If this prejudice obtains within the law profession we may well guess that it does so among the lay public as well.

14. R. Luckham, "Imperialism, Law and the Class Structure: The Ghana Legal Profession" in this volume, *supra* Chapter 14.

15. After pretesting I reverted to asking what income the lawyers reported on their income tax. While this was obviously low, it at least elicited answers. Even the low figures for the private practitioners show differences between men and women, and the figures for male private practitioners compare very favourably with the public sector.

16. North, *op. cit.*; C. Oppong, *Marriage Among a Matrilineal Elite* (Cambridge University Press, 1974).

17. Even where this is possible it is disapproved by men. One lawyer's husband is reported to have told his wife he "married her not the maid."

18. Oppong, *op. cit.*

19. W. Bleek, "Sexual Relationships and Birth Control in Ghana: a Case Study of a Rural Town," University of Amsterdam, 1975.

20. Oppong, *op. cit.*

21. Luckham's data, *op. cit.*, indicate that men prefer private practice to public sector employment; it is seen as a lower kind of career path.

22. Several recent cases have involved land allocation to women on an equal basis with men, women not being allowed to stand surety, and women being asked to bring authorization from their husbands to get a passport.

References

- Bleek, W. 1975 (c) Sexual Relationships and Birth Control in Ghana: a case study of a rural town. *University of Amsterdam*.
- Epstein, C., 1969, "Women Lawyers and their Profession: Inconsistency of Social Controls for Professional Performance", Paper presented at the 64th Annual Meeting of the American Sociological Association, 1969; also in A. Theodore, *The Professional Woman*, Cambridge, Schenkman Publishing Co., 1971.
- Epstein, C., 1970 "Encountering the Male Establishment: Sex Status Limits on Women's Careers in the Professions". *American Journal of Sociology*, Vol. 75, No. 6 (1970), pp. 965-982.
- Fortes, M., 1950, Kinship and Marriage among the Ashanti, in *African Systems of Kinship and Marriage*. Radcliffe-Brown & D. Forde (eds) London: Oxford University Press, pp. 252-283.
- Greenstreet, Miranda, "Social Change and Ghanaian Women, *Canadian Journal of African Studies*, Vol. II, 351-355.
- Griffiths, J., 1974, On Teaching Law in Ghana and Related Matters. *Law Center Bulletin* (New York University), 21; (1) pp. 4-8.
- Luckham, R., 1978 "Imperialism, Law, and the Class Structure. The Ghana Legal Profession". Chapter 4 above.
- North, Jean, et al., 1975, *Women in National Development in Ghana*, prepared for U.S.A.I.D. Ghana, April 1975.
- Oppong, C., 1974, *Marriage Among a Matrilineal Elite*. Cambridge: Cambridge University Press.
- Oppong, C., Okali, C., Houghton, B.D., "Woman Power: Retrograde Steps in Ghana", *African Studies Review*, December 1975.
- Theodore, A., 1971, "The Professional Woman: Trends and Prospects" in A. Theodore (ed) *The Professional Woman*, Cambridge, Schenkman Publishing Co.
- Smock, A. 1975, Development and the Education of Women: The Case of Ghana. International Division Meeting on Support of Education, Ford Foundation, September (mimeo).
- Wipper, A. 1972 The Roles of Women: Past, Present and Future 6 (a) 143-6 *Canadian Journal of African Studies*

Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations

Lawyers in Kenya and Tanzania appeared with colonialism. The need for their services, and a delineation of their role, were defined by the form of colonialism that emerged in these countries. Since lawyers performed their services in relation to the official system of courts and administration, they were firmly tied to the machinery of the state that was required to complete the annexation and domination by metropolitan interests of these countries. They were involved in the establishment and perpetuation of the colonial modes of production. It is therefore obvious that the role of lawyers can only be understood in the context of the organisation of the economy brought about by colonialism. Yet when we look more precisely at the functions of lawyers, we find that they do not always fit fully with the forms of the economy. The capitalist relations that were introduced through colonialism provided for a narrower role for the lawyers than in other market economies. To understand this inconsistency, we have to turn to the contradictions in the colonial economies of Kenya and Tanzania, between settler and peasant modes of production, and mediations effected by the state in attempting to hold the tensions that arose from these contradictions in some semblance of balance. With independence some of these contradictions disappear or appear in a different form, and new ones emerge; the role of lawyers is correspondingly affected.

This essay is not intended to be a comprehensive survey of the changing situation of lawyers in these countries. The development of the legal profession in Kenya until well into independence has been related elsewhere,¹ and contemporary profiles of the profession in Kenya and Tanzania are contained in this volume (Odenyo and Rwelamira respectively). Instead, it seeks to sketch out the outlines of the framework within which the roles of legal professions, especially in dependent and colonial economies as well as in post-colonial states, can be understood. It also examines the problem of the persistence of legal forms and traditions and examines the scope that new states have in altering the inheritance of the organisation of legal services. Kenya and Tanzania have passed through different periods of economic and social change, and their contemporary situation displays such wide disparities of economic

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and political organisation that a study of this kind provides ample opportunities to explore similarities and contrasts, and their impact upon the organisation of the legal profession.

The Colonial Period

As recent work has shown, the tasks that the colonial state had to perform in Kenya and Tanzania were complex and contradictory.² In Kenya they arose most sharply, mainly due to the pretensions of the European settlers, and their attempts to turn Kenya into a white dominion like its "white" southern neighbours. The primary goal of colonialism in Kenya and Tanzania was the enhancement of imperial economic interests, which meant in practice the production of raw materials for the British manufacturers and consumers, and the creation of markets for British goods. In the early years of colonialism there was a great deal of controversy as to whether this production was to be organised on the basis of African peasant agriculture as in West Africa or European settlement and plantations, as in Rhodesia. In Kenya the decision at first was made in favour of European settlement. This decision guided the development of the economic and political institutions in Kenya. In Tanzania the decision was not clear cut; European settlement was encouraged at first, but then African production was promoted, although plantations also made a significant contribution to overall production. Even in Kenya the picture was ambiguous; European production was poor and expensive, and while European settlement was being promoted as state policy, production from African areas was of greater economic significance. European production was expensive in part because it needed costly investment in infrastructure and social facilities, and the retail prices had to reflect the entire costs of production and marketing. This produced the first of the contradictions which the colonial state had to handle: that between metropolitan capital, which wanted East African produce at least cost, and local European settlers who wanted to protect their own output, regardless of the extent of public subsidy and therefore of the real cost. While this contradiction was not resolved for a long time (in Kenya not until the late 40s), its resolution was less a matter for the colonial state than for the metropolitan state. The colonial state was subordinate, and in the end the metropolitan state acted to safeguard the interests of the metropolitan capital.

The colonial state, however, was more decisive in handling another contradiction, that between the modernised sectors of the economy, as represented by European settlers or planters, and the subsistence sector. While the state in both countries was committed to the establishment of capitalist relations, there was less agreement on how extensive these relations should be, nor on the precise relationship between the capitalist mode of production and the traditional. It was clear that the state had to intervene in favour of the capitalist sector, if it was to get off the ground, and it was also clear that the subsidies that the capitalist sector asked for had to be found essentially within the country itself. That the traditional sector

would have to subsidise the capitalist sector was inescapable. This in turn required state intervention, for at this time the traditional sector had a self-sufficiency which enabled it to keep its distance from the capitalist sector. It was necessary for the state to provide labour for the modern sector, which could only be done by compelling people from the traditional sector to leave that sector. This could either be done through outright compulsion or by imposing the necessity on them to earn money income, to pay, for example, a head tax. By and large the second alternative was adopted (even this, as has been pointed out, did not always generate labour for the modern sector, because it led to the production, in the traditional sector, for the market).³ The wages of these labourers were determined on the assumption that they depended on the subsistence sector for part of their livelihood, so that the subsistence sector subsidised the modern.

There were other ways in which the modern sector articulated with the traditional, the mode of the articulation being determined by the state. In order to bolster the rather inefficient settler agriculture, it was necessary to establish certain monopolies in its favour. It was, for example, forbidden for Africans to grow coffee in Kenya (the pressure from Tanzania settlers for a similar ban on Africans in that country was successfully resisted by the government, allowing for the development of peasant economies in some regions). It was further necessary to provide for monopolies and guaranteed prices for the settlers in the marketing of certain crops, maize for example.⁴ Further subsidies were provided for them in the form of preferential transport rates on state railways for their products and through the imposition of duties on the importation of tropical and dairy products that were grown by the Europeans. Competition from Africans was further curtailed through the operation of laws limiting their rights to secure commercial credits or raise loans by pledging their crops.⁵ The insecure nature of their land rights made it impossible to raise loans from the banks. Another way in which the state intervened was by restricting ownership rights in land to Europeans, although such restriction was not possible in Tanzania due to the League of Nations mandate under which that country was administered. It is thus clear that the creation of colonial economies was not achieved through a free play of market forces. Instead, they were created through a tight regulation of the economic resources, their unequal and discriminatory dispensation and distribution, prohibitions of a fairly wide kind, and a host of regulations to maintain a certain balance and interaction between the monetary and non-monetary sectors of the economy. The result was a complex system of laws providing for wide administrative discretion and licensing procedures.

The selective penetration of the capitalist relations in the rural areas and the articulation of the traditional with the modern sector had implications beyond the economic. A major contradiction of the colonial economy arose from the political consequences of this articulation. There was first of all the question as to how far the traditional sector could be squeezed before the appropriation became so intolerable that it would provoke serious political protests. The emigration of young men as labourers in the settler farms might put such strain on the traditional sector

as to seriously reduce its ability to maintain its population and to subsidize the modern sector. The penetration of capital and commodity relations in the rural areas threatened to undermine traditional systems of authority and control, posing serious problems of law and order. The migration to urban areas and the emerging proletarianisation of workers also weakened the traditional order and threatened to provide them with a new basis of association and identity, from which to mount a challenge to colonial rule. The penetration of the traditional sector and the appropriation of its surplus or labour by the modern sector, had to be carefully regulated so as not to destroy the basis of its authority and ideology to maintain social order. It is clear that the colonial authorities were greatly exercised by fears of insurrections; they desperately wanted to avoid defiance of colonial rule, even if they were thereby forced into negations of the ideology of colonialism itself.

The contradictions between rapid economic growth and political stability were sought to be taken care of by various devices. Despite the considerable influence that the European settlers exercised in the two countries, the Colonial Office never gave in to their political pretensions. While there was much subsidisation of European enterprise, the settlers were not given a free rein to exploit the Africans as they wished. In due course restrictions were placed on the land which could be alienated to the Europeans and increasing control was placed over the recruitment of labour. Thus the economically dominant class was not allowed to become the decisive political class (resulting in conflicts between officials and settlers), which enabled a brake to be put on the rate of exploitation which could lead to protest. Further, the ideology and practices of indirect rule were employed where possible to fragment African populations and minimise dangers of concerted political activity. This policy was particularly important in Tanzania,⁶ but its counterpart in Kenya was the system of reserves, both of which were intended to heighten tribal and therefore divisive consciousness. Traditional sectors were carefully controlled by administrative officers, who would scrutinise to see what alien influences were allowed in. Alliances were established with the traditional or colonially imposed leadership of major African communities. The policies of divide and rule were also practised through a system of racial segregation. The three major communities, Africans, Europeans and Asians, were to a significant extent assigned separate roles in the economy, and the segregation was reinforced by the separation of educational, health and residential facilities. Communal and tribal institutions flourished, and the ideology of ethnicity did indeed obscure the identity of economic interests.

How and where do the lawyers fit into this political economy? Before we investigate that, it is useful to outline some of the characteristics of the legal profession. The role of lawyers in a colonial state is marked by a particular contradiction. It owes its status (and often the monopoly that goes with it) to the state⁷: it is not an organic part of the society, in a way that lawyers are in developed capitalist societies, where they have played a crucial role over centuries in moulding capitalism and refining its legal superstructure. On the other hand, even in colonies the private sector of the profession is independently-based. It is a self-employed profession, and as such it is compelled to widen the base of its clientele. The wider

the base the more autonomy it can enjoy of the state. In a highly regulated market, as in East Africa, it plays an important role in the mediation between the public and the state, helping to mobilize the resources that the state dispenses. Although its market orientation means that it is the handmaiden of capitalist enterprise, and therefore basically allied to the colonial state, its independent base nevertheless provides the means (and some times the incentive) to challenge the actions of the state. A legal challenge, especially in a judicial or quasijudicial forum, can be particularly embarrassing for the government. It is open and public; and court processes allow the bringing forth of damaging evidence.⁸ A legal system, particularly a colonial legal system, is riddled with contradictions, which such a challenge can expose and exploit. The ability of the government to deal with challenges of this kind is limited both by practical and ideological considerations. If for example the profession has an economic base in a large number of small holders who cannot be controlled easily through economic or political sanctions, the government finds it hard to bring it to heel (witness the important political activity of lawyers in Ghana, Luckham in this volume). Ideological considerations also hamper government intervention. Colonial ideology is to a large extent that of a civilising mission, and as Pashukanis had pointed out, in bourgeois societies such rationalisations assume the form of legal ideology.⁹ The General Acts of the Berlin and Brussels Conference had imposed an obligation on the signatory states to establish systems of justice in their African possessions and had stressed the importance of judicial institutions as a civilising influence. It remained a proud boast of the British that the greatest legacy they had bequeath to the Empire was the British system of justice.¹⁰ In this ideology the impartial processes of the law had to be upheld; and this meant an independent judiciary and a free legal profession. The ideology also formed an important part of the rationalisation of the role of lawyers, to validate which it did occasionally take on the government. In any case the legal profession is not monolith, and there will generally be found a maverick. For this reason the attitude of the government towards lawyers tends to be ambivalent. It needs them to operate the machinery of government and to lubricate the market economy, and knows that by and large their loyalties can be counted upon, but it finds lawyers more difficult than other groups to control and is always suspicious of their challenges and the destabilising consequences of litigation. A government given to a tight administration of resources and peoples also finds the lawyers' insistence on adherence to rules irksome.

The legal profession in Kenya and Tanzania cannot fully be analysed in the preceding terms. First, the legal profession did not spring fully grown from the soil. Its creation was the responsibility of the government and the government could determine recruitment to it. The Government influence was particularly strong as far as recruitment from the African population was concerned. To understand the policy adopted by the government it is necessary to review its attitude towards lawyers. The government was obsessed with fear that lawyers would promote political difficulties for it. Indigenous lawyers were regarded with extreme distrust. This attitude stemmed in part from British experience in India, where lawyers like

Gandhi and the Nehrus led the struggle for independence, and partly from West Africa, where African lawyers were already agitating for the safeguarding of the rights of Africans.¹¹ Given the private sector orientation of the colonial government, it was difficult to do much about the enrollment of Asian and European lawyers, educated at private expense, but it was possible to determine policy about the education of African lawyers. Since few African families had the means to educate their children at post secondary level, the government was able to prevent the emergence of African lawyers by the simple expedience of refusing government bursaries to African students aspiring to study law.¹² It may also be that, due to restrictions on legal practice discussed below, the investment in such education was not worthwhile. Landed and merchant capital tended to be dominated by the expatriates who were serviced by lawyers from their own communities, and capitalism in rural African areas had not yet emerged (cf. Ghana at the same time). The result was that there were no African lawyers in Kenya and Tanzania until well into the 1960s, and even then there were only two in Tanzania and five in Kenya. The exclusion of Africans from the legal profession had a number of consequences for the role of the profession and the development of the economy in the rural areas which are discussed in this essay.

Even with the absence of Africans from the ranks of the lawyers, the lawyers were fragmented. There was in fact no "profession" in the sense of a cohesive group of people bound by common skills, interests and organisation. At best there were two "professions", the public lawyer and the private practitioner. The former were almost always British, recruited in the United Kingdom, and formed part of the Colonial Legal Service. They seldom spent more than a few years in one colony, and were transferred from one colony to another, and from the prosecutorial to judicial functions and vice versa. As a result they did not often cultivate close connections with a particular colony and its society. They implemented and responded to imperial policy, and in the nature of things, developed imperial rather than parochial perspectives. They were thus frequently critical of the claims of settlers. The private practitioners, on the other hand, were long term residents, with close ties to the local economy and concerned with local politics. The latter were regarded and regarded themselves as professionals, while the former were essentially bureaucrats, operating in bureaucratic organisations. There was thus little indentity of interests or even outlook between the two sectors of the legal profession.

The cleavage was reinforced by several other factors. A racial distinction reinforced the professional differences. Both in Kenya and Tanzania the large majority of the private practitioners were Asians, with a different social and cultural background from the white government lawyer. There was hardly any social contact between the two groups, although the private European practitioners cultivated social relations with their counterparts in the public service. Secondly, the public lawyers were not, unlike private practitioners, required to be members of the local Law Society in order to practise, and in practice seldom did so, so that there was no common organisation to bring them together. Thirdly, the educational background was different. The public lawyers were often educated in a British

university, and then called to the Bar or qualified as a solicitor. In the early days the majority of the private practitioners were trained in India, and even later on when it became customary for students from East Africa to obtain their legal training in England, it was to the Inns of Court rather than a university that they went. Even within the private sector, although there was a common organisation, there were cleavages. In East Africa's intensely racially and ethnically divided society, one's professional contacts were largely confined to members of one's own ethnic group. This meant not only that Asian lawyers had few European clients, but also that within the Asian community, legal practice was generally confined to members of one of its several linguistic or religious groups. Consequently the lawyers were not a cohesive group, especially in Tanganyika where the immigrant communities were politically less influential than in Kenya. Professional societies could in no way compare with ethnic associations in their importance as pressure groups or focal points of identification.

The fragmented nature of the profession meant that, except on narrow issues of professional monopolies and remuneration, it was not possible for the lawyers to present a united position on contemporary matters. They made a few feeble efforts to speak up for the rule of law, but as we shall see, these lacked credibility due to their rather indifferent record as defenders of human rights. The omission of the Africans from ranks of lawyers meant that few popular causes were espoused. The close identification of the lawyers with their communities is one reason why they made so little impact on and among Africans. Their identification with the commercial and economic elite was highlighted. Lawyers functioned in urban areas. Not only did they remain outside the mainstream of African politics, but because of their identification with their own communal politics, they were seen to be hostile to African aspirations.¹³

That Africans did not look upon lawyers as their allies is understandable. What is less easy to grasp is the hostility of administrators, especially in the inter-war years, towards the private practitioners. The administrators were uneasy with them and sought to exclude them from rural areas. Hostility to lawyers was an important part of the explanation for the design of the legal system established in these countries in the twenties. It is instructive to review the debates in the 30s and 40s as to the nature of the legal system that was to operate for the Africans, and the role of professionals in that, for it throws important light on the pre-occupations of the authorities.

It is unnecessary to go into the details of the history of the development of the court system in East Africa. In broad terms, the question was the system of justice to be established for the Africans. A decision was made in favour of a plural system, so that there would be separate courts for Africans from the courts for the immigrant communities. The courts for the Africans would be based on their traditional dispute settling institutions. The controversial question was whether these courts were to be regarded as part of the general court system or as part of the administrative system. Involved in this question were some of the following issues: who should determine the composition and procedures of the courts, who

should exercise appellate and supervisory jurisdiction over them, and whether lawyers should be allowed the right of audience in them. Two conflicting points of view appeared on this question, sometimes referred to as "the administrative" and the "judicial" approaches. The former wanted the system of African courts to be as far divorced from the rest of the legal system as possible and as integrated with the administration as possible. Its proponents wanted the composition of the African tribunals determined by the provincial administration and appeals to be heard by the administrative officers, with no recourse to the superior courts. In addition, they wanted the exclusion of the lawyers from these courts. Their opponents wanted the appeals to lie to the superior courts and adherence to some elementary rules of procedure and evidence, and in most cases favoured a lawyer's right of audience. We do not need to go into all aspects of these debates, which were waged with vigour if not bitterness, and which are well documented.¹⁴

Until the early 1930s, the judicial approach was influential, and though appeals went to the administrators in the first instance, they could be appealed further to the superior courts. There was thus a link between the African courts and the general court system, although district officers, especially acting in their other capacity as magistrates, had in practice a greater influence over the functioning of the African or native courts. Even then, the administrators chafed at the ultimate supervisory powers of the judiciary, and waged battle against it. This battle was won, in Tanganyika in 1929 and the following year in Kenya. In the former country, the Native Courts Ordinance, when some contradictions discussed above were becoming acute, severed the links between the native courts and the general judiciary, appellate powers now being vested in the district and provincial officers, culminating in the Governor himself. Lawyers were excluded from appearance in these courts. The composition of the courts and their jurisdiction were to be determined by the provincial commissioners. The Kenya legislation the Native Tribunals Ordinance, was similar in essentials, the one difference being that the final appellate body was not the Governor. It was in practice the Provincial Commissioner, although it was provided that with his leave, a final appeal could be pursued in the Supreme Court (a provision which was little used). The Kenya legislation not only forbade lawyers from appearing in the native courts, but even on appeals taken to the administrative officers. The victory of the administrative approach was therefore fairly complete, and was to remain undisturbed until the 1950s when the first beginnings of the integration of the different court systems took place.

We may refer briefly to the rhetoric of the proponents of the debate. The administrators defended their system on the grounds that it built on existing indigenous institutions and so was more understandable and acceptable to African people. The tribunals were African institutions applying African law through African procedures to African people. Admitting advocates, they claimed, would lead to corruption and the accumulation of unnecessary legislation. Critics, on the other hand, complained that the system was dominated by administrators, who could appoint and remove tribunal members at their discretion. Such arbitrary

power ran the risk of emphasizing administrative efficiency over justice.

The arguments in favour of a double role for administrators were both theoretical and practical. Supporters alleged that the system had no real alternative, because a full-time judiciary would place a tremendous strain on financial resources. Moreover, they saw the officers' supervisory and appellate powers as to the Africans' advantage, since administrators were more closely attuned to the indigenous mentality and local needs than professional judges, able to temper the rigidity of English law to make justice more accessible and more comprehensible.

Once we go beyond the rhetoric, it is possible to analyse the debate at different levels. The lawyers were socialised by their training into valuing the importance of the legal process and the safeguards of a judicial trial. On the other hand, the lawyers can be seen merely as wanting to extend the base of their practice and the fight between the administrators and lawyers as a quarrel over monopolisation. On the part of the administrators, there could have been impatience with the legalism of the lawyers and the wish to be left alone to get on with the job for which they felt better qualified. But the dispute can also be seen as reflecting a division at a more fundamental level. Lonsdale and Berman have argued that the early colonial state, lacking any very elaborate representative institutions, had to absorb the contradictions of the economic level more directly into the bureaucratic sphere.¹⁵ The lawyers' desire to expand the base of his practice came into direct conflict with the administrators' wish to contain change and deep disruptive influence out of the rural areas.

Many of the administrators, like Cameron, who pushed for this policy had been made wary of lawyers from their West African experience.¹⁶ The containment of the rural areas was easier if there was no challenge to the authority of the administrator.¹⁷ Administrators sought judicial power to bolster personal authority. Administrative expediency often heavily influenced a judicial decision, especially when the individuals involved were considered to be "difficult characters". Administrators sometimes used vague offences under traditional criminal law to reach someone who could not be charged with a specific crime – as a kind of contingency vote.¹⁸

The explanation for the exclusion may also lie in the policy of moderating the impact of capitalism in the African rural areas. Capitalist relations were deemed to be subversive of traditional order, and their growth had to be regulated. If lawyers were free to ply their trade in the rural areas, they would no doubt hasten the emergence of full capitalist relations. Thus the effective absence of lawyers from the African rural areas was not only determined by their exclusion from the native courts; equally or more important was the nature of African land tenures and the general administrative controls over the economy. In Kenya, at first the missionaries and the settlers had negotiated directly with the Africans for the use of land. The government was anxious to prevent direct alienation and other disposals of land by the Africans and introduced legislation to declare much of the land Crown land and grant titles to Europeans and Asians (East African (Lands) Order in Council, 1902 and the Crown Lands Ordinance, 1902). The ostensible

purpose was to prevent the exploitation of the Africans by outsiders (although in fact the Africans got no compensation for land alienated under this legislation). The effect was to prevent transactions in land between Africans and non-Africans, and the administrative handling of land matters meant a correspondingly diminished role for lawyers. In Ghana similar proposed legislation was opposed by traditional leaders and by African lawyers, who saw for themselves considerable opportunities in free transactions in land. Their stronger political position resulted in the withdrawal of the proposal.

Lawyers were also effectively kept out of land transactions and disputes between Africans, especially after the prohibition of lawyers from the native courts. The Ordinance of 1930 did not, however, give the native tribunals exclusive jurisdiction in civil matters over Africans and the Supreme Court held in *Kahahu v. Anderea* that it had jurisdiction in suits and matters relating to rights to land in the reserves, basing itself on the provisions of the Kenya Colony Order in Council 1921. In 1942 this loophole was closed by providing that suits in respect of immovable property in the reserves should be commenced only in the native tribunals. The amendment was justified on practical grounds; the procedures and requirements of the Supreme Court did not make it a convenient forum for such cases.¹⁹ Lawyers were thus excluded from dealing in the most important resource of the Africans – land.

In Tanganyika as well, the British administration declared all lands as “public land” and under the control and disposition of the Governor (Land Ordinance, 1923). Pre-existing German titles were recognised, and so about 2 million acres of freehold land continued in the occupation of the immigrant groups, but as regards the rest of land, it could only be held in rights of occupancy granted by the government (and customary land was deemed to be held on rights of occupancy). Rights of occupancy could be granted for periods up to 99 years, and once granted were negotiable and could be leased or mortgaged. But a right of occupancy or other land interest held by an African could not be transferred to a non-native except with the consent of the government. There was thus little direct dealing in land between the Africans and foreign communities; and land dealings between Africans were dealt with in African courts where lawyers were not allowed. Thus there was a limited role for the lawyers, except in relation to land which had been granted under rights of occupancy to non-natives, and this meant in practice urban land and land which had been alienated during the German period for plantation purposes.

Some points made above about land and security aspects can be further concretized by a brief reference to the Kenyan experience of land consolidation and registration in the Central Province in the mid-fifties. The land consolidation programme was controversial, and it was feared that it would be unpopular with many Africans. The detention under emergency regulations of political activists was seen to provide an opportunity to push ahead with the scheme. It was politically motivated to create a class of yeoman and compliant farmers as bulwarks against radical change. The land rights of a large number of people in a politically volatile area were affected; the whole regime of the applicable law was to be changed from custom to English law; a vast number of disputes had to be resolved and numerous

claims to be adjudicated; new registration procedures had to be established.

It was therefore considered important that the whole process should be under close administrative control, and that the possibilities of protest and challenge be minimised. A detailed study of the period, after access to government files, shows that lawyers played almost no role in this process.²⁰ The government lawyers were not even consulted about the scheme until it had been launched, although the scheme bristled with legal issues. The entire scheme was operated by the administrators, including the adjudication of claims, and the jurisdiction of courts, even native tribunals, was rigorously excluded. Many of the operations under the scheme were against the existing law, and the government lawyers came in only when new legislation became imperative. And even then their advice was ignored, until the lawyers protested to the Colonial Office. A very large number of errors were made in the surveying of land and its registration. But the administrators ensured that legal redress was excluded, by providing firstly that the first registration of a title made by an administrator could not be challenged, and secondly, by enacting legislation presented initially as a temporary measure but soon to become permanent to prevent any law suits. The only participation of a private lawyer which is recorded was in an attempt to challenge unsuccessfully in court the finality of the first registration. In many other countries, such a massive programme of land consolidation and registration would have been a gold mine for the private legal practitioners.

What consequences would have followed the inclusion of lawyers in the African rural areas remain of course a matter of speculation. One can look at the experience of Ghana where lawyers were allowed in. They played an important role in commoditisation of land and the emergence of capitalistic relations.²¹ Similar developments would probably have taken place in East Africa. Both in Kenya and Tanzania Africans were beginning to produce for the market. In some areas (e.g. Chaggaland) some people had become landless. Communal ownership of land was already yielding to individual ownership.²² Lawyers would undoubtedly have speeded up this process; they would have made land a more marketable commodity, increased transactions in land, and helped to raise loans on security of land. As in Ghana, they might well have smuggled in concepts and forms from English law, fee simple and mortgages, and led to the weakening of customary law. In course of time many of these developments did take place, showing that economic forces do not always need the mid-wifery of lawyers, but the course of history might have taken a different turn if these changes had occurred earlier and more systematically.

Another consequence would have been a base for legal practice in the rural areas. With population growth and the cultivation of cash crops, land had become valuable, and there were numerous disputes about land. Lawyers would undoubtedly have become involved in the considerable litigation about land that took place. There is evidence that before the lawyers were excluded from the rural areas, they had already made inroads there, and indeed were accused of touting and fomenting litigation.²³ Lawyers might have become more involved in the general life of the country and might have played a more active role than they did. Africans

might have found enough incentives to qualify as lawyers. They would have been able to mediate between the modern and the traditional sectors, increasing the pace of the incorporation of the latter into the former. They would have become politicians. Not much of this would, however, have fitted in with the designs of the colonial government.

The picture of the hostility between the administrators and the lawyers has to be tempered by the mutuality of their interests; the relationship between them was in fact a cosy one. The colonial state needed lawyers in both the public and private sectors in order to implement its policies. We have already examined the crucial tasks of the state; the establishment of law and order, mediation between the traditional and modern sectors, the subsidisation of the capitalistic enterprises, all of which required a veneer of legitimacy. Concern with law and order led to the criminalisation of conduct; defence of the accused has always constituted an important part of a lawyer's practice in East Africa – pointing both to the repressive character of the political regime and the overt commitment to legality. While one may doubt that law provided legitimacy (for the law was too harsh and discriminatory), lawyers served the important practical function of facilitating the operation of the capitalist economy that was emerging in the European agricultural areas and in urban centres. While this paper has so far concentrated on agricultural developments, both the countries, but more particularly Kenya, were experiencing the growth of commerce and manufacturing. Banking and insurance institutions were established to serve the needs of agriculture, commerce and industry. In order that these developments may take place, it was necessary to establish the superstructure of capitalism. Thus Kenya and Tanzania was early endowed with legislation on companies, partnerships, banking and negotiable instruments, contracts and property. These were based on the principles of English law. Thus the colonial authorities brought with them the full grown legal superstructure of capitalism. The lawyers played a key role in the mobilisation of this superstructure. We have seen that the superstructure was not enough by itself to create a capitalist mode of production, for several economic pre-conditions for it were missing (for example absence of wage labour, difficulties of markets). It has been pointed out that the deficiencies were remedied through state intervention, so that what emerged in the end was not a *laissez faire* market economy, but a highly administered economy. The lawyers mediated between the business community and the state over the administered economy. In this way they built up important links with the administration and the business community. There were few conflicts between industry and government over the establishment and operation of the administered economy. In this picture, lawyers fitted in harmoniously and became increasingly identified with government and business, especially as the conflicts of the twenties between the settlers and the administration evened out, and as commerce and industry progressed.

The links between the lawyers and the mainly expatriate business communities were strengthened by the involvement of the former in the social problems of the latter. Europeans and Asians reproduced their social life in Kenya and Tanzania;

each community won for itself the application of its own personal laws. Numerous disputes of matrimonial and social nature were mediated through the legal system. Lawyers became the confidants of the rich and the powerful.

The convenience of the lawyers to the state, and the convergence of the interests of the two, is well demonstrated by the ready manner in which the state conferred monopolies and other prerogatives on the legal profession. Lawyers were by far the best organised of the professions. Their monopoly and self-regulation were secured through legislation.²⁴ The lawyers reciprocated by aiding the state, and abandoning pretensions as defenders of human rights. (Prominent European lawyers aided and abetted the anti-Mau Mau emergency legislation which curtailed the normal safe-guards in trials.)²⁵ So by the time of independence in Kenya and Tanzania, the legal profession was identified with the colonial state, largely urban based, expatriate, generally isolated from the general population of the country and its problems, but playing an important role in the social and economic life of the expatriate communities and dependent for its living on the capitalist economies they had helped establish. Their close identification with their communities produced an equivalent stratification in the profession. European lawyers tended to serve large industrial and commercial firms and the agricultural sector, and because of the former type of work, tended to be organised in large firms. Asian lawyers specialised in commercial transactions of humbler kind, and helped in the trading sector.

Before we turn to the developments since independence, we should note that there were no major distinctions between the legal professions in Kenya and Tanzania. Such differences as there were reflected the greater settler bias, capitalist relations and commercial development in Kenya. Thus the lawyers had greater political influence in Kenya; the Bar was larger, and the firms bigger. In keeping with Kenya's position as the leader of the East African community and Nairobi's status as the commercial and financial centre for the region, important Kenya lawyers made regular forays into Uganda and Tanzania, and sometimes tended to regard these two countries as their provincial circuits.

Lawyers in Post Colonial Kenya and Tanzania

To examine the role of lawyers in contemporary Kenya and Tanzania, it is necessary to sketch out the essential features of their economic and political systems. This is not an easy task as there is so much controversy about the characterisation of the modes of production, and the nature of the ruling groups and class alliances, in respect of both countries.²⁶ One can say, in general terms, that the modes of production have remained basically unchanged. The articulation between the modes of production may have altered, and the mode of the extraction of the surplus, especially from the rural sector, has undergone some changes (in particular with the changing role of marketing boards and co-operatives). The pressures to retain as much of the surplus as possible in the country have obviously increased, and the state is playing a more active role in the mediation between foreign and domestic capitals, and the mediation itself has undergone changes in form. The

colonially assigned racial roles have been modified under policies of Africanisation. The responsibility for the maintenance of order has passed to the local ruling group; the apparatus of control and repression has been modified in some respects.

Kenya

It is in Kenya that the continuity from the colonial period appears so remarkable. The government has made a clear choice in favour of capitalist development. For this purpose it has had to rely heavily on foreign firms. The transnational corporations now play an important role in Kenya's economy. Kenyans have also participated in the development of capitalist relations. Beset as it too was with the problems of control and legitimacy, the government pursued policies of Africanisation and the state had played a key role in promoting African capitalism. Capitalist relations have spread in the rural areas, and while much of agriculture is still peasant based, a class of wealthy farmers dependent on hired labour has grown up. As in the colonial period, the state has played a crucial role in the development of the economy and in the mediation between foreign and domestic capital, and between the urban and rural sectors. It has fashioned a partnership between foreign capital and local interests, where foreign capital is dominant. The partnership has been mediated partly through the public sector and partly directly through the private sector, but in either event, the state has played a significant role in determining the terms of the partnership. A close alliance between foreign and domestic capital and the state has come about, although conflicts between foreign and domestic capital are not unknown. The domestic capitalists are no longer only Europeans or Asians; an African capitalist class with strong links to the bureaucracy has emerged. With the development of capitalist relations, whether in industry or agriculture, has also come proletarianisation. A privileged class is matched with a depressed class.

In common with other newly independent countries, Kenya has had to grapple with problems of political control and legitimacy. It has had to contain the considerable tensions generated by increasing disparities of income due to the spread of capitalism. It has done so through a combination of repression and cooptation. As with its colonial predecessor, it has called in tribal ideology to undermine class consciousness. It has combined repression of dissent with a relatively open political system. It has relied heavily on the bureaucracy and the machinery of government to punish the recalcitrant and reward the compliant, so that while it is a *de facto* one party state, traditional party politics are unimportant and KANU (the political party) as such has little authority. More than its predecessor, the government has tried to rely upon law as a legitimising device.

Tanzania has opted for a different strategy of development. In 1967 it decided to bring under state ownership the major means of production and banking and financial institutions. Since then more and more enterprises have been taken into the state sector. Thus, in addition to manufacturing, export-import and much internal trade is now under the state sector. It is not only in this area that the growth

of capitalism has been checked. Attempts have been made to collectivise agriculture and many resources have been expended on the establishment of ujamaa villages, even though the bulk of agriculture production still comes from privately owned plots. While private capitalism has been curbed, Tanzania's links with foreign capitalism have become stronger. It has entered into numerous agreements with transnational corporations, and its public sector is in truth a disguise for joint-ventures sector. Unlike Kenya, foreign capital has been mediated largely through state institutions; transnational corporations may wield less political influence than in Kenya, but the systems of production are determined just as much by them in Tanzania as in Kenya. The lack of progress in the systems of production and the increased linkage with international capitalism have prompted criticism of the genuineness of Tanzania leadership's claim that it has opted for a socialist path to development. It has been alleged that state capitalism has been established because this was the only way its political leaders could acquire control over the means of production.²⁷ So a bureaucratic bourgeoisie has emerged, whose role is no different from that of the capitalist bourgeoisie in Kenya – that of the intermediaries of a foreign capital, who in both instances must be regarded as the real ruling class.

Tanzania has coped with problems of control and legitimacy differently from Kenya. It early abandoned the Westminster political model in favour of a one party system. While Kenya leaders tried to enhance their legitimacy by emphasising continuity in constitutional and political institutions, Tanzanian leaders sought legitimacy in claims of revolutionary change. It invested TANU (the political party) with high moral and political authority, and asserted its supremacy over the legislature and the bureaucracy. It mobilised an ideology of socialism and participation. Nevertheless, it has relied even more than Kenya on repression for control. The press is less free, elections are more tightly regulated, and there are more political detentions than in Kenya. The contradictions in the rural sector have been handled less subtly than in Kenya, with a greater reliance on force.

How have all these developments affected the lawyers? We examine this by looking at a number of issues, and whenever possible by comparing the situation in the two countries. We look first at what has happened to the legal systems of the two countries. Kenya's predilection for capitalist development and reliance on bureaucratic methods means that its inherited system was fairly servicable. It moved towards a fully formal court system, with the right of audience for lawyers in all courts and has accepted the principle that all magistrates should be legally trained. It has extended the scope for the application of English law; as more and more land is registered, it comes under the regime of statutory law. Customary law with its communal orientation is systematically being replaced in all sectors of life. Not only is such a system congenial for capitalist development, but is also deemed to serve an important ideological function, associated as it is with notions of impartial judiciary and a free legal profession. As we shall see, the ideology is sedulously cultivated by the government.

In Tanzania, on the other hand, with its avowed commitment to socialism, it was not so easy to continue the old system. There has been considerable but not very

systematic debate on how to adapt the legal system to achieve socialist goals. Although at first Tanzania moved towards a fully formal court system, this was soon abandoned in favour of a certain measure of de-judicialisation and lay participation. Lawyers are still not allowed in the primary courts. Many matters have been taken out of the jurisdiction of courts, and are now finally determined by the ministers or bureaucrats. There is, as we shall see, intolerance of legalism or legal procedures. It is not easy to relate the changes in the legal system clearly to socialism. Some of them owe their origin to an Africanist ideology (especially the changes soon after independence under the ministries of Amri Abedi and Rashidi Kawawa).²⁸ A greater number of individuals and groups have had an influence on the development of the legal system in Tanzania (partly because the responsibility has been so distributed and partly because no dominant figure with interest in law has appeared) than in Kenya where Charles Njonjo was Attorney-General for the first 17 years of independence, dominated all aspects of the legal system, and had a clear notion of what he wanted.

Impact on the Profession of the Organisation of the Economy

As we have seen, Kenya developments have followed capitalist lines. Kenya's capitalism is not the classical free enterprise system which depends for its dynamism upon the private sector. In many instances the government has had to intervene directly in the economy through parastatals, and has itself engaged in productive enterprises. Despite the growing public sector, it is regulated essentially through the media of private law (even though a recent commission of enquiry on parastatals has suggested special laws to deal with some aspects of their operation).²⁹

Before we can examine the impact on the profession, it should be stated that around the time of independence, legal education was started at Dar es Salaam for students from East Africa. A steady stream of lawyers would therefore be entering the profession, most of whom would be Africans, and one issue the established profession faced was the manner in which the new, locally trained lawyers would affect its dominance of the legal scene.

The scope for and the encouragement to the private sector has enabled lawyers to extend their activities. The government has encouraged large scale private, often foreign, investment, as well as humbler forms of entrepreneurship by Africans through various schemes of Africanisation. As a result more and more people have been drawn into the monetary sector; more and more transactions take place through the market; more land is moving into the commercial sector. Property relations are being mediated increasingly through lawyers. This has provided an expanding base for the work of lawyers, so that despite the flow of African lawyers, the profession is still prosperous. So the profession has faced fewer tensions than seemed likely in the early 1960s when the expatriate lawyers appeared to view with great apprehension the entry of Africans. There are some tensions nevertheless, and these are discussed in a later section.

It is interesting to examine the state of the public sector of the profession in an economy like Kenya's. Kenya has opted for the model of the private profession as servicing the needs of the economy, so that even its own commercial and industrial work is handled by private lawyers. Since the volume of government commercial work is expanding and since the economy is still an administered economy, the government is nevertheless able to influence the private profession in important ways. It is able to direct work through the parastatal sector to particular firms; it is able to influence the larger business firms in their choice of legal representation. Kenya has not used an important possible tool – trade licensing, whereby foreigners could be excluded from the profession. At one time it was envisaged that this would be done, but Charles Njonjo, when Attorney-General ruled this out. Trade licensing, he argued, was not suitable for application to a profession; law was not a trade.³⁰ Nor has Kenya adopted the Tanzania system of bonding students holding its bursaries to a specified period of government service.

Charles Njonjo has been accused several time (in Parliament, press and in private conversations) of bias against African lawyers, and of wanting to maintain the status quo ante independence as far as the profession is concerned. African lawyers accuse the government of channelling lucrative government and parastatal work to European firms. They allege systematic discrimination against them in the recruitment to government service and the judiciary. It is true that the government has been recruiting lawyers from England, and that the judiciary is still largely expatriate so many years after independence. Njonjo has rebutted these allegations; African lawyers do not want to work in the public sector, because they prefer the more remunerative work in the private sector, they merely use his Chambers for their training; and as far as channelling work is concerned, he prefers to use the best existing talent. Whatever the causes, the pull towards private practice is strong, and thus Kenya shares the problems with many African countries of attracting competent lawyers to the public service. Within the private profession there is a clear hierarchy. European firms tend to monopolise the top end of the work – that of large firms, transnational corporations, banks and insurance companies, and parastatals. They are organised as partnerships of considerable size (about 15 lawyers in one chamber) and are able to offer specialised services to their clients. They are able to smooth the operations for their clients because, it is alleged, they get a more privileged hearing from government offices. The important interface between foreign capital and the local state and domestic capital, which is crucial to an understanding of Kenya's political economy, is thus mediated by European lawyers. (Many of the Europeans have taken out Kenya citizenship, and a few have employed the token African lawyer.)

Asian practice has remained unchanged, serving the middle commercial sector, and still dependent largely on Asian business enterprise. They have captured some new African business, but are still excluded from the large firms. To secure large firms and multinational corporations as clients remains their wish, as indeed of the new African lawyers. Like the run of Asian lawyers, the African practitioner has to engage in general practice, operating through small one or two person offices.

While two or three African firms have achieved some eminence and are modelled on the large scale, bureaucratised firms, they are still excluded from lucrative financial and commercial contracts – and complain much about it. For many African lawyers, the competition from established profession is strong, and they have to seek new avenues. The search for a new base has taken young African lawyers to smaller towns, serving a rural hinterland, where they have tapped new work, handling land transactions, loans from banks or financial parastatals, wills and criminal defence.

There has been a steady growth in the private profession. The profession has exploited the possibilities offered by the market based economy fuelled by government interventions and subsidies. The lip service by the government to individual incentives and private initiative fits in well with the ethos of the profession. The commercial and financial operations of Nairobi provide a congenial environment for it. It can present itself as an important and loyal partner of the government and the business community. Thus despite certain tensions and competition within the profession, it is a group well satisfied with its economic position.

Tanzania

Tanzania provides quite a contrast in this respect. The government pursues a militantly anti-capitalist ideology. The large-scale nationalisations of commercial and industrial enterprises from 1967 onwards have shrunk the size of the private sector. More and more of the economic relations in the country are mediated through the state institutions. The markets forces are directly and tightly controlled by the government, and few of these are mediated by the lawyers. The tendencies towards the commercialisation and marketisation of land in the rural areas have been arrested by policies of collectivisation. Encouragement is given to collection rather than individual activity; collective activity lends itself more to bureaucratic administration and control, making easier to dispense with the services of lawyers. Legal representation is still not allowed in the most numerous courts in the country – the primary courts, nor in various new tribunals. The private profession, which has been associated with expatriate communities and a capitalist economy, has therefore come under severe pressure. If Kenya provides an example of a burgeoning profession, Tanzania provides that of a sharply declining profession.

Two developments in particular effected the base of private legal practice. At first the nationalisations of large firms did not affect private practitioners, for the new parastatals continued to retain them, especially as the management of these parastatals was often vested in the former owners. With the expansion of the public economic sector and its growing legal needs, the government decided to set up its own law firm and dispense with the services of private law firms. In 1969 it established the Tanzania Legal Corporation for this purpose. All parastatals can be required by the Attorney-General to use its services, and since July 1971 no parastatal has been allowed to use private legal practitioners. Two of the largest firms, both essentially European, collapsed immediately, and most of their partners

left the country. While these nationalisations had affected the large firms, a blow was struck at the larger number of Asian advocates by the nationalisation of rented real estate in 1971. All at once the most important source of the livelihood of these lawyers – conveyancing and other land transactions, was removed, since now most land transactions were handled bureaucratically by the Ministry of Lands. The dramatic effect of these developments is illustrated by the fact that the number of private practitioners declined from over 100 in 1970 to 43 by 1975. Most of them emigrated; their common law training enabled them to search for legal practice in various Commonwealth countries.

The economic crisis of the private profession was compounded by a political environment in which there was a strong suspicion and distrust of legality, a point we discuss below. More directly, there was an attack on the model of the organisation of legal services. It was considered incongruous that a private profession should be operating in an allegedly socialist society. And it was sometimes thought that if the government was to exercise adequate control over the public enterprises, which had a tendency to disregard government directives in pursuit of their own parochial interests, it would be necessary, among other things, to have some control over those who provided legal services to them. Hence the Tanzania Legal Corporation.³¹ The Corporation was also a response to the emerging legal problems of the twin characteristics of Tanzania's public sector economy: relations with international capital, and the structure and organisation of public enterprises. We have already mentioned that the bulk of productive enterprises within the public sector were joint enterprises with foreign firms. The relations between these enterprises (and the government) on the one hand, and the foreign firms on the other, were regulated through one or more contracts, covering matters like the transfer of technology, management services, marketing, pricing, copyrights and trade marks, equity participation and loans, and the remuneration of the firms. In the beginning the drafting of these agreements was shared between the Attorney-General's office and private practitioners, but soon the need for greater specialisation and skills became obvious. A number of unfavourable contracts were entered into, and it looked like that much of the surplus of the public sector was appropriated by the foreign firms through the contracts. Much of the work of the Corporation is taken up by the negotiation of these contracts. A considerable expertise has been built up, and lessons from one set of negotiations and instruments can more readily be assimilated and transmitted to another.

The task of regulating organisation of and the relations between public enterprises is only partially discharged by the Corporation. Important policy questions of structures of enterprises and their relations with the government are determined by the government assisted by the Attorney-General, but many questions of the relationship between different enterprises come before the Corporation. Since the Corporation is legal adviser to all the public enterprises, all legal disputes between them are dealt with by it. Since it is not accepted the public enterprises should litigate against each other, and as far as possible avoid controversy in public, the Corporation finds itself mediating many of these disputes.

It does not strictly apply legal principles in resolving these disputes, seeking more to achieve an amicable solution. If one enterprise is not happy with a proposed solution, it can request the Attorney-General for the services of a private practitioner.³² Thus many commercial disputes remain outside the domain of courts, and are dealt with bureaucratically. At the same time it is recognised that this may not lead to a proper allocation of responsibilities and losses, and could result in a lack of commercial and accounting discipline. Consideration has now been given for three years or so to the establishment of a special tribunal to handle disputes between enterprises and applying the relevant principles of law. But that no decision appears to have been made so far indicates that the government has still not been able to make up its mind on how best to organise a system of law for its political and economic system.

A similar vacillation can be seen in regard to the question of the existence of a private profession. At various times there have been hints or proposals that the profession must be organised in co-operatives or nationalised. In 1974 the Attorney-General's office had proposed the re-organisation of the private profession into legal collectives or co-operatives. The collectives would all belong to the Tanzania Advocates Association, to whom it would contribute part of their income. Each advocate would receive a minimum salary (then proposed at 2,000 shillings) plus some allowances; there would be an upper limit for the senior lawyers. Although some discussions took place between the government and the Law Society, no decision was reached, and the question of the organisation of the profession was referred to a commission set up by President Nyerere to enquire into the judicial system. It came out strongly in favour of the abolition of private practice, and proposed a state financed Legal Services Corporation to provide legal services to the public. Although the report was made in 1977, no decision has been taken.³³ Meanwhile the depletion of the private profession continues, and the Tanzania Legal Corporation has been forced to take on the defence of the accused in serious cases where the courts considered that his legal representation was necessary, and even to represent parties in purely private civil litigation.³⁴

While the private profession has shrunk, there has been a steady expansion in the public legal profession, which now employs several times more lawyers than the former. Despite that, and despite the collectivist bias of Tanzania's economy, Tanzania has not escaped the problems stemming from the pull of the private profession. Incomes in the private profession are still higher than in the public, and in Tanzania's case, a private practitioner is not trammelled by the Leadership Code which restricts the business activities of a public servant. There still are pockets of "rural capitalism", areas where transactions in land pass through lawyers, and a private sector in commerce and industry so that given the shrinking private bar, there are opportunities to be seized by a public lawyer who is willing to move into the private profession. A small movement of this kind has taken place, with former public servants or members of the judiciary setting up offices in rural towns. As in Kenya, the Attorney-General's office complains that it has become a training ground for lawyers, who then move on. But the defections from the public service

are not on the same scale. Quite apart from the limited opportunities in the private sector, the practice of the government to tie university graduates to public service for the first five years allows it greater scope to regulate the balance between the private and public sectors; rapid promotions of the early Tanzania lawyers (as reflected in senior positions in the judiciary, administration and the parastatals, compared to the still expatriate dominance in Kenya,³⁵ has increased incentives to stay in the public sector; and the greater influence Tanzanian lawyers have had on the administration compared to their African counterparts in Kenya has provided a challenge which has made public service worthwhile. And add to that the general political ethos which has not been tolerant of the private sector.

Indeed it is to this political factor that we turn now to establish a composite picture of the legal profession, for while the organisation of the economy is a key determinant of the material well-being of the profession, many aspects of its public role, morale and cohesiveness can in the context of East Africa only be comprehended if we look at what I call the politics of control. And here we find that despite the differences between the profession in Kenya and Tanzania we have outlined above, they share problems of identity and purpose.

Politics of Control

Tanzania

On the face of it, Tanzania and Kenya have different approaches to the politics of control and legitimacy. In order to appreciate Tanzania's choice of methods of control, it is important to bear in mind that whatever the relationship now between the political leadership and the bureaucracy, at the time of independence there was considerable mutual suspicion. The political leadership had a base in traditional, Swahilised systems³⁶ (to a larger extent than for example in Kenya) and was less able to cope with modern administrative structures. The Party reflected interest groups like the *wazee* who had not been incorporated within the bureaucracy. In order therefore to ensure the dominance of the political leadership, it was considered important to establish the Party as a key decision making body, and to reduce the centrality of the bureaucracy and associated court structures.

Tanzania has relied for its legitimacy on the one political party (TANU, then CCM with the merger of the Afro-Shirazi party of Zanzibar) and the ideology of *ujamaa*.³⁷ It has devoted much attention to the organisation of the party, and with the 1965 Constitution, confined political activity to the one party, and in 1975 an amendment to the Constitution made the Party the supreme institution in the country, superior even to the legislature. The Party is also custodian of the ideology, which sets out to prescribe the norms and values by which society must live and be governed. The importance of the ideology as a standard of ethics and behaviour has been repeatedly stressed by Nyerere, who has said that good ethics are a surer guarantee of decent government than constitutional safeguards. At first the ideology of *ujamaa*

stressed the harmony of interests of the people; then it was modified to reflect some of the tensions and conflicts in society. Tanzanian authorities have often justified repression of the opposition by the need to maintain the purity of the doctrines.

The implication for law of this preference has been a degree of ambivalence towards the law and its use. There has been impatience with the processes of the law, both in requiring legal authorisation before the government or the party could do various things, and because of the delays in and the unpredictability of court decisions. Tanzania is much given to revolutionary rhetoric, and then it is easy to deride the procedures of the law. Zanzibar provided a good illustration. It dispensed, more or less, with the services of lawyers. Karume, who shaped the system of law in Zanzibar after the revolution, was very sceptical of lawyers and colonial laws. Party members and officials played a key role in the courts (in the treason trial after his assassination, Zanzibar's Attorney-General acted both as prosecutor and defence lawyer!).³⁸ The mainland did not, however, follow the island in abandoning the formal model of the legal system. Nevertheless, it modified its operations in a number of significant ways. Combined with a desire for greater party and bureaucratic control over decision making, the distrust of court processes led to two developments: first, to take some jurisdiction away from courts and vest it in the executive or other tribunals, and second, to de-emphasise the role and expertise of the profession in the judicial institutions. An example of the former is the Extradition Act, passed in 1965, to replace the Fugitive Criminals Surrender Ordinance.³⁹ Under the latter, surrender of a fugitive could be refused if the court before whom he was brought was satisfied that the request had been made with a view to try or punish him for an offence of a political character. The rule was changed in 1965 so that now once the fugitive claims that the offence for which he is allegedly wanted is political, it is the duty of the magistrate to refer the matter to the Minister responsible for legal affairs for final determination. Another example is the Ward Development Committee Act of 1969, which gives quasi-judicial powers to the Area Commissioners. This Act is a response to restrictive interpretations of the substantive law.⁴⁰ Under this legislation, Ward Development committees may draw up plans for schemes of local development and, if these are approved by the Minister, may require all adult persons within the ward area either to work on the scheme or to make a monetary contribution. Appeals to courts against the orders of the committee are not allowed. Complaints against the monetary contribution orders can be lodged with the Area Commissioner, and appealed from him to the Minister, whose decision is final. A last example may be drawn from the Customary Leaseholds (Enfranchisement) Act, 1968, the object of which was to enfranchise leaseholders of land held under customary law. Customary Land Tribunals, consisting essentially of non-lawyers, are established under the Act and authorised to determine complex issues like ownership, whether the land in question is subject to the Act, reasonable compensation, etc. It is true that an appeal to the district court is possible, but the powers of the Tribunals are extensive, and given the nature of the parties involved, appeals are likely to be few.

The second development, the "de-professionalisation" of judicial functions and

procedures, can be traced to an act of 1964 which required assessors to sit on all cases in primary courts, although their opinion was only advisory.⁴¹ In 1969 their opinion was given greater force: they each have one vote, and so can outvote the sole magistrate.⁴² Assessors originally were selected by local authorities, but are now selected by TANU branches. Parallel with the 1969 changes in the position of the assessors Arbitration Tribunals were set up to settle minor disputes. The Tribunals consist of five members nominated by the TANU Branch Committee within whose jurisdiction the Tribunal falls.⁴³ The Tribunal is intended to bring about an amicable settlement of the dispute, and if such a settlement is achieved, it can be filed in the primary court and then becomes enforceable as a judgement of that court.

In addition to the Tribunals, there are a number of informal dispute settling institutions, the most important of which is the TANU cell leader. Although the post of the cell leader was not established for this purpose, dispute settling occupies the greatest part of his time. The primary courts recognise this function of the cell leader, and often require parties to go to the cell leader before the courts will consider the dispute.⁴⁴ TANU committees also deal with disputes, especially when disciplinary action is deemed advisable. In the *ujamaa* villages, much local law is made and adjudicated by the management committees of the village.

These tendencies are further manifested in the exclusion of lawyers from commissions and tribunals, even when an important part of their functions is fact finding and application of the law. Thus the commission to adjudicate the claims for compensation arising out of the nationalisation of real estate or the Permanent Commission of Enquiry (Tanzanian Ombudsman) have seldom contained a lawyer. The Presidential Commission on the Judicial System was headed by the Chief Secretary of the Party, and only a minority of its members were lawyers (all of whom were drawn from the public service).

To a significant extent the preference to rely on more overtly political and administrative forms of control arises from the inability of the leadership to acquire mastery over the legal system and to mobilise the law. This point may be illustrated by reference to the attempts by the government to impose firmer discipline on workers in the public sector.⁴⁵

The public service lawyers were young Dar graduates, while the private practitioners were as a rule more experienced. Prosecutions were badly handled, and the government considered that many guilty people got off free. The response was to remove or dilute many of the safeguards of criminal trials, in many instances to shift the burden of proof on the accused, thus creating a presumption of guilt, establish presumptions of law against the accused, set up criminal liability for mere negligence, ease rules of evidence, and to make penal legislation retroactive. Despite this, the success rate for successful prosecution is low.

Similar developments have taken place in the enforcement of laws against economic crimes, like the evasion of exchange controls, and bribery. These difficulties among other reasons, have led to a widespread disregard of the law by the Government. There have been several instances of unlawful detention of persons who for some reason have run afoul of local officials and at other times

orders have been given by political or administrative authorities that affect the rights of individuals or groups, but have no sanction under the law. These include extra-legal attempts to regulate dress, censor music, or require compulsory attendance at rallies.⁴⁶ The President himself has on occasions chosen to ignore legal procedures. A well known example is his action in ordering the wide scale arrests of "cattle thieves" in the Mwanza District early in 1967. Over 4000 arrests were made, a detention centre set up, and screening teams established to review the cases of the detainees. The cases were not taken to court.⁴⁷ Similarly, in 1975, the President ordered the confiscation of cattle belonging to families in villages alleged to be involved in cattle thefts, and their redistribution to others, alleged to be the victims.⁴⁸ The President also ordered the expulsion from the University of a large number of students in 1966 for protesting against proposals for a national service. The President acted outside his lawful authority in each of these cases. In the case of cattle thieves, there is indeed legislation from the colonial days that might well have been used, but it does provide for some procedural safeguards which were not followed. There are also instances where, although his actions have been strictly legal, they have not been in accord with the spirit of the law. He has used his powers under the Preventive Detention Act, which was passed in 1962 to authorise the detention without trial of persons suspected of being a threat to the security of the state, to detain persons against whom the only allegation has been that they were involved in corrupt or other illegal activities.

If the courts have not played an important role in the enforcement of criminal law, they have equally not played a role in safeguarding the rights of the people. A declining private profession, bedevilled with low morale and operating within what it regards as a hostile environment is too afraid to take up *habeas corpus* applications, which in any case could be barred by the use of the Preventive Detention Act. Courts are afraid to give judgments that would upset the government and party. Although Tanzania has not interfered to dictate decisions to the judiciary (except that its dismissal of the first Tanzania Chief Justice was hardly consistent with judicial independence) the general political system does not encourage a bold and impartial exercise of the judicial functions.

This crisis of the legal system has further demoralised the profession. It has itself been under constant attack. The Attorney-General until 1976, Mark Bomani, criticised the legal profession for being largely motivated by its own self-interest.⁴⁹ The law has been frequently criticised for leaning too heavily in favour of the individual and for ignoring community interests. The judges are attacked for being too lenient to the accused, for acquittals on purely technical grounds, and for inappropriately light sentences when convictions are recorded.⁵⁰ The Law Society's views on proposed legislation are hardly ever sought by the government and tend to be ignored when pro-offered. The government has assumed greater control over the regulation of the profession.

How have the different members of the profession reacted to these developments? The private profession has declined, many of its members have gone abroad; its cohesiveness as a group, never strong, is totally lost, and it is unable

to defend either its professional interests or the wider interests of justice. It has never been able to come to terms with the one party political system, and its defence of itself has seldom been in terms that could be related to Tanzanian political or economic ideologies.⁵¹ As far as the judiciary is concerned, there has been considerable discussions about its implications for their role in particular, and for the law in general. The response has been twofold: to assert the centrality of the judicial function, by arguing that a key component of Tanzanian socialism is human freedom, which is the special responsibility of the courts and the law, while at the same time extolling the objectives of TANU and appearing to be striving to achieve them. Members of the judiciary have joined the Party.⁵²

In one respect, however, there is evidence of considerable disquiet in the judiciary. It is reported that the judges are very upset at the violations of law committed by party officials, and are resentful of the strains placed on the courts by the contradictory pressures arising out of the development of ujamaa villages, for which until recently there was no legal basis.⁵³

The most important section of the profession now operates in the public sector. Not a great deal is known about its attitudes. It may be expected that its interests would be allied with those of other bureaucrats. Nevertheless, while other bureaucrats wish for wide delegations of discretionary authority, public lawyers, may, due to their own special technical and ideological training, be ill at ease with the general disregard of the law and its procedures.⁵⁴ They may be in a better position to make the case for the law than their counterparts in the private sector. One group which has been outspoken against the government is the university law teachers. It has been in the forefront of the radical critique of Tanzania, arguing that despite its rhetoric, the government is petty bourgeoisie, linked to international capital, and using the state apparatus to exploit the workers and peasants. They have subjected Tanzanian law to a fierce exposure of its class bias.⁵⁵ Given that law teachers do not directly depend upon the market or the government for their living, they have been bolder than other sections of the profession, as indeed is also the case with academics in Kenya, who have been the only group to take on Njonjo.⁵⁶ But in both cases the academics have paid a penalty of forfeiture of all influence with the government or the practising profession. And yet the paradox remains that these two radical facilities are responsible for the reproduction of the legal system which they attack, as suppliers of the personnel necessary for its functioning.

Kenya

Kenya has tried to cultivate an image, at home and abroad, of a democratic country, where pluralist politics are pursued through a Westminster constitution, where continuity is valued, and the rule of law is upheld. There are various reasons for this ideology: having opted for a capitalist form of development, Kenya considers that it appeals to foreign and domestic capital, and was necessary at independence to overcome the image of the lawlessness of the Mau Mau; it is more attractive to the local people than its version of "African socialism"; it is handy to deal with dissension. The government's emphasis on legality and the rule of law arises in part

from the weak position of its political party and the preference to rely on state and bureaucratic apparatus. While Tom Mboya, then Minister for Constitutional Affairs, was able to mobilise the niceties of constitutional law to demolish the opposition and transform Kenya into a *de facto* one party state, while retaining the ideology of a multi-party democracy,⁵⁷ it was Charles Njonjo, the first Attorney-General, who nurtured this ideology. As the custodian of the legal system with a firm charge over its resources, his own position was enhanced by an emphasis on the centrality of the law and the judicial process. It had the subtle effect of shifting the levers of control (and intimidation) away from political leaders, (and rivals) to himself.

Kenya did not rely only on the processes of the law for intimidation and repression of dissent. There are strong suspicions that if necessary a section of the leadership is willing to murder (suspicions which are fuelled by the assassinations or death in mysterious circumstances of politicians like Pinto, Mboya, Kariuki and Ngala). Kenya has also employed preventive detention legislation, and held political opponents for long periods without trial (Odinga, Oneko, Ngugi, Seroney, Anyonya). Its leaders can also use the bureaucratic machinery to cut off official patronage, powerful sanctions in a system like Kenya's. But it is clear that as far as possible the process of the law has been used. Its use has been particularly important in dealing with dissensions within the ruling elite, dissensions generally over the share out of the spoils of the system.

At first blush, it would appear that the emphasis on law and its processes would add to the prestige and confidence of the legal profession. To explain why this has not happened, and that some sections of the profession are as demoralised as the Tanzanian lawyers, we need to explore the contradictions of the strategy of legality. At first the fact that important politicians could be hauled before the courts enhanced the image of law as an impartial process and of the government as committed to the law. Court processes were used to destroy reputations and careers.⁵⁸ After some time, however, the selective nature of prosecutions became obvious. Politicians in grace got away with assault and damage to property and well documented allegations of corruption went uninvestigated. Politicians out of grace were prosecuted for trifling offences (e.g., a member of Parliament who had raised awkward questions about the involvement of senior ministers in the murder of Kariuki was charged with having assaulted his wife 18 months previously,⁵⁹ or those who were outspoken in Parliament were charged with offences of incitement to violence on the basis of vague statements).⁶⁰ A particularly serious consequence for members of Parliament of convictions in these trials is that if they are (as they regularly are) sentenced to more than 7 months, they lose their seat, and it is widely believed that this is often the reason for prosecution. A pattern appears to have become established so that a prosecution of an important person was assumed to be politically motivated.

It was not only this selective and political use of the legal process which served to discredit the law. The logic of the strategy led to a compromise with the fundamental principles of the process of the law. From the government's point of view, the effectiveness of the court process was that it could disclaim responsibility

("nobody is above the law" "the law must take its course"), and what could be more damning for the accused than that he is found guilty of criminal charges in open court presided by impartial judges and assisted by members of an independent legal profession? The Kenya Constitution provides for an independent judiciary, legal representation by counsel of the accused's choice, public proceedings, and a reasoned decision by the court.⁶¹ The court process cannot for that reason be as tightly controlled as the bureaucratic. If the system worked according to the ideology, the government would run the risk of acquittal (although this might not preclude the use of preventive detention) and so incur charges of victimisation. It therefore becomes necessary to minimise the open endedness of the court process. This can only be done by the subversion of the fundamental principles of that system. Observers of the Kenya scene claim that this is precisely what had happened there. The selective use of the prosecutorial powers has already demonstrated their manipulation for political ends. The barrier of an independent judiciary has allegedly been overcome by the appointment of a few compliant magistrates and judges. Despite the constitutional provisions for the appointment of the judiciary by an independent commission, appointments are in fact decided upon by the government. The fact that the expatriate judges – still a majority on the bench – are appointed on short term contracts (of dubious constitutional validity) increased their dependence on the government. It is significant that cases of this kind tend to be heard regularly by a few members of the judiciary, that bail is regularly refused, and severe punishments are inflicted. Numerous members of the legal profession (both private and government) claimed that these judges sought instructions from the executive before making their rulings and judgements. (It was mentioned to me by several lawyers that a "code language" has developed between the two and three lawyers principally charged with these prosecutions and the judges so that the former can signal to them the wishes of the government, such as "I have been personally instructed by the Attorney-General to ask . . .")⁶²

It has also been alleged that in order to ensure convictions pressure has been brought to bear on defence lawyers. It is easy to control the larger firms, for their business depends so much on co-operation from the government. Business organisations can be told to bring their legal advisers into line (or else to drop their services). Less subtle methods have been used to tame a few independent lawyers. One of them (Pranlal Sheth) legal adviser to the then leader of the opposition was stripped of his citizenship and deported. Another, adviser to the more radical trade unions, was warned off and abandoned legal practice for two years before he was restored to grace. An even more blatant case was the prosecution for currency fraud of one of the ablest defence lawyers in East Africa, Achhru Kapila. Kapila had assisted Denis Pritt in Kenyatta's defence at the Kapenguria trial, and had been involved in almost all of the main trials of the emergency period. Since independence, he has defended various accused who were under a political cloud. His distinguished record, his experience and skills, and his independent wealth, irked some government lawyers, who eventually sought to settle scores by having him arrested and tried. Kapila's characterisation of his own trial in so many ways

typifies the prosecution process. "This prosecution is back to front. You choose the accused first. You look for an offence afterwards. . . It is not the first time I have defended a case of this nature."⁶³ The conviction and subsequent recantation by Kapila, however, drove home the message sharply. Not that that was really necessary, for a long time before advocates had been reluctant to take on politically contentious cases. It is seldom that accused in such cases were represented by counsel of their first choice; and few lawyers would take these cases without prior clearance from the Attorney-General's chambers. The Attorney-General acquired both formal and informal controls over the affairs of the profession.⁶⁴ While control over the local profession was complete, it was necessary to ensure that lawyers from abroad, not susceptible to similar pressures, did not interfere with the pre-ordained path of the judicial process. This was duly done by divesting from the Chief Justice and transferring to the Attorney-General the power to determine whether overseas lawyers would be allowed to appear in Kenya (Act 8 of 1968).

The dominance of the Attorney-General over, and the government's willingness to manipulate the legal system had, it was widely believed, led to further abuses by his subordinates. Collusion between certain prosecutors and magistrates meant that when a charge was made, the accused was told by the prosecutor to go to particular defence lawyers, and the fees were eventually shared out. Plea bargaining is quite common; it is illegal under Kenya law and proposals that it be legalised have been turned down (it is alleged because of its informal use for corrupt purposes). Whether or not these allegations were true, they were widely made and believed, and several advocates stated their dilemmas in advising clients since they knew that the magistrates were so influenced. They were bitter at the manner in which the legal system and the judicial process in particular had been so subverted. Morale was low, and they were afraid that a seemingly innocent debt collection case might have political implications embedded as it might be in "some tribal politics" in a constituency.

It was interesting to compare the reactions of the lawyers when I discussed the state of the profession with them (1977). The African lawyers were the most willing to speak, and the most outspoken. They have had numerous clashes with the Attorney-General (many of them were trained in Dar es Salaam, and the Attorney-General's contempt for most things Tanzanian was well known). They felt that they were discriminated against, and were angry with expatriate lawyers who had connived with the Attorney-General. The European lawyers, on the other hand, were most enthusiastic about Njonjo, who they presented as a paragon of propriety and a strong defender of the rule of law. They denied that they had ever come under any pressure from the government, and maintained that the profession was totally independent. They were critical of the political orientation of the Law Society, now increasingly under African dominance, and wished that it would stick to purely professional matters (the Society has not been "political"; presumably they meant its vocal stand vis-a-vis Africanisation of the legal profession). African lawyers accused European firms of opportunism, and maintained that they stayed away from criminal defence work in order not to run foul of authorities. And yet to establish

their image of public service they give small grants to a legal advice centre run mainly by members of the University. With a few exceptions, Asian lawyers were difficult to talk to, and most of them were equivocal. Judges and magistrates, especially the ones mentioned to me as colluding with the government, professed total commitment to the rule of law as understood to mean an independent judiciary, non-political use of prosecutorial powers, and a fair trial. They had no doubt that the rule of law was fully maintained in Kenya, and that this was the signal achievement of Njonjo.

Conclusion

This study set out to examine the role of lawyers in the context of the political economy of Kenya and Tanzania, on the assumption that this was the most fruitful way to study that role. The study has outlined some of the broad considerations that need to be taken into account; but it is a very preliminary account painted with a broad brush. To test the validity of its conclusion, it is necessary to adopt a more careful periodisation and to explore more closely the differences in the Kenya and Tanzania political economies, colonial as well as contemporary.

The manner in which the economy has been organised has played a key role in determining the functions and position of lawyers. The continuing relations with foreign capital leads to the persistence of legal forms and concepts. In the pursuit of political control over rural developments, Tanzania may wish to dispense with them, but its dependence on the World Bank and other international and national agencies, with their financial orthodoxies, means that legal concepts like title and security have to be re-introduced. In Kenya the functioning of the domestic market itself requires that relations of property and exchange be mediated through law, while the inability of Tanzania to run a planned economy through administrative directives may compel a return to concepts of property and contract to regulate the relationship between public agencies. But the way in which the forces of production have been mediated by the state and the superstructure which has been established to manage the economy are also important. Fundamentally, the modes of production, and the relationship between foreign and domestic capital, in the two countries are similar. However, Kenya manages the economy through a controlled market, while Tanzania attempts to do so through state direction and operation. This provides the lawyers in Kenya with an economic base, which has a measure of independence of the government; while lawyers in Tanzania have little opportunity to carve out a niche independently of the government. Neither political system is tolerant of dissent, or of groups autonomous of the state. The attrition of the professional autonomy of lawyers is not a singular phenomenon; other professions and associations have been similarly affected.

Their views of the profession have not prevented the governments from relying on the law both for legitimacy and repression. Law is a well tried and adopted instrument of governance, and not lightly to be abandoned. If the politically dominant group does not have mastery over the legal system (as in Tanzania, cf.

Kenya where there is heavy reliance on expatriate skills in order to enable that group to control the system), law can be taken away from the provenance of lawyers, and can be mobilised politically and bureaucratically. The problems of legitimacy are however, less easy to tackle. Kenya and Tanzania have no strong commitment to the ideology of the law. The formal law touches directly the lines of only a small proportion of the people. It sits uncomfortably with the expectations and practices of many communities. It still suffers from its colonial associations with overt discrimination, inequality and repression. The problem is compounded in the contemporary period by the reluctance of governments to accept the discipline of law on themselves. For law cannot operate effectively as a legitimising ideology if it is seen merely as an instrument of the authorities, and is capable of calling the authorities to account or safeguard the rights of citizens and communities.

Notes

1. Y.P. Ghai, and J.P.W. B. McAuslan, *Public Law and Political Change in Kenya*, 1970 Chap. X.
2. E.A. Brett, *Capitalism and Underdevelopment in East Africa*, 1973. A good summary of the discussion on Kenya is to be found in John Lonsdale and Bruce Berman, 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914,' 20 *Journal of African History* (1979) pp. 487-505.
3. Lonsdale & Berman, op. cit. 501-502.
4. Brett, op. cit., esp. Chap. 6.
5. M.L. Marasinghe, 'Natives and Business in British Colonial Africa: Some Problems in the Law of Contract', X *East Africa Law Journal* (1979) 213.
6. J. Iliffe, *The Modern History of Tanzania*, 1979.
7. Terence Johnson, 'Imperialism and the Professions: Notes on the Development of Professional Occupations in Britain Colonies and the New States', in Paul Halmos (ed.) *Professionalisation and Social Change: Sociological Review Monograph*, University of Keele, 1973.
8. For an interesting account of colonial political trials, see D.N. Prith, *Law, Class and Society*, Vol. 3.
9. E. Pashukanis, *Law and Marxism*, 1979, Introduction, p.
10. E.g. Lord Denning M.R. on the East African countries in Foreword to *East African Law Today* (1966) at p. vii: "One of their most valued legacies from England is the system of upright justice based on the rule of law."
11. Luckham, Ghana study in this volume; O. Adewoye, 'Prelude to the Legal Profession in Lagos, 1861-1880', 14 *Journal of African Law* (1970) pp. 98-114.
12. Law was not taught in East Africa until 1961. Milton Obote has described, in a BBC interview, how he was frustrated by the colonial authorities in his attempts to read law, and attributes his determination

to fight for the independence of Uganda to this episode. Ali Mazrui was likewise frustrated. Sir Philip Mitchell, the Governor of Kenya told him, 'In India every lawyer is a politician and every politician is a lawyer – there is no professional pride'. Ali Mazrui explains this attitude thus, "A major reason was of course that the law suffered under the handicap of political suspicion. Sir Philip's description of India and the tendency of lawyers to become politicians was part of this total colonial suspicion of the legal profession. The legal profession was thus deemed to be a profession for political agitators", A.A. Mazrui, "The Making of an African Political Scientist", *XXV International Social Science Journal* (1973) pp. 101–116. Ironically, both Obote and Mazrui turned to politics with great distinction, the former as an "agitator", the latter as a scholar.

13. There were honourable exceptions. The late Mr. Chanan Singh played an important, useful political role, and Asian lawyers defended Africans accused of subversive activities in Kenya and Tanganyika.

14. See Ghai and McAuslan, op. cit., H. Morris and J. Read, *Indirect Rule and the Search for Justice*, 1972.

15. Lonsdale & Berman, op. cit., p. 490.

16. See Adwenyo, op. cit.

17. For example, the official historian of the Mau Mau, writing in 1962, attributed the outbreak of violence is no small measure to the process of the law, and in particular decisions of courts (staffed by lawyers) which were too ready to acquit the accused, see Corfield, *Historical Survey of the Origins and Growth of Mau Mau*, 1960, esp. Chapter 13.

18. Phillips, *Report on Native Tribunals*, 1944, para. 799.

19. The *Kahahu* case was decided in 1938 (18 *Kenya Law Reports*, 5) See Ghai and McAuslan, op. cit. pp. 155–56.

20. M.P.K. Sorrensen, *Land Reform in Kikuyu Country*, 1967.

21. S.K.B. Asante, 'Interests in Land in the Customary Law of Ghana: A New Appraisal', 74 *Yale Law Journal* 848.

22. Philip Mayer & Iona Mayer, "Land Law in the Making", in H. & L. Kuper (eds.), *African Law: Adaptation and Development* (1965).

23. See, for example, the Phillips Report, op. cit.

24. Ghai & McAuslan, op. cit., Chap. X.

25. *Ibid.*, p. 401.

26. For Kenya, see Colin Leys, *Underdevelopment in Kenya, the Political Economy of Neo-Colonialism*, 1975; G. Kitching, 'Modes of Production and Kenya Dependency' *Review of African Political Economy*, No. 8 (1977); S. Langdon & M. Godfrey, 'Partners in underdevelopment; The transnationalisation thesis in a Kenyan context', *Journal of Commonwealth Politics*, March 1976; and Nicola Swainson, *The Development of Corporate Capitalism in Kenya*, 1980.

For Tanzania, see I. Shivji, *The Class Struggles in Tanzania*, 1976; L. Cliffe and J. Saul, *Socialism in Tanzania: An Inter-disciplinary Reader*, 2 Vols., 1973; J. Saul, 'The State in Post-Colonial Societies: on Tanzania', *Socialist Register* 1974, pp. 349–372. M. von Freyhold, 'The Post-Colonial State and its Tanzanian version', *Review of African Political Economy*, No. 8 (1977).

27. See esp. Shivji, op. cit.

28. See for a detailed discussion, Yash Ghai, 'Notes Towards a Theory of Law and Ideology: Tanzania Perspectives', in 13 *African Law Studies*, 1976 pp. 31–105.

29. The Ndegwe Commission on Parastatals 1979.

30. *The Weekly Review* (Nairobi) 28 November 1977.

31. See Yash Ghai in Ghai (ed) *Law in the Political Economy of Public Enterprise in Africa*, Chap. X.

32. Personal information.

33. The medical profession was nationalised in 1980 and the legal profession is said to be next in the line. *Guardian* 25 April 1980.

34. Patrick McAuslan, 'The Training of Legal Personnel: Reflections from an East African Perspective' (1980, unpublished).

35. This required the amendment of the law, for originally, the work of TLC was confined to the parastatals.

36. Iliffe, op. cit.

37. Ghai, op. cit., (footnote 28); John Nellis, *A Theory of Ideology* (1972).
38. Hank Chase, 'Treason Trial in Zanzibar', *Review of African Political Economy* (No. 8) 1976.
39. Cap. 22.
40. In order to strengthen 'self-help' schemes, the Penal Code was amended in 1962 by the Penal Code (Amendment)(no. 3) Act to make it an offence for "any person who with intent to impede, obstruct, prevent or defeat any self-help scheme approved by the Regional Commissioner or the Area Commissioner or any self-help scheme of a type approved by the Regional Commissioner or Area Commissioner, dissuades or attempts to dissuade any person from offering his service, or from assisting, in connection therewith, shall be guilty of an offence and liable on conviction to a fine not exceeding Shs 1000 or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment."
41. Magistrate Court (Amendment) Act 1964.
42. Magistrate Court (Amendment) Act 1969.
43. Ibid.
44. For an account of all leaders, see Levine in Cliffe and Saul, op. cit., p. 39.
45. Ghai, op. cit. (footnote 31).
46. See the discussion in Robert Martin, *Personal Freedom and the Law in Tanzania*, 1974.
47. Ibid, p. 98, quoting from an article by Gill Boehringer, 'Development in Criminology in Tanzania'.
48. The President said that unless the culprits were pointed out, each family would lose 10 head of cattle. Some of the cattle would be given to those families whose cattle were stolen. The rest were to be kept by the government. He also order the police to round up all the cattle rustlers in the area. *Daily News* 22 November 1974.
49. M. Bomani, 'The Machinery of Justice'. 16 *East African Journal* (May 1966).
50. Thus, for example, when a commission to review the legal system was announced in November 1974, the reason given for its appointment was that the legal system "gives chances to some criminals to escape punishment." *Daily News*, 9 November 1974. Kawawa has complained that despite the tightening of the law, there are few convictions. *Daily News*, 18 June 1975.
51. In its submission to the Commission on the One Party State (1965) and the Commission on the Judicial System, it has emphasised the traditional concept of the Rule of Law and the role of lawyers in maintaining it. It has made little attempt to formulate its role in the context of Tanzania debates on the one party state or the attainment of *ujamaa*.
52. For an elaboration of this, and particularly former Chief Justice George's attempt to relate the judicial process to Tanzanian ideology, see Ghai op. cit. (footnote 28).
53. In 1964, *Africa Confidential* reported a meeting of judges and magistrates in which they expressed considerable disquiet at the handling of the *ujamaa* cases. Protesting against Chief Justice Saidi's alleged verbal directive that cases involving individuals and *ujamaa* villages should not be heard in the Primary or District courts, but should be taken directly to him, they moved that "this conference of judges and magistrates, conscious of the difficulties that arise in the acquisition of land for the purposes of setting up *ujamaa* villages and apprehensive of the consequences of overzealous efforts on the part of some people, hereby resolves that until it is seen fit by Parliament to change the law, the courts must apply the existing laws as best as we can."
54. At a meeting of government lawyers in 1973, anxiety was expressed at the use of the Preventive Detention Act when there was enough evidence to go to court. They criticized certain arrests under the Exchange Control Act, and slow police investigations which delayed trials, and urged need for law reform. *Daily News*, 15, 16 November 1974.
55. See particularly the issues of the *Eastern African Law Review* published by the Faculty.
56. *The Weekly Review*, 23 June 1978.
57. Ghai & McAuslan, op. cit., esp. Chap. XIII.
58. A prominent opposition leader, Bildad Kaggia, was charged with holding an unlawful meeting (1968), although the evidence was weak and no public disturbance occurred. See discussion in Ghai & McAuslan, pp. 447-450. The First Kenya Chief Justice, Kitili Mwenda, was implicated in the course of state evidence in a trial of army officers on conspiracy charges, and forced to resign.
59. See *The Weekly Review* 25 August 1975 for details of Mwithaga's case.
60. See *The Weekly Review* 16 February, 23 February and 15 March 1976 for the trial of Ms. Mutai, a

leftwing member of Parliament.

61. See Ghai & McAuslan, op.cit. Chap. IX.

62. See also R. Martin, "Teaching Law in Kenya: A Personal Footnote", in 14 *African Law Studies* (1977) pp. 63-85.

63. *The Weekly Review*, 1 August 1977.

64. He promoted legislation in 1966 to vest increased powers in the Attorney-General over the membership of the Council of Legal Education (without prior discussion with the Council or its Chairman, the Chief Justice). Statute Law (Miscellaneous Amendments) Act, 1966.

Professionalism and Change

The Emergent Kenyan Lawyer*

I. Introduction

The Model of Professionalism

The literature of occupational sociology is especially rich in its treatment of one prominent occupational category – the professions. The central theme in this literature has come to be the professional model, conceived as an “ideal type” that permits comparison between actual professions and the abstract model. The model is said to consist of a series of attributes which are deemed important in distinguishing professions from less or non-professional occupations. The attributes are conveniently categorized into two basic types: those which are part of the structure of the occupation and those which reflect the attitudes of the practitioners to their work.

The structural side of the professional model has been extensively examined by Harold Wilensky, who views occupations as evolving through distinct stages on their way to becoming professions.¹ The structural attributes, according to Wilensky, start with the creation of a full-time occupation out of the work done. Second is the establishment of a training model reflecting the knowledge base of a profession and the efforts of early leaders to improve the lot of the occupation. Third is the formation of professional associations, which attempt to define more clearly the exact nature of the professional tasks and eliminate those practitioners deemed incompetent by the emergent professionals. The associations also characteristically engage in political activities as they attempt to protect their occupational turfs from potential competitors by such means as licensing laws. The fourth is the formation of a code of ethics to guide interaction among colleagues and interactions between the practitioners, clients, and the public.

The attitudinal side of the professional mode, reflecting the manner in which the practitioners view their work, has also been extensively examined and debated. Three main attitudinal attributes have been said to be characteristic of professions² (though it is difficult to separate them entirely from the structural features described above). First is corporate identification with a group of professional colleagues, including use of a professional association as a major point of reference for attitudes and behavior. Second is the belief in professional autonomy. Self-regulation

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incorporates the idea that colleague control is desirable, and that only a fellow professional can adequately judge the work of a colleague. And third is belief in service to the public and closely related to it, the sense of calling to the field. This incorporates the idea of the indispensability of the profession to the public. A sense of calling is sometimes termed the Florence Nightingale syndrome, the dedication to work for its intrinsic rewards, rather than for its extrinsic gratifications such as a high salary.

The professional model as outlined above has come to gain acceptance in the literature of occupational sociology as an ideal type. It is used as a measuring tool used to determine how far along the professionalization path a particular occupation has moved. It is the movement towards correspondence with the model that is considered to constitute the process of professionalization.³ Models, however, are no more than the elements of which they are constructed; besides, they do not mirror contexts different from, or wider than those in which they are formulated. A casual look at the professional model suggests that not only is it inapplicable to the professions in the developing world, but also that its application to the industrialized world needs to be reassessed in light of recent developments.

In a major critique of the model, Johnson argues that the conditions which gave rise to the institutions of professionalism are no longer dominant in industrialized societies, and therefore this 'trait' framework of analysis, championed by the functionalist perspective, is inadequate for analysis of occupational change.⁴ He points out that the growing strength of consumer movements and the emergence of 'communalism' as forms of client control have weakened the usefulness of the professional model. Hall and Ryu also observe, in their study of the professions and power in American society, that as the consumers of professional services have organized, professional authority has declined.⁵ The essence of this authority is the belief on the part of the client that the professional has not only the knowledge, but also the right to prescribe a course of action to the client. It is this authority that is commonly thought to be at the heart of the professional-client relationship. In recent times, however, recipients of public assistance have organized against social welfare workers; students have organized against professors; rape victims have organized against the police and judges; all amounting to a client revolt seriously questioning the basis of professional authority. In a further discussion, Johnson criticizes the way in which the ethnocentric professional model has been elevated to a cultural universal and applied uncritically to Third World situations.⁶ Third World professions have undergone a process of historical development which differs fundamentally from that experienced by professions and occupations in the industrialized world.

This paper proceeds on the basis that occupational development occurs in culturally distinct locations, and that such locations significantly affect the nature of occupational development. The application of the professional model in measuring professionalization in the Kenyan legal profession has therefore been tempered with the presentation of the unique historical context in which the profession has developed.

Methodology

Three basic instruments were used in the research. The first was the collection of historical data. This was necessary in light of the fact that the development of the legal profession in Kenya is occurring in a rapidly changing cultural context. The high court library in Nairobi was very cooperative in this phase of the research. It is in this library, incidentally, that the first acquaintance was normally made with the lawyers as they browsed in between their court sessions. The structural attributes, including the establishment of a training model, formation of the Kenya Law Society and the formation of a code of ethics were examined during this phase.

A questionnaire, as the second instrument, was then prepared and pretested on selected lawyers. Their criticisms and suggestions proved to be valuable. A portion of the questionnaire was then designed to measure the attitudinal attributes including belief in self-regulation, use of the Law Society as a major reference, a sense of calling, a feeling of autonomy, and a belief in service to the public. The measurement was accomplished through the standard Likert technique of attitude scaling. A stratified sample of lawyers of European, Asian, and African descent was drawn in as random a manner as was feasible under the circumstances. The administration of the questionnaire was then carried out with the help of three University of Nairobi law students, who doggedly followed the ever-busy lawyers until interviews were granted. Seventy African, forty-seven Asian, and twelve European lawyers were interviewed. The number of interviews with Europeans completed was less than hoped; although those we did interview were particularly expansive and gave us the impression that their views were shared by many of their colleagues.

An in-depth interview, as the third instrument, was carried out with selected lawyers. The selection included those who have served as officials of the Kenya Law Society; those who were engaged in unusual legal activities such as legal aid schemes; those who typified a style of practice that tended to set a trend for others to imitate, for example, a small but successful partnership fully managed by Africans; those very few Africans who were practising law before independence; and those who have taken up sensitive legal tasks, such as the defence of political assassins or political detainees. The in-depth interviews utilized parts of the questionnaire but, for the most part, were open-ended conversations lasting as many hours as the respondent could give without the interview reaching the point of diminishing returns.

Discussion of the Findings

It is recognized that the most professionalized occupations structurally are not necessarily those most professionalized attitudinally. Applying the Wilensky stages of professionalization, the Kenya legal profession appears on the surface to have passed through all the stages. It has eliminated part-time practitioners such as the *vakeels* and it is a full-time occupation. Although the establishment of the training model is incomplete in that the apprenticeship and the academic models of training still co-exist, it can be said that the academic model is likely to predominate in the

near future. The formation of the professional association, the Law Society, was accomplished early, and the Kenya legal profession has an ethical code that it has enforced. These accomplishments, according to Wilensky, should place the profession at a high level on the professionalization scale. Moreover, despite a plural legal profession, the measurement of professionalism by means of a battery of attitude questions reveals few significant differences between the lawyers of Kenya's three racial groups (see Table 1),⁷ suggesting a broad consensus on professional values which cuts across lawyers' backgrounds and group affiliations. But what do these achievements actually mean in the social and economic context of a society such as Kenya?

Table 1. *Professionalism Scale Scores by Race of Lawyer (Percent of Lawyers of Each Racial Group within given range of scale scores)*

Range of Scale Scores	Africans %	Asians %	Europeans %
+ 23 to + 12	23	15	0
+ 11 to + 4	40	45	67
+ 3 to - 3	27	26	25
- 4 to - 16	4	11	8
No answer	6	4	0
Total	100	100	100
N =	70	47	12

The professionalism scale is based on responses to twenty questions measuring the following different dimensions of professionalism:

- a. use of the professional association, the Kenya Law Society, as a major reference group (including attendance at meetings and social functions organized by the Society);
- b. belief in self-regulation of the profession;
- c. sense of calling to the field;
- d. importance attached to the skills of the profession (e.g., the extent to which lawyers use or contribute to professional journals, discussion of legal issues with fellow lawyers).

Some examples of the questions used may be seen in the other Tables.

II. From Self-Regulation To State Mediation

One of the attributes of a profession outlined in the model described above is said to be the presence of self-regulation. Not only are the professions deemed to have won the right to regulate their own affairs, but also they are expected to exhibit a strong belief in the maintenance of that right. On the other hand, it may be argued that this describes only one among a number of different ways professional occupations may be controlled. Johnson outlines three basic types of control.⁸ First

is the classic model of self-regulation or collegiate control in which the producer of the professional services defines the needs of the consumer and the manner in which these needs are met. Second is patronage control in which the consumer defines his own needs for professional services and the manner in which these needs are to be met. This type is exemplified on the one hand by oligarchic patronage; in traditional societies and on the other hand by the patronage of corporations and other large organizations in industrialized societies. Third is mediative control in which a third party mediates in the relationship between producer and consumer, defining both the needs and the manner in which the needs are to be met. This type is exemplified by state mediation in which a powerful centralized state intervenes in the relationship between producer of the professional services on the one hand and the consumer of those services on the other.

Johnson convincingly argues that the development of the professions in the Third World is marked by the existence of both state meditative and patronage control resulting from the fact that the colonial state was the main consumer of professional services. It appears, however, as if the Kenya legal profession may have been a partial exception to this generalization. For the profession seems to have developed initially under a mild form of mediative control, but quickly moved into a political context that readily granted the profession the right to self-regulation. However, with changes in the political context, especially from colonialism to independence, the profession has evolved into its present status where self-regulation, or in Johnson's terms, colleague control, has given way to a much stronger form of state mediative control.

Ghai and McAuslan have ably documented this evolution.⁹ The initial stage (1901–1905) of the profession was marked by a mild form of mediative control, in which the Chief Justice was empowered to license non-lawyers to practise. This he did when he felt that public demand for legal services exceeded the available supply. He was also empowered to mediate in the remuneration arrangements between lawyers and their clients if it was felt the arrangement was unsatisfactory. With these powers, the Chief Justice determined to some extent the manner in which legal services were provided to those who consumed them.

The Legal Practitioner's Act of 1906, however, marked the beginning of the profession's efforts to organize for its collective protection. The act was subsequently reformulated to exclude the *vakeels* and the clerks from the practice of law, while extending the right of practice to lawyers from the British Isles and the self-governing dominions. It also permitted legal practitioners to make remunerative agreements with clients in the amounts they saw fit. The act finally imposed penalties for any non-lawyer, including legal clerks, who acted in the capacity of a lawyer. The initial Act and its subsequent versions served an important function for the profession. It defined the profession's turf and made it secure of competition from others (clerks, *vakeels*) who aspired to offer the same services to the consuming public.

However, full-fledged self-regulation was not achieved until the enactment in 1949 of The Law Society of Kenya Act. Under this act, the several voluntary law

societies that were flourishing in the major Kenyan cities amalgamated under the name The Law Society of Kenya, which achieved statutory authority to regulate its affairs. The Society set up two regulatory committees: the Remuneration and the Disciplinary Committees respectively. The former proceeded to set the rates at which all the lawyers would work in an effort to eliminate price competition between colleagues, while the latter proceeded to set up a structure for processing complaints from both the public and colleagues. An amendment to the Act three years later (1952) made membership in the Society mandatory for all legal practitioners, thereby putting an end to the former voluntary law societies as well as preempting the future formation of splinter law societies opposed to the statutory one. Two years later (1954), the Disciplinary Committee was granted executive powers to actually discipline the members, instead of acting in an advisory capacity as previously. With the closed-shop status of the Society and its power to discipline its members, self-regulation in the profession was at an all time high.

Nevertheless, this self-regulation was achieved under very special circumstances which limited the autonomy the profession achieved to narrow matters of self-interest; and as Ghai and McAuslan point out¹⁰ did not allow it to take on a broader role of guardian of the rule of law and civil liberties within the colonial state. The success of the British and Asian lawyers who composed the profession in winning the right to regulate their own affairs can be understood in the context of the general success of expatriate interests in obtaining concessions favorable to themselves from the colonial government.¹¹ Furthermore, it was an autonomy that derived from the express delegation of powers to regulate the profession by the state; powers which could always be taken away if state interests altered or the legal profession became too active a defender of civil liberties.

A profession composed largely of expatriates and dependent on the state for many of its privileges was thus particularly vulnerable to shifts in the balance of political forces such as occurred with the coming of independence. Africans were coming to power, yet in 1961 the long-standing policy against legal education for Africans was still in effect. If the concept of self-regulation had succeeded in regulating potential African lawyers out of the profession, the African governments were now bound to intervene. The opportunity presented itself in the aftermath of the Denning Report on legal education for African students in Britain.¹² Among other reactions to the report, the new Kenya government decided to set up a Council on Legal Education, whose function was "to exercise general supervision and control over legal education in Kenya. . . and to advise the government in relation to all aspect thereof." With the creation of the Council, direct state mediation in the affairs of the Kenyan legal profession was effectively reinstituted. The Kenya Law Society, which had previously enjoyed self-regulation, turned its attention to the composition of the newly created council and sought to regain its control of the profession by obtaining a dominant voice within it; but without success. The fact is that after various attempts at compromise, the state (and in particular the Attorney General) retained the controlling voice in the Council, and the voice of the law Society has been effectively subordinated.¹³ The Council retains the final authority

in admitting new lawyers to the practice, hence is the gate-keeper for the profession.

The most conspicuous area of state mediation has thus been in the education of the new lawyers. This mediation has been achieved without major confrontations because the profession, still predominantly expatriate, finds itself politically impotent by virtue of its own myopic past policy of denying the Kenya Africans legal education. Expatriates are, after all, aliens and thus not well situated to do battle with the state, even in the name of the sacred principle of professional self-regulation.

To be sure, the profession still has managed to retain some of its powers to regulate its own internal affairs. The Disciplinary Committee of the Law Society retains responsibility for initiating corrective action against erring lawyers. And the Remuneration Committee still reviews lawyers' professional charges and monitors the implementation of the remuneration regulations. Nevertheless, despite the view held by some as late as 1973 that "the profession has been able to fight for its independence from the government and... succeeded,"¹⁴ the evidence indicates that not only is state mediative control firm, but also likely to continue into the future.

The profession has failed to emerge as a pressure group capable of speaking on issues that affect the law in general and the profession in particular. Cases have occurred of lawyers themselves being detained by police when visiting their clients in their cells. There is a widespread belief that certain magistrates, usually Asians, have been used by the government to jail political opponents. Lawyers who agree to appear for the defence in such cases may also run the risk of themselves being classified together with their clients as political opponents.¹⁵ These are matters about which a genuinely autonomous profession would be compelled to comment. But if recent Third World history where the political pendulum swings between authoritarian civilian regimes and military rule is any guide, professional autonomy might as well be considered gone as part and parcel of the colonial era (if it ever existed during the latter).

III. Establishment of a Training Model and the Role of the Emergent African Lawyer

Wilensky argues that occupations pass through a sequence of stages on their way to becoming professions.¹⁶ Particularly relevant to the development of the Kenyan legal profession is his concept of a training model stage. This stage reflects both the knowledge base of the profession and efforts by initial leaders of the profession to improve its lot.

In his discussion of the history of legal education in East Africa, William Twining suggests that this history might be divided into three stages: the period of neglect, the period of revolution, and the period of consolidation.¹⁷ The period of neglect is the colonial era during which Africans were denied legal education under the pretext that they wished to study law only as a preparation to careers in politics, and that engineers, doctors, and agriculturalists were therefore more urgently needed. The lawyers then practising in the region, all European and Asian, were trained

outside East Africa. This also meant that the important question of the appropriate model of legal training for an East African post-colonial lawyer, whose career would span the initial and most crucial years of nation building, was left in abeyance.

With the inevitability of independence for the East African territories, however, the question of what should be the appropriate role of the newly minted African lawyer during what Twining, perhaps over optimistically, refers to as the revolutionary stage had to be answered. At this point, several basic questions about the place of the profession in a post-colonial society might have been considered. First, because the law of the colonial period was received law and out of touch with the cultural pulse of the indigenous majority population, should the post-colonial lawyer be a legal reformer endeavoring to change the law to reflect the local conditions, customs and the dominant ethos and values? Should the new model alert the lawyer to the possibility of a balanced mix between the received and the customary laws in areas such as family law where the received law has been shown to fail? Should legal education sensitise the lawyer to customary ways of settling disputes? Should the new model instill into the lawyers an innovative approach to law rather than concentrating on the familiar areas of law that lawyers have always come into contact with in the past? Should lawyers be instilled with a sense of the need for the general development of the law, as opposed to the narrow and mechanical application of the existing law? Lastly, was there validity to the contention of the colonial administration that legal training for Africans was merely a preparation for careers in politics? Such questions might have been asked by the planners, but if they were, they were never answered.

Ghai and McAuslan suggest¹⁹ that one of the reasons these questions were never really confronted was the firm resolve of the Kenya Law Society during the initial stages of the post-colonial reconstruction to install an apprenticeship model of legal education, and to prevent at almost any cost the introduction of alternative models, especially the academic model. The Kenya Law Society not only opposed Lord Denning's recommendation to establish a law faculty at the University of Dar-es-Salaam, but was later also to oppose the Kenya Government's receptiveness to the idea of creating a law faculty at the University of Nairobi.

This opposition continued even after the government yielded to the Law Society by establishing at the Kenya School of Law facilities for the training of lawyers who were to be apprenticed to established practitioners. The opposition was prolonged because the government insisted on viewing apprenticeship as one among a number of alternative routes into the profession; and indeed made plans to also introduce the academic model through the establishment of a faculty of law at the University of Nairobi. Writing at this time, the Principal of the Kenya School of Law predicted an eventual complementarity between the two models, but not without questioning the wisdom of installing a competing model.

It is difficult to envisage two major centers of legal education existing in Nairobi with identical objects: producing lawyers. What seems possible is that the school will be complementary to the University and that one of its functions will be to provide a course of post-practical training for law graduates of the University of East Africa who wish to practice as advocates in Kenya.²⁰

On July 1, 1970, the faculty of law at the University of Nairobi opened its doors to the first intake of students with its mission spelled out as offering a basic three-year legal education leading to the LLB degree.

Twining's third stage, that of consolidation, is yet to come; hence the continuing debates and conflicts surrounding legal education and the considerable variation in the training to which the different groups of lawyers are exposed. Thirty percent of the African lawyers we interviewed were products of academic training, but not from the University of Nairobi which had only just begun to produce its first graduates at the time of our interviews. Most of these belonged to the pioneering cohort of Kenya students trained at the Faculty of Law, University of Dar-es-Salaam. The majority of the Africans interviewed, 51 percent, were products of the apprenticeship training provided at the Kenya School of Law. Most of the remaining 19 percent were trained abroad in Britain or in India. None of the European lawyers interviewed was a product of any institution in Kenya, 58 percent being trained in England as solicitors and the remaining 42 percent as barristers at the Inns of Court. The majority of the Asians were either products of the law faculties in India (30 percent) and the Inns of Court (40 percent); though a few trained in England as solicitors (15 percent) or were the products of East African training (15 percent) mostly at the Kenya School of Law. Among the African lawyers our interviews suggest that the products of the two streams of legal education did not assess each other as equals. Products of the academic model for the most part regarded the products of the Kenya School of Law as being less well qualified than themselves. Yet it is the products of the apprentice model who have found their way in greater numbers into employee or partnership arrangements with the dominant expatriate law firms; thus appearing to work in collusion with the latter in providing them with what is still an effective competitive edge against the fledgling African-owned firms, many of which belong to the first graduates of the University of Dar-es-Salaam. Nevertheless, the overall relationship between the two training models is moving towards a situation where one will complement the other as predicted by the principal of the Kenya School of Law, with the School of Law in the future providing the practical portion of the training and otherwise catering for those in the civil service who require refresher courses. The probability, however, of an amalgamation or merger between the School of Law and the University of Nairobi appears remote, since the forces that have traditionally supported the former are likely to remain active a while longer. This is indicated in the fact that the majority of the African as well as of the Asian and European lawyers interviewed (61, 68 and 58 percent respectively) said they would be opposed to such a merger.

There was, however, a certain amount of division on racial lines on the question of whether the profession was being Africanized fast enough. An overwhelming majority of European and Asian lawyers (92 and 62 percent respectively), felt the rate at which African lawyers were being enrolled was satisfactory. In contrast, of the African lawyers, only 33 percent thought the pace of Africanization satisfactory (34 percent, 17 percent and 9 percent of them judging it to be fair, unsatisfactory or deplorable respectively).

There were also differences of opinion among lawyers of different races on the length and difficulty of training required for practice. Most European lawyers (64 percent) but only a minority of Asian (44 percent) and African lawyers (30 percent) thought that the requirements for enrollment of law graduates in force at the time of the interview should remain unchanged, namely: three years at the University of Nairobi, one year of pupillage in chambers, one year of post-practical training at the Kenya School of Law, followed by a pass on a professional examination set by the Kenya Council on Legal Education. (The total length of the training period has been reduced from five to four years since our interviews took place.) Thirty-three percent of the African lawyers and seventeen percent of the Asians but none of the Europeans said either that the training was too long or that at least one of its stages should be omitted.

In view of the opinions held by Europeans about the need for a long and exacting training period for African lawyers, it is a major irony that they themselves seem to attach less importance to the intellectual skills of the profession than their African or Asian colleagues. Not only (see Table 2) are they less likely to read or contribute to professional journals, but they are less willing to make judgments about their colleagues' competence (though the latter may also reflect a certain unwillingness to be drawn into evaluations of their colleagues because of their weak political position).

Table 2. *Importance Attached to Intellectual Skills of the Profession*

RESPONSE	A. "Although I would like to, I really don't read the professional law journals too often."		
	Africans	Asians	Europeans
Agree or Strongly Agree	60%	53%	75%
B. "Have you ever contributed an article to a Law Journal?"			
Yes	11%	6%	0%
C. "I enjoy seeing my fellow lawyers because of the ideas that are exchanged."			
	Africans	Asians	Europeans
	%	%	%
Strongly Agree	24	19	8
Agree	59	47	83
Disagree or Strongly Disagree	9	25	8
D. "As lawyers in current practice, we really have no way of judging each other's competence."			
	Africans	Asians	Europeans
	%	%	%
Strongly Agree	27	23	50
Agree	43	38	42
Disagree or Strongly Disagree	16	34	8
N =	70	47	12

Note: Percentages do not always add up to 100% down columns because of a small number of non-responses to each question.

The existence of such divergent views within the profession should be understood in the wider context of the dilemma posed for postcolonial elites by the existence of a double criterion of elite status. As pointed out by Leach and Mukerjee and elaborated by Johnson,¹¹ during the fight for independence, it is the educated elite, usually the professional group, who lead the struggle. Yet elites are often educated in the metropolitan centers and share common professional ground with those they intend to overthrow. Hence their post-colonial political and professional respectability depends on the double criterion: they need to have demonstrated their hostility to the colonial power; yet they also need to have exhibited professional competence of a kind which the colonial authorities themselves recognized. The dilemma is particularly acute for the professionals who, while being the beneficiaries of new post-colonial States, seek to retain metropolitan standards, which may be costly, as a means of controlling entry to the professions. Political activity against the colonial authority had aimed at rapid Africanization once independence was won. Yet the desire to maintain common international standards is also perceived as being legitimate lest the professions fall victim to international lack of recognition. The dilemma becomes even more acute when development plans call for rapid expansion in professional services, yet at the time there are fears within the professions that accelerated minting of new professionals may lead to the lowering of standards (and lower average incomes).

Kenya has not escaped this dilemma. Indeed, during our study, a fascinating scenario that dramatized the problem was repeatedly enacted on the campus of the University of Nairobi. Students of architecture staged demonstrations demanding the removal of an expatriate head of the school of architecture, only to be met by the police riot squad, thus escalating the conflict which precipitated a chain of events resulting in injuries to many students, the temporary closing of the institution, and finally the resignation of the expatriate professor. The students accused the latter of conspiring with the local architectural association either to slow down or actually to prevent local students from entering the profession. As the headlines of the newspapers at the time indicate, the issue was not confined to academic corridors.¹² The problem of training architectural and other students for professional responsibilities quickly turned into a national debate.

The law students, as if not to be out-distanced, were already staging an act of their own. Upon learning that a bill proposing to amend the Advocates Act was on the floor of the Parliament, with the intended effect of prolonging the overall period of legal training, they launched an unusual lobbying campaign. The Kenya Law Students Society (Makerere, Nairobi, Dar-es-Salaam Universities) drafted and distributed a memorandum to the parliamentarians, part of which reads as follows:

It is our view that the proposed amendments is a conspiracy aimed at delaying further the entry of Africans into the legal profession, and subjecting such entry to the whims of foreign advocates with vested interest in the profession.

This is a deliberate effort to defeat and frustrate the declared government policy of Africanisation in the judiciary and the legal profession as a whole. The available statistics show that after ten 'great years of independence', out of 440 practicing advocates, only 144, a mere 32 percent, are Africans.¹³

This prompted a long defence published in the newspapers by none other than the principal of the Kenya School of Law, in which he documented the meticulous way in which the government has proceeded in training African lawyers.²⁴ And the Attorney General himself took to the floor of the parliament and first chided the students for their illiteracy and lack of command of the basic English grammar as revealed by their memorandum; but then on a more serious note, declared: "The Kenya government does not intend to take short-cuts in the production of lawyers. What we want are lawyers who are competent, punctual, prepared to serve diligently and honestly."²⁵ The Attorney General went on to issue a warning to the law students to stick to their studies and to stop meddling in parliamentary politics. Perhaps revealing his preference for training by apprenticeship, he advised that university law students instead of issuing memoranda should imitate their counterparts at the Kenya School of Law, who had settled down to serious legal studies.²⁶

In parliament, however, critics have often raised questions such as: Why is it that there are so few African lawyers working in the Attorney General's own chambers?²⁷ To this he has replied that his department is faced with the problem of law graduates who, after having been absorbed and groomed, decide to give one month's notice of resignation to enter lucrative private practice. The same problem, the unwillingness of the young African lawyers to work on what they view as low government salaries, appears to be responsible for the slow Africanization of the judiciary which is currently dominated by the Asians, who either have other independent sources of income, or have simply accumulated long records of service beginning from colonial era and are now on the top salary scales in these posts.

During the initial period after independence the main problem had been that, with Africans dominating the public service as prosecutors, the expatriates would continue as in the colonial period to dominate the private sector and bear a disproportionate share of the defence in criminal prosecutions of the underdog. This role reversal between Africans and expatriates seems particularly unpalatable in the light of the fact that not too long ago it was the African professional elites who challenged the colonialists, supposedly on behalf of the underdog. Unlike the initial stages of independence when many African law graduates joined the public service, the current trend is for private practice to attract the predominant proportion of graduates. Rather than recommending salary raises to attract young African lawyers into the public service, the parliamentary comment on the issue has tended merely to condemn the cupidity of these newly minted professionals. The general mood of the parliamentarians on the issue is well exemplified in the words of one of them:

African lawyers should not be in a hurry to get rich, but should make sacrifices to enable the government to Africanise the judiciary which is a vital institution. They must persevere just as foreigners who are at the moment serving in the judiciary have done.²⁸

However, career paths which lead African lawyers into private practice and away from the public sector are becoming even better established than before, despite the

Table 3. *Perceptions of Pupillage*

Africans: "Would you say your master during pupillage opened every possible learning opportunity for you?"

Non-Africans: "Would you say your pupil made use of every possible learning opportunity made available?"

RESPONSE	Africans %	Asians %	Europeans %
Yes	41	47	33
No	34	2	33
Other	25	53	33
Total	100	100	100
N =	70	47	12

racial cleavages of the profession. All the African lawyers interviewed had taken pupillage from non-African masters. The pupillage encounter was often said to have yielded mutually satisfactory results despite the fact that the encounter is pregnant with potential role and racial conflicts (see Table 3). In the past, the pupil has almost always been African and the master expatriate. The expatriate is aware that the pupil is a potential competitor. Yet our interviews also showed that the European lawyers were more inclined to take in pupils than either the Asian, or the few African lawyers now qualified to admit pupils. Both the willingness to welcome pupils, and the mutually satisfactory experience that sometimes follows may be partially explained in terms of the survival strategy of the European law firms. Not only are they responding to the government's policy of Africanization, but it is also through pupillage that a firm can select a congenial employee or a potential junior partner before it is eventually forced into taking in an unknown product. The reluctance of some Asian lawyers to take in pupils (although nevertheless others do) may be partly because of what Marris and Somerset identify as the successful and time-tested Asian way of doing business in Africa: the family business." And the African lawyer's reluctance to welcome the pupil may be partly explained by pointing out that after completing the qualifying five years of practice, he is often not well established enough to spend his time on a new trainee. Hence the whole question of an orderly transition from the classroom to pupillage in chambers in the socialization of new Kenyan lawyers is somewhat problematic; though the situation may be eased by the use of legal aid schemes as an alternative route for pupillage.

The most popular form of private practice among Africans is the two-man partnership or company as it is often known. "T and J – Advocates" or "T and Company – Advocates" is the title most preferred. The reason most lawyers give for either shunning the public service or having resigned from it is that there are unwarranted frustrations in the public service. What this boils down to is that superiors are slow to reward merit and instead place emphasis on seniority or the 'right' connections. There is no doubt that the young African lawyer out of law

school tends to see the partnership as a quicker way to make a comfortable living than public service.

Partnerships, while popular, are also fraught with problems; the major one being that few of them last. Unlike other businesses, the lawyers contemplating a partnership do not have the privilege of securing business loans from lending institutions. Hence the formation stages of partnerships are plagued with financial problems. Among the reasons dissolutions sometimes occur is the incarceration, suspension or disbarment of a partner for the misuse of clients' accounts on short-term investments. The temptation to use clients' money, hoping to replenish the accounts with funds from other clients is greater when the partnership is young. The lack of balance in the expertise of the partners is another frequent cause for dissolutions. In the surviving partnerships the weaknesses of each partner seem to be balanced by the strengths of the other.

Partnerships are formed not only between the emergent African lawyers but also between Africans and non-Africans. As has already been shown, a considerable number of young African practitioners pass through the expatriate firms and partnerships as pupils. In addition, a growing number of Africans are being absorbed into the established European firms in positions other than mere employees. For such firms, offering partnership to the young African is a further element in their strategy for the long-run survival. A few Africans are also employed by commercial companies. Insurance, tea and coffee firms retain lawyers. However, since many of the larger firms are foreign based, they rely on their head office lawyers; and only consult a Kenyan law firm or shop around for lawyers when in need, rather than taking them on a continuing basis.

Solo practice is perhaps the second choice of most African lawyers. Like partnerships, it is a hazardous route for the African lawyer to take. The urban solo lawyer experiences the most difficulty in starting his business. He often cannot afford to rent an office in a decent part of the city, pay a secretary, and maintain a functioning telephone. The temptation to abuse clients' accounts is greater. The range of cases he can competently handle is limited, yet his need for income may force him to take cases he knows he may not have the expertise to handle. In spite of this a few solo practitioners in Nairobi are quite successful. The successful ones are those who have developed marketable expertise such as defence of those charged with robbery (the robbery rate in Nairobi being said to have greatly increased as the city attracts international tourists).

The rural lawyer is almost always a solo practitioner. By rural lawyer, we are referring to the African or occasional non-African who has an office in a small town such as Kisii, Kapsabet, Kakamega, Eldoret or Kisumu, but actually deals mostly with clients from the rural areas adjacent to these towns. There appears to be some division of work in that the non-African lawyers (usually Asians) in these small towns usually confine themselves to the town residents for their clientele; whereas the African lawyers commute to District Magistrates' Courts deep in the rural hinterland.

The African rural lawyer tends also to specialize in the type of case that his Asian

counterpart avoids. An Asian lawyer in Eldoret, for example, was interviewed on his last day in the town. He was moving to join a law firm in Nairobi. When asked why he was moving, he answered that the cases in the area increasingly involved African customary law, and that town clients were not enough to keep him in business. Land disputes are the major specialization of most African rural lawyers. This is in spite of the fact that rural Kenya, especially the Western region of Kakamega, appears to be generating a major new social problem, that of rural crime. Abrupt social change from a subsistence to a money economy has led to a growing number of cases of petty theft, alcoholism, assault, robbery and killing. Yet rural lawyers, for obvious reasons, tend to avoid cases resulting from these incidents. Criminal litigation in the rural areas is not financially rewarding, as the clients it brings in are usually poor. Rural land cases, on the other hand, are lucrative, not so much because the rural people are rich, but because relatives in the city with a stake in the land are willing to finance the litigation.

The rural lawyer, especially the African, is almost bitter against the Law Society. He feels isolated and forgotten out there since the Society concentrates its activities in Nairobi. One lawyer sarcastically remarked, 'the most important function of the Law Society these days is entertaining themselves in Nairobi.' The rural lawyer rarely travels to Nairobi to attend any of the Society's functions on the grounds that the expenses would be prohibitive compared to the purpose.

It is also in these areas where the irrelevance of some Kenya laws, such as the English-based legislation on matters like bigamy, succession, and the acquisition of land, is most keenly felt; and the lawyer often has to rely on his own common sense in settling disputes. The irrelevance of some of the professional rules is also more obvious. Even in rural courts lawyers are required to be 'properly' dressed, meaning a suit and a tie. Not only is this inconvenient to the lawyer who has to travel miles through muddy roads, but also the dress itself creates a communication barrier between the lawyer and his clients.

Almost all the rural lawyers who appear before the District Magistrates' Courts agree that a serious problem exists between them and the Magistrates. One rural lawyer asserted that whenever a client is represented by a lawyer against an unrepresented client, the represented client loses, because this gives the District Magistrate a chance to show the lawyer that despite the lawyer's training, the Magistrate has more power. The problem is a basic gap in education between the lawyers and the District Magistrates, who are dispute settlement administrators not necessarily trained in law. Mutual resentment has developed between them partly because the lawyer tends to see the Magistrate as an ignorant individual wielding power he does not actually deserve, whereas the latter sees the lawyer as a verbally tricky individual out to prevent the guilty from being punished and to enrich himself in the process.

One factor that must be mentioned regarding the African private lawyer, whether in partnership or solo, is the complete lack of expertise in office organization. There is a serious need to train a cadre of para-legal personnel to work in law offices. Nairobi abounds in secretarial colleges, yet one wonders why the

lawyers have not negotiated with one of these to train the equivalent of legal secretaries who would be capable of processing clients, writing case histories, and generally saving the lawyers much time now spent on tedious, time-consuming preliminary tasks (in contrast to the judiciary which has created a cadre of court clerks to assist it in its routine functions).

IV. The Use of the Profession as a Reference Group

Another attribute of a profession is said to be the use, by the professionals, of their profession as a major reference group.³ This involves on the one hand the formal organization of their professional association and on the other informal colleague networks as the major source of ideas and standards of professional judgment. Once again, it is necessary to examine this attribute within the historical development of the Kenya legal profession if the present use of the Law Society as a major reference point by Kenyan lawyers is to be understood.

In his discussion of imperialism and the professions, Johnson argues that it was the colonial bureaucracy, rather than the professional association which became the major reference body for the early professionals serving in the colonies.⁴ He attributes this partly to the fact that the meaningful professional associations were in metropolitan centers such as Paris or London. Professionals in far flung corners of the empire found it difficult to keep in touch, and they were too few to form chapters of the home association. And if they tried, colonial administrators sometimes became suspicious and discouraged the endeavor.

As accurate as Johnson's view may be in some parts of the Third World, the situation of the Kenya legal profession appears different. Voluntary law societies appeared very early in Kenya, largely it should be said, because of the rapidity with which Kenya was settled by expatriates who created a market for the services of numerous professionals, including the lawyers. To start with, law societies were established in the main towns – Mombasa and Nairobi – and subsequently in the 1920s the Law Society of Kenya was launched. From this time and still more so after it gained statutory authority in 1949, it became a major reference body for lawyers with considerable influence. The powers that it gained, both to discipline its members and control their remuneration, could not but help to solidify its organization.

The Kenya Law Society is currently a statutory association to which all qualified lawyers must belong. Not all who become members take out practising licenses, although around 95 percent of its approximately 500 members do. The Society annually elects its council which acts as its administrative body with a chairman, secretary and treasurer as the major officers. In turn, the council organizes itself into committees such as those on remuneration, hospitality, discipline and rules. The council dispatches its members to represent the Society in other relevant associations such as the Council on Legal Education, the Association of Professional Societies in East Africa, Mathare Valley Mental Health Hospital, and The Legal Aid

Table 4. *Identification with Law Society of Kenya*

	A. "The legal profession in this country should be subjected to governmental control and cannot be left in the hands of its professional association: the Law Society of Kenya."			B. "I personally am <i>not</i> in support of the Law Society although I am a member."		
Response	Africans %	Asians %	Europeans %	Africans %	Asians %	Europeans %
Agree or Strongly Agree	17	4	0	22	15	8
Disagree	19	38	17	47	60	33
Strongly Disagree	57	51	83	20	21	58
Other (including non-response)	7	7	0	11	4	0
Total	100	100	100	100	100	100
N =	70	47	12	70	47	12

Scheme. It schedules the Society's functions, such as the monthly luncheons. The purpose of the luncheons is stated to be "... not so much to sit down at a table to eat but to provide a regular occasion where members can meet and discuss aspects of the Society's work and indeed other aspects informally."

Currently, however, evidence shows that there exist potential threats to the formerly unchallenged status of the Kenya Law Society as a major reference body for lawyers. The great majority of Kenyan lawyers say that they support the Law Society and wish to keep it free from government control (see Table 4). Nevertheless a number of the African and Asian lawyers are less enthusiastic than their European counterparts. And when they are interviewed in greater depth, several criticisms of the Society are voiced. First, its seeming neglect of the non-city lawyers. The tendency of the Society to concentrate its activities in the capital draws resentment from the small town lawyers. In the course of the research, interviewers were more warmly received outside Nairobi than in the capital, often with the remark that someone has remembered they exist and is interested in their views. With some probing it became clear that the target of their resentment was the Law Society. That this is a problem is also recognized by the Society itself.

An attempt was made by the 1972-73 Chairman of the Council to visit the lawyers in the smaller towns and, in his report to his successors, he urged that this be continued although the Society does not budget for such travel.

A more accurate index of the level of satisfaction with the Law Society is probably attendance at its functions which is, generally speaking, low (see Table 5). These functions are the prestigious annual dance, the monthly luncheons, and the

Table 5. *Attendance at Law Society's Functions*

	A. "Within the last five years I have attended the Law Society's dance X times."			B. "From January 1973 to present I have at- tended the Law Society's monthly luncheons X times."		
Response	Africans %	Asians %	Europeans %	Africans %	Asians %	Europeans %
Never	43	55	67	63	66	84
Once or twice	27	13	17	17	9	0
Three or more times	18	21	16	10	17	16
Other or no response	12	11	0	10	8	0
Total	100	100	100	100	100	100
N =	70	47	12	70	47	12

periodical hospitality on behalf of foreign legal dignitaries; for example, the Chief Justice of Ghana stopping in Nairobi on his way to or from some international conference. Such functions are conducted in a characteristically Western and formal atmosphere in which the African lawyer sometimes feels awkward. Not only is attendance at these functions poor, but also many confidential conversations reveal that the functions are actually despised by a fair number of the indigenous lawyers, both in rural as well as in urban practices.

The poor attendance of European lawyers – lower on the whole than that of both Africans and Asians – presents a more difficult phenomenon to explain, since most of them are actually the veteran members of the Law Society dating back to its colonial days. And it is inconsistent with their greater identification with the Society at the purely verbal or ideological level than the other two racial groups.³ One might venture to suggest that they may be reacting against the changed posture of the Law Society, which they had built and, in the past, used as an effective pressure group on behalf of the profession. The Society has now become politically impotent to protect its members against encroachment by other organizations into the affairs formerly managed by the profession. In short, the present external powerlessness of the law Society is felt by both the African and the European lawyers. Whereas the Society is internally strong enough to discipline its members, it is at the same time too weak to be of much use in protecting its members' interests against competing organizations such as the judiciary, the police, the state, the council on legal education, and the occasional complaining public.

The European lawyer's expression of unhappiness with the Society may also have to do with the general change in inter-group relations that has been forced by the advent of independence. The same Law Society, when formerly dominated by Europeans, lobbied against legal education for Africans; yet these Europeans now

Table 6. *Composition, by Race, of the Chairmanship of the Council of the Law Society of Kenya: 1949–1974*

5-Year Periods	Africans	Asians	Europeans
1949–1954	0	2	3
1954–1959	0	3	2
1959–1964	0	1	4
1964–1969	1	2	2
1969–1974	2	1	2
Totals			
1949–1974	3	9	12

have to sit together with the Africans as colleagues at the formerly exclusive dances, luncheons and sundowners sponsored by the Society. This is not to underestimate the fact that some of the large and prestigious law firms have accepted Africans as equal partners in their practices, although, as we have already seen, this seemingly voluntary Africanization may in part be interpreted as a strategy for survival rather than a genuine change of heart.

The shifting position of the different groups may also be seen in the history of leadership in the profession. Over twenty-five years (1949–1974), the prestigious position of chairman of the Council of the Law Society was held an almost equal number of times by Europeans and Asians (11 and 10 times respectively). Up to the time of the interviews, Africans had held it only three times. Yet, as may be seen in Table 6, the racial balance has been much more even in the past ten years than over the previous fifteen: Africans, Asians, and Europeans having held the position three, three and four times respectively. In future the leadership structure of the profession will almost certainly reflect the shift in the racial balance even more sharply than it does at present. As a prosperous Nairobi African lawyer, who is also a past chairman of the Council of the Law Society put it:

African lawyers who are not active in the Law Society are mistaken. They should be active now that their numbers have increased. Voting for officers has always been along racial lines and the Africans, if they become active, could actually run the show. The European and Asian blocks of voting could be changed."

Lack of integration into a professional organization invariably means that the organization ceases to be a major reference body for the unintegrated members. Carlin has also observed that it negatively affects the behavior of the unintegrated members, especially their adherence to ethical codes.³⁹ It has been mentioned that the disciplinary committee of the profession remains free of state mediative interference. The committee currently consists of three lawyers of not less than ten years experience in practice, one of whom must be practising outside the capital city of Nairobi. The three are elected by the Society for a term of three years. Several questions in the questionnaires were designed to tap lawyers' views regarding disciplinary procedures.

Table 7. *Perceptions of Professional Standards and Discipline*

A. "Violators of legal professional standards in this country do not, in fact, receive severe penalties."			
Response	Africans %	Asians %	Europeans %
Strongly Agree or Agree	17	36	50
Disagree	47	51	25
Strongly Disagree	29	6	8
B. "A lawyer who violates professional standards should be judged by his professional peers, for example, other lawyers with whom one feels contemporary and equal."			
	Africans %	Asians %	Europeans %
Strongly Agree	23	15	42
Agree	39	60	42
Disagree or Strongly Disagree	31	19	16
C. "The real test of how a lawyer is, is the layman's opinion of the lawyer."			
	Africans %	Asians %	Europeans %
Strongly Agree or Agree	17	24	8
Disagree	34	55	33
Strongly Disagree	43	17	50
N =	70	47	12

Note: Percentages do not always add up to 100% down columns because of a small number of non-responses to each question.

It is apparent that there is a distinct division of views between members of the profession's different racial groups.

Whereas the majority of European lawyers think there is laxity in applying existing sanctions in disciplining erring lawyers, most African lawyers perceive no such laxity and indeed sometimes view the disciplinary committee as overzealous in dishing out punishments to them (see Table 7A). Whether or not there is a basis in fact for this view is difficult to determine. As will be seen from Table 8, all but one of the thirteen lawyers disciplined over the four-year period 1972-1976 were African. The typical charges were: failure to answer correspondence, lack of cooperation between the lawyer and clients, failure to reimburse clients, dishonored checks, failure to attend court on behalf of a client, practising without a license and charging exorbitant fees. One reason Africans sometimes give for the fact that more of them are disciplined than members of other races is that not many of them have been in practice long enough (ten years) to qualify for membership in this important committee.

Table 8. *Disciplinary Actions taken by the Law Society of Kenya: 1972-1976*

Period	Origin		
	Africans	Asians	Europeans
1972-1973	2	0	0
1973-1974	1	0	0
1974-1975	5	1	0
1975-1976	4*	0	0
Total	12	1	0

*These cases were pending at the termination of field work.

Source: Report of the Council of the Law Society and personal communication.

The perception is further strengthened by the headline publicity that often surrounds disciplinary cases. Thus while Kenyan lawyers, indigenous and expatriate alike, support the principle that a lawyer who violates professional standards should be judged by his professional peers with whom he feels contemporary and equal and not by laymen (Table 7 B and C), the African lawyers perceive this kind of autonomy as tending to exclude them. Although they feel uncontemporary and unequal to those disciplining them, they do not apparently appear to waver in their support for the principle of professional self-regulation; and as seen earlier, strongly reject like other lawyers the suggestion that the profession should be subjected to government control. This would mean that the state mediative control already being instituted in some areas like legal education partly in order to enhance the lot of the African lawyer in the profession is not much appreciated by the intended beneficiary.

In conclusion, the Law Society of Kenya as a professional organization has historically enjoyed a high status as a major reference body for the lawyers; and lawyers have looked up to the society to set the tone, standards, norms and sanctions of the profession. With the advent of independence, however, and the loss of external power by the profession, its status is somewhat diminished in the eyes of a fair number of both African and European lawyers. Among them there is some ambivalence about the ability of the profession to retain the undivided corporate allegiance of its members.

V. Belief in Public Service and Sense of Calling to the Field

A persistent yet disputed issue in the literature of occupations and professions is the notion that in the professions, more than in mere occupations, one should find a strong belief in service to the public and an equally strong sense of calling to the field. First, belief in service to the public is said to include the idea that the profession is indispensable to society and that its work benefits the public as well as its members.*

Second, the sense of calling to the field is said to reflect the dedication of the professional to his work and his motivation by its intrinsic rather than its extrinsic rewards.

In a study of eleven different occupations at various levels of professionalization, Hall has demonstrated that the more professionalized occupations structurally are not always those more professionalized attitudinally.³⁷ Furthermore, the study suggested that the professionals (librarians, nurses, social workers) who scored highest on public service and a sense of calling to the field were those normally most poorly paid. One might be forgiven for drawing the slightly cynical implication that such a strong expression of dedication to service is merely a substitution for the fact of poor extrinsic rewards; and that claims to be working primarily for the public benefit coming from professionals enjoying high extrinsic rewards, such as lawyers, may be interpreted as mere rhetoric.

The history of the Kenyan legal profession does not show much sense of calling or commitment to public service. Its fierce push for self-regulation from its beginning in the colonial era to the present day shows that it has concerned itself more with its own welfare than with service to the public. The first remuneration committee formed under the Law Society of Kenya Act of 1949 is known to have specified rates *below* which lawyers were forbidden to serve, but said nothing about the maximum rates the lawyers could charge for their services. The lawyers quickly made a practice of treating the specified rates as their minimum and of bargaining for the highest possible a client could pay. After the amendment of the Law Society Act in 1952, a client could change his or her lawyer on the recommendation of the remuneration committee if dissatisfied, but without any right to a refund. As if that were not enough, the same Act stipulated that a member of the public who felt mistreated by a lawyer could appear before the disciplinary committee but only at for stiff fee to be used for furthering the goals of the Law Society. It would appear that the more the profession succeeded in regulating its own affairs, the less importance it placed on service to the public and the sense of calling.

The post-colonial era might seem, however, to have provided a better testing ground for the profession to display its commitment, if any, to service to members of the public. The demand for legal services, especially among the African population, has increased as the Africanization and de-Indianization of the commercial sector, especially the retail business, have been accelerated by the government.³⁸ The changing disposition of land from a subsistence communal use to a commercial commodity, owned by and registered under individual titles, has also accelerated the spread of legal services to the rural areas. There is also the increase in rural crime to which attention was called above. With the fabric of traditional culture crumbling as the money economy penetrates the hinterlands, the utility of traditional culture as a mechanism of social control diminishes. At the same time, however, newly introduced western methods of deterrence such as probation, fines, imprisonment and others are not an adequate substitute especially in rural areas.³⁹ The result is not only an increase in rural crime, but also in potential business for members of the legal profession.

But, with such an increase in demand, especially by a population which can barely pay for the services, has the legal profession responded with a sense of service or calling to their field? Some clues to the answer may be found in the development of the Legal Aid Scheme and the attitudes that have surrounded that effort.

In his analysis of the youth culture in the 1960's, Reich discusses the resurgence of the service as opposed to the profit ideology in the United States.⁴⁰ This resurgence of idealism affected many young lawyers and law students who responded by setting up law clinics in poor neighborhoods to educate and otherwise assist the poor in asserting their rights. This contrasted with the traditional pattern in which the young law student looked on his graduation day as a ticket to the elite firms in Wall Street and elsewhere. The Kenya Legal Aid Scheme is a partial beneficiary of this resurgence of the service ideology, since young American lawyers in the Peace Corps or other voluntary missions in Kenya had a lot to do with the founding of the Kenyan Legal Aid Scheme. They spearheaded the persuasion of the established expatriate law firms in Nairobi to donate money for the opening of a law center at Shaurimoyo, one of the poorer neighborhoods in the city. The point to be made therefore is that the Kenyan profession can claim only half the credit for the bold display of public conscience which the legal aid scheme seems to exemplify.

The center has been run on a voluntary basis and fills a growing need for legal services in the area. It is inundated with cases such as insurance compensations following road fatalities, violation of labor contracts, including unfair dismissal from employment, claims for alimony and for child support on behalf of unwed mothers. Most of the cases reflect a new awareness of legal rights. The average African during the colonial era was probably not aware that one could press charges against a careless driver's insurance company, and women rarely sued for either alimony or child support. One of the center's more important functions, therefore, may be educational in encouraging the poor for the first time to assert their rights in the courts. The expansion of the aid scheme to other poor parts of the cities, to other towns and to the rural areas is a much awaited development.

We asked Kenyan lawyers of all races whether or not they were in favor of the establishment of legal aid schemes such as the one at Shaurimoyo. The answer was overwhelmingly positive (see Table 9A). However, when they were asked whether or not they had ever volunteered their services on behalf of the center, the answer was overwhelmingly negative. Only 11 percent of the African lawyers interviewed had ever donated any of their time to it.

Some lawyers, especially African, expressed a hostile attitude at this point, accusing the center of accepting cases from clients who could well afford to pay for conventional legal services. They regarded the scheme as an economic stumbling block in the way of the young lawyers struggling to set up practices. There was resentment because many of the volunteer lawyers tend to be the African graduates of the Kenya School of Law employed by the successful expatriate firms who can afford the time; in contrast to their compatriots striving to make do in their precarious practices who have a harder time making ends meet. There were also doubts expressed by African lawyers about the competence of the volunteer

Table 9. *Indicators of Belief in Public Service*

A. "Are you personally in favor of the establishment of legal aid schemes such as the one at Shaurimoyo?"			
Response	Africans %	Asians %	Europeans %
Yes	81	87	92
B. "If your answer [to A] was yes, have you volunteered your services?"			
	Africans %	Asians %	Europeans %
Yes	11	26	17
C. "A person enters this profession because there is money in it, not necessarily because he likes the work."			
	Africans %	Asians %	Europeans %
Disagree or Strongly Disagree	76	71	67
D. "People in this profession have a real calling or dedication to their work."			
	Africans %	Asians %	Europeans %
Agree or Strongly Agree	68	58	84
N =	70	47	12

lawyers, partly because several of the volunteers had not yet taken out their practising licenses. This was, it appears, because a number of law teachers from the University of Nairobi and legal bureaucrats from the Attorney General's Chambers were among the volunteers. Since many of them need not attend court, they do not always take up practising licenses. Other practising lawyers mentioned the scarcity and preciousness of their time as reasons for not volunteering.

A number of lawyers, however, ventured that the legal aid scheme could be strengthened if it were made a government sponsored project on a par, for example, with aid in the area of health, where the Kenya National Hospital Insurance takes care of those who cannot afford private health care. Others thought the scheme could be brought under the National Social Service Department and put on the same basis as other welfare agencies.

The same contradiction between the ideological rationale of the profession and the actual organization of legal work and of the market for legal services is probably behind lawyers' responses to a question which asked in a straight-forward manner whether a person chooses to enter the profession because he likes the work or because there is money in it, the overwhelming response being that financial gain was not the main reason for entry (see Table 9). Similarly, when asked if people in

the profession had a real calling and dedication to their work, the overwhelming answer was that they did (see Table 9). Other evidence, however, points in the opposite direction; and was voiced by the Attorney General in his answer to parliamentarians on the question of Africanizing the judiciary, that resignation from public service and pursuit of quick wealth, through private practice, is the current pattern among the emergent African lawyers. Moreover, lawyers seem to share a fairly modest assessment of their *actual* indispensability to society compared to other occupations. When asked to rank their own profession against four other occupations, Kenyan lawyers placed it third; after farmers and physicians; and in front of businessmen and politicians.

VI. Conclusion

The argument has been presented that the professional model as popularly accepted in occupational sociology is ethnocentric and ignores the distinct cultural locations of occupational development. The application of the model in this study to the Kenyan legal profession has therefore been tempered with the presentation of the historical, cultural, and political context in which the profession has developed.

In examining the structural side of the profession, several conclusions can be reached. First, unlike most professions developing in the imperial context in the British colonies, the Kenyan legal profession appears to have initially developed under only a mild form of mediative control. But it quickly moved into another stage in which it achieved self-regulation through winning concessions favorable to itself from the then colonial administration in Kenya. In the post-colonial reconstruction era, however, the profession has lost its grip on regulating its own affairs; instead, a stronger form of state mediative control has taken hold and is likely to continue into the foreseeable future.

Second, the long established policy of denying Africans legal training during the colonial period delayed consideration of desirable training models for the post-colonial lawyers. Hence the profession and the authorities have wasted much time in what appear to be no more than petty matters such as the composition of the membership of the Council on Legal Education, rather than rationally examining the merits and demerits of the alternative ways of training and organising legal services. The conclusion to be made nevertheless is that whereas the apprenticeship and academic models of professional socialisation now co-exist uneasily, the academic model is likely to dominate legal training in Kenya in the future.

Third, the professional organization, the Law Society of Kenya, has long been a major reference body for the members of the profession. Evidence shows, however, that it is to some extent losing this status, at least in the opinion of a significant portion of its members. This is mainly because of its external weakness and its slow progress towards integrating the majority of the African lawyers, particularly the rural lawyers, into its affairs. As the African membership increases, their level of

activity in the affairs of the society and identification with it is also likely to increase. More important, however, is the fact that the Society and the profession as a whole might then be politically secure enough to begin to reverse the profession's loss of external influence which occurred because its expatriate leadership was not in a position to negotiate aggressively with the power centers outside the profession.

Fourth, Kenyan lawyers do not view themselves as indispensable to society, meaning that their belief in service to the public is tempered with the realization that while their services are essential, they are not necessarily as crucial as those of the doctor. For the role of the lawyer in the process of dispute settlement, unlike that of the doctor in the process of managing ailments, lacks a clear precursor in traditional African societies. Although Kenyan lawyers claim that a belief in public service is an important feature of their profession, on the other hand they do not in practice seem to have availed themselves of opportunities to display a sense of calling to their field. The profession's historical posture of aggressive self-interest has left little room for any exhibition of the Florence Nightingale syndrome.

Finally on the attitudinal side of the professional model, the study shows that there are a number of differences between the three major racial groups in the profession, reflecting on the one hand the Africans' perceptions of the discrimination they suffered in the past; and on the other, the fears of the expatriates about their declining political and professional importance. Yet there is little evidence that the attitudes of any one group taken overall are significantly more (or less) "professional" than those of any other.

Notes

1. Harold Wilensky, "The Professionalization of Everyone?" *American Journal of Sociology*, Vol. LXX, September, 1964, pp. 137-158.

2. See, among others, William J. Goode, "Community Within a Community: The Professions," *American Sociological Review*, Vol. XXII, April, 1957, p. 194. Edward A. Gross, *Work and Society* (New York, Thomas Y. Cromwell Co., 1958) pp. 77-82. Ernest Greenwood, "Attributes of a Profession," *Social Work*, Vol. XI, July 3, 1957, pp. 45-55. Richard Scott, "Reaction to Supervision in a Heteronomous Professional Organization," *Administrative Science Quarterly*, Vol. X, June, 1965.

3. Howard Vollmer and Donald Mills (eds.), *Professionalization* (Englewood Cliff, N.J., Prentice Hall, 1966).

4. Terence J. Johnson, *Professions and Power* (Macmillan Press Ltd., London and Basingstoke, 1972).

5. Richard H. Hall and Jai P. Ryu, "Powerful or Powerless: The Professions in American Society," Unpublished manuscript.

6. Terence J. Johnson, "Imperialism and the Professions: Notes on the Development of Professional Occupations in Britain's Colonies and the New States," *Sociological Review Monographs, Number 20, Professionalism and Social Change*, University of Keele, December, 1973.

7. Though this could be because of the insensitivity of attitude statements of the type used in the questionnaire to variations in actual behavior.

8. Johnson, *op. cit.*

9. Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (London, Oxford University Press).

10. *Ibid.*

11. Colin Leys, *Underdevelopment in Kenya* (London: Heinemann, 1974).

12. Lord Denning accepted, on July 25, 1960, the chairmanship of the Lord Chancellor's Committee

on Legal Education for Students from Africa. The Committee held its first meeting October 14, 1960, held ten more meetings, made short visits to Nigeria and Kenya, and reported to the British Parliament in January, 1961. It recommended (among other things) (a) that a Faculty of Law serving all East Africa be established (in Dar es Salaam); (b) the qualifications for practice in East Africa should be uniform; (c) one year's practical training should be provided for students after their law degrees, and schools should be set up for the purpose.

13. The Council is composed of the Chief Justice as Chairman with a casting vote; two judges, three lawyers nominated by the Law Society, the Attorney General, and one law teacher elected by the whole council. (All of the members, except the three lawyers, are directly or indirectly the employees of the state.)

14. G.G.S. Munoru, "The Development of the Kenya Legal System, Legal Education and Legal Profession," *East African Law Journal*, Vol. IX, Number 1, 1973, p. 9.

15. Mark Mwithaga (Member of Parliament) vs. State was a case of a vocal opposition politician who became the first person in Kenyan history to win an election while in police custody accused of a criminal offense. The overwhelming public perception was that the state was silencing a political opponent, not trying a criminal. Nairobi, *The Weekly Review*, November 1, 1976.

16. Wilensky, *op. cit.*

17. William Twining, "Legal Education within East Africa," *East African Law Today*, British Institute of International and Comparative Law, Series 5.

18. *Report of the (Kenya) Commission on the Law of Marriage and Divorce*, Nairobi, Government Printers, August 1968.

19. Ghai and McAuslan, *op. cit.*

20. Tudor Jackson, *Guide to the Legal Profession in East Africa*, (London: Sweet and Maxwell, 1970).

21. Edmund Leach and S.N. Mukerjee (eds.), *Elites in South Asia* (Cambridge, 1970) p. 10, and Johnson, "Imperialism and the Professions," *op. cit.*

22. "Dr Jorgenson's Resignation: A Victory for Students." Nairobi: *The Sunday Post*, March 24, 1974.

"Architects Say it is Unfair to Blame the Professor." Nairobi: *Daily Nation*, March 12, 1974.

"Professor Jorgenson is not a Racist." Nairobi: *Daily Nation*, March 13, 1974.

"The Truth Should be Established." Nairobi: *Daily Nation*, March 20, 1974.

23. Part of a letter from the Kenya Law Students Society addressed to All Honorable Members of Parliament. March 24, 1974, University of Nairobi.

24. Tudor Jackson, "The Role of our African Lawyers." Nairobi: *The Sunday Post*, February 18, 1974.

25. "Attorney General's Parliamentary Speech on the Training of Lawyers." Nairobi: *Daily Nation Editorial*, March 29, 1974.

26. "Stick to Studies and Stop Meddling, Law Students Told." Nairobi, *East African Standard*, March 28, 1974.

27. Mark Mwithaga (Member of Parliament), Nairobi: *The Daily Nation*, March 28, 1974.

28. Martin Shikuku (Member of Parliament), Nairobi: *The Daily Nation*, March 29, 1974.

29. Peter Marris and Anthony Somerset, *African Businessmen: A Study of Entrepreneurship and Development in Kenya* (Oxford University Press, 1971).

30. Goode, *op. cit.*

31. Johnson, "Imperialism and the Professions," *op. cit.*

32. Excerpt from the *Report of the Council 1972/73*, the Law Society of Kenya, January 31, 1973.

33. This disparity may be one reason that there is little difference between the groups on the professionalism scale (Table 1) which is a composite of both the behavioral and the attitudinal questions.

34. Quoted from an in-depth interview with this practitioner.

35. Jerome Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (Rutgers University Press, 1966).

36. Gross, *op. cit.*, pp. 77-82.

37. Richard H. Hall, "Professionalization and Bureaucratization," *American Sociological Review*, February, 1968.

38. Marris and Somerset, *op. cit.*

39. Erasto Muga, *Crime and Delinquency in Kenya* (Nairobi, East African Literature Bureau, 1975).

40. Charles H. Reich, *The Greening of America* (New York: Random House, 1970).

The Tanzania Legal Profession

Introduction

In a judgement on an East African case before the Privy Council, Lord Denning once equated the English common law with an English oak: "Just as with English oak, so with English Common Law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England".¹ This dictum expresses one of the most interesting problems with which anyone trying to modify or utilize institutions in ex-British Africa has to grapple. As many writers have observed "the advent of British rule imposed a foreign legal system basically that of England."² Not only did His Majesty's Government extend jurisdiction through the Foreign Jurisdiction Acts and Orders-in-Council, but a whole range of institutions were also introduced with little regard to the indigenous structures. From that angle alone, it is worthwhile looking at how institutions adjusted to each other, the extent to which the "oak", flourished. Yet as will be evident from this paper the issues are much broader than those of the "success" or "failure" of this process of institutional transfer because of the role of these transplanted institutions in establishing and modifying the colonial and post-colonial economy, state and class structure.

My approach was to look at the profession through three major historical epochs. The first was that of the early formation of the legal profession in Tanganyika during the period of colonial rule imposed at the beginning of the twentieth century.³ An attempt is made to show how the establishment of the legal system and the legal profession was related to the expansion of the imperialist metropolis. The role of the profession either as a legitimizing institution or as a lubricant of the colonial system in Tanganyika underlies the process of capitalist penetration and development of under-development.

The second extends from the time of Independence in 1961 to 1967 when Tanzania adopted the Arusha Declaration which set the country on a socialist path. I consider this a time of adjustment and reform for the profession as it attempted to accommodate itself in a new political structure.

The third significant period runs from the Arusha Declaration up to the present time. A number of questions can be raised in this period. What has been the relationship of the profession to the increasing dominance of the TANU party? What is the role of a lawyer in an economy increasingly characterised by public sector control, and what type of lawyers does the system need? These are some of the questions which touch upon salient areas constituting current debate not only in governmental legal departments anxious to bring about legal reforms, but to

anyone interested in institutional transformation or adaptation to suit the present socio-economic transformation.

A number of theoretical problems cropped up at the early stages of the inquiry. The term "legal profession", hardly lends itself to mathematical precision. The model of institutional transfer which at the beginning I was interested in examining seemed to compound the problem even further. Apart from its ethnocentric bias, it espoused a predetermined pattern for institutional development. The orthodox definition of "professions" as autonomous institutions with exclusive control over certain skills, and controlling both the content and entry into the profession could not provide a useful tool in analysing the legal profession in Tanzania. My definition of the legal profession is therefore broadbased, encompassing all legally trained persons even though they may not currently be performing legal jobs. There might also be merit in the opposite argument, that one should look at "legal jobs" rather than "legally trained persons". This is why towards the end of the paper extra-judicial institutions performing legal jobs, like Party offices, traditional dispute settlement institutions and the Permanent Commission of Inquiry are discussed. Nevertheless, the major emphasis is on persons who are legally trained and their role in the legal system.

The adoption of a frame of reference which laid excessive emphasis – in the Tanzanian context – on the "profession" meant that to begin with I gave too much weight to the problems and perspectives of the lawyers in private practice. (For an account of the methodology of this study see Appendix 1.) Historically, however, the private Bar has never been a very strong institution in Tanzania, compared for instance with its counterparts in Kenya and Uganda. Since independence it is increasingly the public lawyer who has been at the center of the stage and is likely to be so in the future. In view of these considerations I later included in my interviews lawyers in the public sector including State Attorneys in the Attorney Generals' Chambers, Magistrates and Judges and Counsels employed by the Tanzania Legal Corporation, a government agency set up to give legal advice to government parastatal organisations.

The problem of the legal profession and legal education cannot be adequately discussed outside the framework of the whole problem of state and law. At any given point in time, law is an expression of the major influential groups in society. To understand the legal profession, one must look at the material base which shapes the nature and content of the law. The study of the legal profession is therefore a study of underdevelopment and class conflict. The profession as a central institution in the legal system has played an important role both in spreading alien values and drawing closer the previously basically subsistence Tanganyika economy to international capital. It is no accident that Charters and Treaties formed the early bases for the acquisition of sovereignty in most colonial Africa. Judges and other judicial officers were constantly involved in the process of legitimizing the system through their decisions and legal advice to the Colonial Office. There is a link between the development of the economy and the recruitment of the lawyers. The process of professionalisation apart from being a system of system-legitimization,

was also a process of class formation. It helped particular groups to have more access to certain services and resources than others. In the colonial situation it can be looked at as representing the embryonic formation of an elite class.

It is important that such an analysis be extended to the present time when Tanzania is trying to build a socialist society. Who uses the legal system and what classes does it and the legal profession serve? How does the system of recruitment and training ensure the perpetuation and self-reproduction of existing class alliances? It is in the light of these themes that an attempt to analyse the Tanzania legal profession is made.

The Legal Profession and Colonial Society

Tanganyika is largest country in area in East Africa, covering 363,000 square miles, six times the size of England; and its population exceeds 13 million. During the scramble for Africa which culminated in the Conference of Berlin of 1885, Germany had established a Protectorate. In 1884 Carl Peters, the founder of the Society of German Colonization, led a small party into the East African interior and concluded a number of treaties with local chiefs which were later to form the basis of German jurisdiction in the area.¹ German rule came to an end with the defeat of Germany during World War I. Under the Treaty of Versailles of 1919 Germany renounced in favour of the principal Allied and Associated powers all her rights over her overseas possessions, including her East African colony. All former colonies were placed under Mandates which were administered by the League of Nations through its Permanent Mandates Commission.² German East Africa, which was later to be known as Tanganyika was handed over to Britain as an administering power. In legal theory Tanganyika had a different status from Kenya and Uganda, Britain's other East African possessions. In real practise, however, the protecting or administering power came to exercise "authority as ample in scope as though these territories were colonies acquired by conquest or cession".³ In Tanganyika, as in other British dependencies, the Foreign Jurisdiction Acts of 1843-1890 were promulgated giving the Crown's representatives powers of legislation and administration.⁴ It is under this Act that Britain proceeded to promulgate the Tanganyika Order in Council of 1920 which can rightly be regarded as the basic constitutional document of the colonial period.

This Order in Council established the High Court vested with unlimited civil and criminal jurisdiction with power to apply English law, common law, doctrines of equity and statutes of general application in England in so far as the local circumstances permitted.⁵ The High Court with the approval of the Governor was empowered to make rules regulating the practise and procedure of the High Court and other courts which might be established in the Territory. These rule-making powers included powers to fix fees and scales of remuneration and to regulate the conditions upon which persons might be admitted to practise as advocates or solicitors of the courts. The Legal Practitioners Rules of 1921 were subsequently

made prescribing the requirements for admission. Apart from Colonial legal officers – the Attorney-General, Crown Counsel or Legal Advisers to the Kenya, Tanganyika and Uganda Railway – who were allowed to practise in any court by virtue of their offices, practitioners were only entitled to practise in the High Court if they had been admitted as members of the Bar in England, Scotland, Northern Ireland, or as Solicitors of the Supreme Court of England or their equivalents in British Dominions or British India and could produce satisfactory proof of their qualifications to the Chief Justice.

It was clear from the regulations that the profession was bound to be monopolized by non-natives, in particular British or Indian lawyers. This has been the major weakness of the profession both in the nationalist struggle period and in post Independence Tanganyika. Its continued alliance with colonial interest and its isolation from the native population have sown seeds of antagonism which have continued to plague the profession up to the present time.

The Order-in-Council also empowered the Governor to establish subordinate courts, which he did under the Courts Ordinance of 1920. An important feature of the colonial legal system was the dual court system and the institutionalization of custom through the policy of Indirect Rule.⁹ Sir Donald Cameron, the greatest exponent of Indirect Rule, argued very strongly for the establishment of two parallel court systems, one for the non-natives and the other for natives. The judicial structure that thus emerged to a large extent moulded the characteristics of the legal profession. The policy of Indirect Rule espoused the principle that the position of customary chiefs should not be prejudiced in the eyes of their fellow natives by separating their judicial roles from their executive functions. Under the Native Courts Ordinance of 1929, native courts were established throughout the territory and the law prevailing in the locality was to be the law applicable, provided it was not “repugnant to justice, morality and good conscience.” Native Courts were controlled and presided over by administrative officers. The importance of this Ordinance was first that it institutionalized customary law and second that it made it impossible in the normal course of events for natives to come into contact with lawyers and professional judges. Appeals lay to District Commissioners and Provincial Commissioners. Legal representation was not allowed in the Native Courts, a feature which has even survived the nationalist reforms after independence.

Side by side with the Native Courts were set up Subordinate Courts for non-natives, and for conflicts between natives and non-natives. Lawyers were allowed to appear in these courts which were manned by professional judges who strongly adhered to English procedure and applied English law. The contact between the African and a professional lawyer (either as judge or practitioner) was the limited. The system of indirect rule, though initially designed to function as a transitional mechanism to facilitate the development of African legal and political skills which would enable Africans to participate in a territorially integrated system of courts and government, institutionalized a dualism in the territory: Native Courts and customary courts for Africans; and the territorial British government, British

Courts and British law for non-Africans. As a result the territorial government provided no facilities for the legal education of natives except facilities for training court clerks. This resulted in the exclusion of Africans from the territorial judiciary and the legal profession generally.

The Bench consisted mainly of career judicial officers who were often interested in seeing English law applied to the letter. Nevertheless, this group were among the most outspoken opponents of the parallel legal system in Tanganyika. They argued for "pure" application of English law and according to the English procedure," with an independent judiciary and professional judges and magistrates. They looked down upon and in fact actively opposed the performance of judicial roles by administrative officers. There were a few isolated voices from the predominantly white and Asian Bar who joined the chorus in favour of the independence of the judiciary. This resulted in the appointment of the Bushe Commission to look into the administration of justice in East Africa." Its recommendations for judicial autonomy were, however, rejected as inconsistent with colonial policy.

The colonial government was also careful to limit the activity of the Bar, both to stifle any possibility of any local resistance to the government and to preserve the structure of Indirect Rule. Lawyers who championed native causes were liable to be either severely reprimanded or deported from the territory. In March 1938, for instance, a number of Chagga Tribesmen were convicted and sentenced to six months imprisonment for criticising the management of the Kilimanjaro Native Cooperative Union Limited. They were later served with Deportation Orders. Four Advocates relying on English law took up the case on behalf of the accused. In a letter sent to His Majesty's Principal Secretary of State for the colonies through the Governor, they argued that the Deportation Orders were invalid. There followed a bitter exchange of correspondence between them and the Governor in which the latter strongly emphasised the need to exclude lawyers from Native Courts, and cautioned lawyers to refrain from taking such cases on behalf of natives."

Another factor which shaped the profession was the economy which emerged with the introduction of colonisation. The expansion of industries in Britain made it necessary to look for sources of raw materials to keep them running as well as for markets for the products that were produced. The legal profession was thus a product of the economic structure which emerged from the expansion of capitalism in Tanganyika, through both the formation of a plantation sector and the growth of African commercial farming. Shortly a pattern of structural underdevelopment emerged characterised by dependence on external economic forces and growth within the country of regional inequalities.

An important feature of the Tanganyika economy during the colonial time, was that it was neither dominated exclusively by European plantation industry nor by the African peasant." In contrast to Kenya, European settlement never became the official colonial policy. The areas of settlement were scattered across-country and were relatively isolated from the capital. The largest concentration – helped by the building of the railway and favourable climate – was in northern Tanganyika, especially in and around foothills of Mounts Kilimanjaro and Meru. There were also

pockets of white settlement in parts of central and southern Tanganyika, where sugar and sisal were cultivated.

The relative absence of significant white settlement and plantation agriculture meant that Tanganyika never attracted many white lawyers (except those in the colonial legal service) and secondly that certain branches of the law remained less developed. Legal problems arising from the peasant economy were largely dealt with under customary law; such litigation as cropped up was usually adjudicated through traditional dispute settlement institutions. However, the process of colonisation reinforced traditional class differences at the same time that it introduced and developed new class distinctions linked to capitalist exploitation. This resulted in a degree of class and regional differentiation which was further accentuated by the introduction of cash crops and of labour markets on the one hand, and by the uneven distribution of educational facilities on the other. As a result there soon developed on the one hand a fairly prosperous peasantry located in northern areas; and on the other a less prosperous peasantry located in areas with moderate and unreliable rainfall still largely engaged in subsistence cultivation. In the areas where cash crops for export were introduced, land holding tended to be individualized, leading to the breakdown of the traditional communal system and to some extent the emergence of landless peasants and a rural proletariat.

The introduction of cash crops encroached on the traditional system of land tenure and encouraged land litigation, but as noted above, customary land disputes were still heard by Native Courts. This of course, was a matter of deliberate policy fitting within the strategy of indirect rule. Appeals lay from the Native Courts to the District Commissioners, the Provincial Commissioners and finally to the Governor, rather than to the colonial High Court.

At the same time, cooperative movements were set up to market cash crops. Although most of the surplus from these sales was usually channelled into commerce by individual farmers, some cooperatives set up educational funds which were used to finance education for children of the members. It is significant to note that these cooperatives were later to be among the major clients for private African practitioners.¹⁴

The commercialisation of agriculture began to create an African merchant class, although admittedly big business continued to be operated by Europeans and Asians. Licensing laws and regulations made it difficult for Africans to operate except as low-turnover retailers, and this retarded the development of an African property owning class. Nevertheless cash crops soon introduced economic differences. In Bukoba, for instance, where coffee emerged as a predominant cash crop, it was initially monopolised by the aristocracy, a situation which was buttressed by the quasi-feudal system of land tenure in the area. Similar developments were taking place in Moshi and Arusha. The educated local elite soon emerged out of this select group. The educational system for Africans was closely tied up with the regional development of the whole productive system, giving rise to a salaried African class, consisting of minor functionaries in the civil service who were later to become the nuclei of political activity.

During the colonial period these emerging class differences among the African population were outshadowed by the differences in access to social and economic opportunities of the different racial groups of the colony, with Europeans at the top, Asians in the middle, and Africans at the bottom. These differences were sustained in part by the structure of economic relations, with British oligopolistic firms at the apex, and with Asians carrying out the bulk of commercial activities either as proprietors, middlemen or agents of European and British firms and being concentrated in, and owning much of the property in the towns.

Another factor which shaped the development of the profession was the overall educational policy in the territory. The subsidies given to African education were less than those devoted to non-African education. Education for Africans in Tanganyika was very much associated with the spread of religion." Different denominations set up their own schools which, apart from being places for imparting secular knowledge, were convenient for passing on religious doctrine. During the 1920s and 1930s the majority of the African children who went to school were unable to finish even six years of education and take up a sub-professional career such as teaching. It was not until 1949 that a handful of students were enrolled in the University College at Makerere, Uganda, for degree courses or were given scholarships to study abroad in British Universities. On the other hand the Asians augmented the enrolments in schools of their community through their own charity and social organisations.

Some Asian families were also financially able to send their children abroad for higher education. This discrepancy in the educational opportunities available to the different racial groups was of crucial significance as a selective mechanism for entry into higher education and professional bodies during the whole colonial period.

The predominance of the Europeans and Asians in the commercial and plantation sectors reinforced the effects of this selection and to some extent set a pattern for the distribution of legal services in the Territory. Lawyers during the colonial time set up their Chambers near the concentration of commercial activity in towns or adjacent to the large expatriate plantations (see Table 1). More than half of these law offices were concentrated in the Territory's capital, Dar es Salaam, which was also the main centre of commercial activity. Tanga, Arusha, Mwanza, Bukoba and Moshi came next in the number of law offices, because of proximity to agricultural areas where plantations and estates were established (e.g. near Tanga, also a port, large sisal estates; near Arusha and Moshi, large scale maize, wheat and bean farming by white settlers, and near Mwanza, also a commercial centre and lake port, and Bukoba, peasant export crop production).

The close association between the establishment of law offices and commercial and plantation activity meant, however, that the greater part of the rural population in Tanzania did not have access to legal services. Even in the towns (which in 1967 included only 5.7% of the Tanzanian mainland population) only a small percentage of the urban population had access to these services, mainly the non-African ethnic groups which were in a position to afford it (Table 1C). Urban areas were essentially enclaves of non-African development. Indeed according to the 1957 population

Table 1. *Distribution of Law Offices in Tanganyika, 1929–1975, in Relation to Urban Population and to Non-Africans as a Percentage of Urban Population.*

A. Number of Law Offices

Year	Dar-es-Salaam	Tanga	Arusha	Mwanza	Bukoba	Moshi	Morogoro	Iringa	Tabora	Dodoma	Mbeya	Linda
1929	17	4	1	4	1	—	—	—	—	—	—	—
1936	15	7	5	3	1	2	—	1	2	2	2	—
1949	17	—	4	—	6	4	—	1	—	1	—	1
1958	68	14	5	11	2	—	2	3	—	3	2	3
1975	25	5	5	4	—	5	2	—	2	1	1	—

B. Urban Population ('000)

1948	69.2	20.6	5.3	11.3	5.2	8.0	8.2	5.7	12.8	9.4	3.2	8.6
1957	128.7	38.1	10.0	19.9	5.3	13.7	14.5	9.6	15.4	13.4	6.9	10.3
1967	272.8	61.1	32.5	34.9	8.1	26.9	22.3	21.0	23.6	12.6	12.5	13.4

C. Non-Africans as Percent of Urban Population

1957	27%	25%	44%	23%	28%	30%	14%	18%	20%	21%	17%	19%
1967	14%	16%	13%	17%	17%	14%	7%	7%	9%	11%	10%	11%

Sources: (i) For numbers of law offices: Tanganyika Secretariat: Legal Practitioners Returns for Colonial Office (National Archives, Dar Es Salaam File No. C.12504) and Roll of Advocates (Tanzania High Court: Dar Es Salaam) 1975.

(ii) For urban population: B. Egerö and R.A. Henin (eds.) *The Population of Tanzania: An Analysis of the 1967 Population*, Vol. 6, Bureau of Resource Analysis and Land Use Planning (BRALUP) and Bureau of Statistics, Dar Es Salaam.

census non-Africans made up more than a quarter of the population in the following towns: Arusha 46%, Moshi 31%, Dar es Salaam 28% and Tanga 27%. After Independence, however, this changed and in 1967 in none of these towns were non-Africans more than 16% of the urban population.

Structure of the Legal Profession From Independence to 1967

The legal system and the structure of the legal profession remained basically unchanged until the rise of nationalism in the 1950s and 1960s. The advent of Independence was accompanied by nationalist reforms in the legal system. National unity necessitated the integration of the judicial system. There was also a feeling that it was time for the African to have access to British institutions of justice. In many cases access to these institutions represented a further step towards autonomy and "real" independence. Another argument was that in independent Taganyika it would have been undesirable to maintain a court structure predicated on racial considerations, for such an approach would indeed have been against the very ethics to which Tanzania was committed.

The magistrates Courts Act of 1963 came therefore as a natural consequence. It abolished the dual system of courts and established a single three tier system.¹⁶ Native Courts were superceded by Primary Courts and appeals from these now lie straight to the District Courts and High Court, both of which are manned by professional judges. Customary law is now to be applied just like any other law and not subject to repugnancy clauses. Legal representation is still forbidden in the Primary Courts but lawyers can appear in the higher courts. These changes have drawn Africans closer to the formal legal system than they used to be in colonial times.¹⁷

The Independence government has also taken an active interest in the profession, and it was on the government's insistence and initiative that the Faculty of Law in Dar es Salaam was set up in 1961. The independence era was also characterized by increased African enrolment into the Bar (there had been only two African lawyers at the time of independence, one of whom was later to become the first Tanzanian Chief Justice). Immediately before independence there was a considerable exodus of lawyers, most probably due to the uncertainty as to the kind of reforms the nationalist government would introduce. Since most of the lawyers were foreigners – either British, or Asians with British citizenship – such anxieties however unfounded were bound to occur. At the same time a number of African practitioners enrolled as advocates. Some of these had trained in India and some in the Inns of Court. Almost all of them came from wealthy backgrounds except one who was given a scholarship by the Indian government. Quite a number are now successful advocates in Tanzania.

Since Independence the growth of the private Bar has been slow. All the law graduates from the Law Faculty are sponsored by the Government of Tanzania, and

consequently are under an obligation to serve the government for five years. Moreover, law graduates have, until recently, preferred not to leave government service because of rapid promotions into responsible positions in the public legal service. The development of the private bar was especially curtailed after 1967 when Tanzania committed itself to socialist development by the Arusha Declaration.

A Leadership Code was adopted forbidding all public officers earning monthly salaries from having shares in companies or two sources of income. This has made it impossible for lawyers drawing a salary from the Government to practice on the side.¹⁰ The nationalisation of the major companies, agricultural estates and banks has deprived many lawyers of a sizeable amount of their work,¹¹ just as did the Acquisition of Buildings Act of 1971 which did away with the whole area of private legal transactions in Real Estate.

Despite this, however, African lawyers have, in recent years, been increasingly attracted to the private Bar. There have been a number of significant resignations from the Bench to the Bar, including a High Court Judge.¹² There has also been some movement among those in government service, who often enroll as advocates after they have qualified in order to be able to practise once they resign from government service later on. This trend is now being counteracted by the considerable degree of uncertainty about the future of private practice. The government has already announced its intention to abolish private medical practice. The terms of reference of the Judicial Review Commission which has recently looked into the legal system included the relevance and/or need for a private Bar; and it may well recommend the abolition of private practice in its present form.

The Present-Day Structure of the Legal Profession

There are about 350 lawyers working in Tanzania today. There has been a remarkable growth since Independence particularly in terms of indigenous lawyers. In 1961 at the time of independence there was only two qualified African lawyers, out of a total of about 120 registered lawyers. By 1964 there were 180 registered lawyers in Tanzania, and by 1969 a total of 217, of whom 77 were in government service and 140 in non-governmental institutions including those in private practice. Although there were many more African lawyers than before, expatriates still formed the majority, with 38% of the lawyers employed in public service in 1969 and 82% of the lawyers in the private sector being non-citizens. These changes in recruitment seem to have continued up to the present time while the private sector has markedly diminished in size relative to the public; the government now employs about 75% of all the lawyers in the country of whom about 90% are Tanzanians.

In the public sector, three major organs of government employ lawyers, namely the Attorney-General's Chambers, the Judiciary and the Tanzania Legal Corporation. About 30% of all public sector lawyers are in the Judiciary, 25% in the Legal Corporation and the greater part of the remainder in the Attorney-General's

Chambers. Also a number of lawyers are employed directly by Ministries, Embassies and parastatal organizations. Lawyers in the Attorney-General's Chambers are employed as State Attorneys and mostly deal with prosecutions and litigation for government ministries in the Resident Magistrates Courts and the High Court. In recent years there has been a directive in force that all Tanzanian lawyers have to be registered initially with the Attorney-General's Chambers and from there be moved to parastatals and Ministries as situation requires. The idea is to have a central pool of lawyers who can be allocated and utilized according to national requirements.

The Tanzania Legal Corporation was created in 1970 to provide legal services to parastatals¹⁰, although now the establishing order has been amended to enable it to represent private individuals at a reasonable fee.¹¹ The Corporation takes up both civil and criminal cases, but most of its work is of a civil nature involving parastatals and in certain cases government Ministries.

The mass exodus of lawyers in the private sector and steady inflow of lawyers into the public service reflects the country's strategy of socialist development, intensified after the adoption of the Arusha Declaration in 1967.¹² The nationalisation of Banks, Insurance and most other large-scale private business and the creation of parastatal organisations to take them over has significantly undermined the demand for legal services from private practitioners and caused many to leave the country.

Prior to 1970 parastatals either looked to the Attorney-General's Chambers for legal services and advice or obtained the services of private practitioners. But with the departure of many of the latter it proved increasingly difficult for parastatals to obtain these services. The National Bank of Commerce, the National Insurance Corporation and the National Development Corporation employed their own legal advisers but this precedent could not be followed by the rest of the parastatals owing to the shortage of trained lawyers in the country. These difficulties both led to the creation of the Tanzania Legal Corporation and increased the pressure to produce the necessary number of locally trained lawyers to cope with the needs of the ever expanding public sector.

The rapid expansion in recruitment of law students like all other categories of university entrants has meant that many of them come from relatively humble social backgrounds, as may be seen in Table 2. Not many of the Tanzanian lawyers interviewed (only around 4 per cent) have fathers who are themselves professionals or have attended universities. Almost half the fathers of lawyers work in the rural sector and four fifths of them have only a primary education or less. Nevertheless, when one compares lawyers' parents with the adult population as a whole it is clear that even in socialist Tanzania there are powerful processes of social selection at work. Substantially larger proportions of lawyers' fathers and mothers received education (at all levels) than the adult male and female population respectively. Although a precise comparison of the occupations of lawyers' fathers with those of the active working population is not possible, it is clear from the figures in Table 2 that proportionately more of the former were in professional, white collar and entrepreneurial occupations (10% of these, however, being large plantation

Table 2. *Education and Occupation of Tanzanian Lawyers' Parents Compared with that of Adult Population, 1967 Census (Percentages)*

A. Education

	Lawyers' Parents		Adult Population	
	Father	Mother	Male	Female
University	4.4	0.0	0.1	0.0
Secondary	13.0	4.4	2.3	0.4
Primary	58.7	47.9	33.9	11.0
None	17.4	41.3	63.7	89.2
Don't Know	6.5	6.5	—	—
	100%	100%	100%	100%
	(N = 92)	(N = 92)		

B. Occupation

Lawyers' Fathers		Active Male Adult Population	
Professional	4	Professional and Technical	1.9
Civil Servant	14	Administrative and Executive	1.9
Businessman	28	Clerical	1.2
Farmer (Large Plantation)	10	Sales	1.8
Peasant	38	Services	2.7
Other (e.g. Preacher)	6	Mining	0.1
		Communication	1.8
		Skilled and Unskilled Labour	5.4
		Agriculture	83.3
	100%		100%
	(N = 92)		

owners), whilst 83% of the active male adult population in 1967 worked in agriculture.

Such broadening of the social base of the legal profession as has occurred has been the consequence of the extension of government scholarships for higher education immediately after Independence. After 1961 all students in higher education were financed by the government. Students are also bound to work for the government for a minimum period of five years after they qualify, which is one of the main reasons for the large numbers of lawyers in the public sector.

The socialist reforms have also affected the type of legal work lawyers handle, particularly those in private practice after most commercial enterprises were taken over by the State. Since the establishment of the Tanzania Legal Corporation, no public institution can use private advocates to handle its cases. Consequently criminal cases now form the major occupation of private practitioners. The survey of lawyers indicates that about 61% of the lawyers spend more than half their time on criminal cases. At the same time the survey indicates the limited extent of all types of civil litigation, as may be readily seen from Table 3. A sizeable number of advocates felt that civil cases were no longer lucrative because of the low scale of fees they can charge. The most important civil cases are the commercial ones, most of them involving petty breaches of contract.

Table 3. *Percent of Time Spent in Different Areas of Practice by Private Practitioners*

Area of Practice	Percent of Time			Total	Average Percent of Time Spent
	Less than 10%	10% to 49%	50% or more		
Criminal	0	39	61	100%	56%
Company and Commercial	46	54	0	100%	11%
Land	69	31	0	100%	10%
Divorce and Matrimonial	38	62	0	100%	7%
Debt-collecting	69	31	0	100%	8%
Personal Injury	77	23	0	100%	8%

N = 26

These characteristics of the market for legal services may help to explain why private law practice in Tanzania is still very largely on an individual basis, there being very few partnerships or firms. Most lawyers admitted that they maintain a network of social contacts with their clients and have no defined working hours. As one successful practitioner in Mwanza put it: "Clients come even at home. It is part of African upbringing; anywhere, anytime. Some come to me out of respect. So when they even come home I do listen to their problems there. Once you do a case for a person you become relatives". Lawyers are seldom selective either about the cases they would like to handle or the courts in which they would like to appear. The only constraint to which lawyers called attention is a practical one, that of transport; a number of senior lawyers expressing their unwillingness to take cases which involve a lot of travelling into remote areas with poor facilities for accommodation, except where a case is of major significance such as an election petition.

Control of the Bar

The Advocates Ordinance of 1955 amended and consolidated the law relating to advocates in Tanganyika. The Act establishes a Committee to be known as an Advocates Committee, consisting of a Judge of the High Court as Chairman, the Attorney-General and a practising advocate nominated by the Council of the Law Society.¹³ Decisions in the Committee are by vote and the quorum must include the Attorney-General. The powers of the Committee include ability to examine allegations of misconduct against advocates and to discipline them by striking them off the Roll of Advocates, suspending them or admonishing them. Lawyers aggrieved by decisions of the Committee are free to appeal to the High Court which may affirm, vary or reverse the decision of the Committee.¹⁴ Lawyers in the public service are, of course, governed by civil service regulations like any other employee or by the instruments establishing the parastatal corporations in which they work.

An important feature of these provisions is that they appear to enhance governmental control of the affairs of the profession, two of the Committee's three members (the High Court Judge and the Attorney-General) being government nominees. This apparent lack of professional autonomy is partly to be explained in terms of the colonial background analysed earlier and partly in terms of the present political structure, for the government is anxious to control institutions like the legal profession which might form a basis for political opposition.

Nevertheless the monopolistic structure of the market for legal services has been (at least partially) retained under the present legislation. The Registrar of the High Court is required to keep an up-to-date Roll of Advocates and to issue certificates authorizing advocates to practise. Every advocate applying for a practising certificate is required to pay the required fee to the Registrar and to pay the Law Society the annual subscription for the current year. Membership to the Tanganyika Law Society is therefore a condition precedent to be satisfied before one can be admitted into practice in Tanzania. This is further reinforced by the provision that only qualified persons may act as advocates and, wilful misrepresentations of one's self as a qualified advocate is considered an offence. (A qualified advocate is one whose name is on the Roll of Advocates and who has in force a practising certificate.) Any instrument or document prepared by a lawyer must be endorsed with the name and address of the drawer. The prohibition of any corporate body or director or agent thereof from performing any of the functions of advocates has reinforced the latter's monopoly over legal services." This in effect makes illegal the emergence in Tanzania of certain occupations such as real estate consultants, which in other countries have encroached on the province of the legal profession.

The Advocates Ordinance also establishes the Council of Legal Education and the Remuneration Committee. The latter consists of advocates elected by the Law Society, and it has the power to make general orders as to remuneration of advocates. The Council of Legal Education is composed of the Chief Justice or his representative who is at the same time Chairman of the Council, the Attorney-General or his representative, the Dean of the Faculty of Law or his representative and two practising advocates elected by the Law Society. Decisions in the council are arrived at by majority vote and the function of the Council *inter alia* is to exercise general supervision and control over legal education in Tanganyika and to advise the government in relation to the development of legal education. It is sad to note however, that the Council has not been a dynamic force behind legal education."

Legal education still leans heavily on the English model, particularly the curriculum for the University of London with which the Faculty of Law of the University of Dar es Salaam (initially the University of East Africa) was associated when it was established. Nevertheless a number of compulsory courses have recently been introduced to give the syllabus a more East African orientation, including Development Studies courses taken in the first and second years. Changes in teaching methodology emphasizing historical and socio-economic approaches to law have also been introduced with interesting results. Students are not only taught

rules but are made to appreciate them in the context of their socio-economic roots. Nevertheless, on the whole, the training is still practitioner-oriented. Students are drilled in procedural rules, contract, tort etc. and this is an area which needs serious examination and appraisal.

The Public Lawyer Versus the Private Lawyer

It is becoming increasingly evident that the life span of private law practice is coming to an end. In an attempt to create an egalitarian society, professions as elite associations have been an obvious target. Access to the services of private legal practitioners has essentially been the privilege of an elite who can afford to pay the fees of advocates. There is currently a Bill to abolish private medical practice.⁷ Control of the medical profession is perhaps accorded greater priority than that of law practice since it touches more directly upon the mass of the population. Nevertheless, it will become even more difficult to justify an economically independent legal profession once the private practice of other professions has been abolished.

The process of evaluating the role of the lawyer in a socialist society has already begun. In 1974 proposals were made to organise lawyers in cooperatives under a loose form of state control, but these were strongly criticised by, among others, the private practitioners. The government was also dissatisfied with the scope of this proposed reform and it therefore decided to broaden it by appointing a Law Review Commission to look into the entire legal system with the intention of suggesting necessary changes. The Commission's specific terms of reference were (i) the structure and performance of the courts, (ii) the role and desirability or/and undesirability of private legal practitioners and (iv) lastly, the structure and performance of the offices of Director of Criminal Investigation and Public Prosecutor. The Commission has already presented its report to the Minister of Justice and there is a strong likelihood that whatever reforms are introduced are bound to have very wide implications.

Already, as pointed out earlier, the Tanzania Legal Corporation is playing an important role in legal representation. In 1972 the Order establishing the corporation was amended so as to extend the scope of legal services the Corporation could provide. The amendment reads:

(c) Subject to the directions of the Attorney-General to provide legal services to members of the public on such terms and conditions as the Chief Corporation Counsel may deem fit.⁸

The aim was to enable the Corporation to provide legal services to the public, and it is now possible for an ordinary member of the public to get a lawyer from the corporation to assist him in the conduct of his case or have any legal matter dealt with by him. The Corporation also defends on request by the Judiciary persons accused of murder or manslaughter who are financially unable to retain counsel; and when requested by the East African Court of Appeal, argues Appeals of persons convicted of murder who cannot afford the services of advocates. In carrying out

these functions the Corporation does everything that any law firm would do, ranging from giving legal advice and opinion to drafting and litigation. The Corporation now has an establishment of twenty-seven lawyers, mainly young graduates from the University of Dar es Salaam. This does not permit a great deal of specialisation, although attempts are being made to increase it.

The Corporation is self-supporting, obtaining all the required funds for operation from the legal fees it charges. Parastatals usually pay retainer fees, the amount depending on the size, nature of business and turnover of the particular Corporation. Except when referred under the legal aid scheme, members of the public are charged the normal scale fees they would pay to a private practitioner. It may be worth mentioning that the professional staff are also employees of the corporation who are paid only their basic salaries (an alternative might have been to have the Corporation operate like the Collectives (Boards) of Advocates in the German Democratic Republic in which case the lawyers would receive pro rata, a percentage of the fees obtained in addition to a salary).

How well does the Corporation perform its duties in relation to a private client? Is there no conflict of interest, the Corporation being a public institution? In cases where the individual is suing a public corporation or parastatal, indeed, the corporation will usually refuse to represent him on the grounds of conflict of interest, even when he is an indigent person who might otherwise be eligible for assistance. For the same reason that the Corporation acts as mediator where there are two parastatals involved in a dispute; although in the unlikely event that a parastatal refuses to accept the settlement suggested by the Corporation, it may, with the consent of Attorney-General, seek the services of a private practitioner.

It is clear from what has been stated above that the primary objective of the Corporation – that of providing legal services to other parastatal organizations – is a direct consequence of the adoption of the Arusha Declaration. Even without the departure of private practitioners from the country the need for a national institution to provide legal services to the parastatals would still be there.²⁹ The increasing participation of the State in the private sector has of necessity meant that less and less room is left for the individual entrepreneur and this in turn has implications for the very survival of the private lawyer and his traditional role as the defender of private interests.

Deprofessionalisation: A Search for Alternatives

Throughout colonial rule race was a major determinant of accessibility to legal institutions. The integration of the legal system after independence was a move aimed at abolishing this imbalance. Although social and economic inequalities along racial lines still persist and very much determine access to courts, in a formal sense at least race is no longer a criterion for jurisdiction. Since Independence, however, there has been a conscious effort by the government to deemphasize law as a means of bringing about social change. Formal courts and laws are increasingly

being overtaken by a series of tribunals which undertake parallel judicial functions at the grass-roots level." This of course must be looked at on the one hand in the context of what courts of law represented during the colonial time when they were essentially instruments of coercion; and on the other, in the light of the present day development strategy based on communal ownership and persuasion.

Although the Magistrates Courts Act of 1963 unified the Court system, and brought the native courts within the central courts structure, certain elements of the native courts have been retained. The former Native Courts were replaced by Primary Courts. Primary Courts are the lowest within the formal hierarchy, applying predominantly customary law. Certain offences under the Penal Code are also triable in the primary courts and follow simplified versions of the Criminal and Civil Procedure Codes. It is clear that while an element of professionalism has been introduced at the lowest courts (for instance now the Primary Court Magistrates have to undergo a one-year course in which they are taught laws of procedure, evidence and the penal code), there has been a conscious attempt to keep a certain amount of informality." Magistrates are required by law to sit with two assessors whose decision is binding on the Magistrates. Assessors are laymen who are selected because they are conversant with the customary law in issue. What is more, these assessors are selected from a panel appointed by a regional Party Office, and may sometimes be regarded as possible institutions for politicization.

Side by side with the Magistrates Courts there have been established Arbitration Tribunals. Where parties agree to resolve their conflict through reconciliation they can resort to these Tribunals before they go to Court. The intention is to arrive at an amicable solution on the basis of "take a little give a little" rather than "winner take all". A decision thus reached can be registered in the Primary Court and enforced as any other court decision. In fact primary courts sometimes refuse to entertain complaints until they have been considered by Arbitration Tribunals.

In addition there are informal tribunals which deal with particular areas of law, for example, the Reconciliation Boards in matrimonial disputes. These are endowed with original jurisdiction and the courts will not entertain any matrimonial dispute unless a certificate from the Reconciliation Board is produced referring the case to them." There are also other tribunals dealing with rent, leadership behaviour, housing and customary land disputes" and controlled by the Party through the selection of personnel.

Thirdly, and perhaps of the greatest potential significance, is the TANU Party itself, including its District and Division offices and the Ten-Cell leaders and Village Committees at grass-roots level." These are administrative units of the party primarily established for political mobilization at grass roots which have assumed legal roles through usage, in the sense that people constantly go to them with disputes. The decisions of such institutions are not usually binding in a legal sense, and the parties do not in any way forfeit their right to go to court thereafter. However the courts have sometimes encouraged parties to refer their disputes to party bodies before bringing them before them. The types of cases they can entertain are not strictly defined and range from petty theft to matrimonial disputes.

Finally, there is the Permanent Commission of Inquiry, the main function of which is to check abuse of administrative power by government and party officials. It is manned by non-professional people and they are supposed to come to their conclusions without undue regard to technicalities and procedures.⁴

What is emerging in Tanzania is not, however, a confrontation between the formal courts and informal dispute resolution institutions, as the latter tend to operate parallel to the formal system.

It is possible to offer a number of conclusions in regard to this trend which in the long term will affect both the legal profession and the legal system as a whole. First, dispute settlement is increasingly put at the disposal of informal tribunals, both for reasons of efficiency and of political mobilisation. Secondly, the multiplicity of tribunals without clearly defined jurisdictional limits has and is likely to give rise to confusion and interminable litigation.⁵ Thirdly, these trends have a bearing on the law and the judiciary. There is a discernible tendency to minimize the function of the law and the courts. As informal tribunals increasingly take the upper hand, managed as they are by people not trained in law but in administration or political functions, the independence of the judiciary may be increasingly undermined. A solution will have therefore to be devised to clearly demarcate the jurisdictions of all these institutions which presently have competing and concurrent jurisdiction. A pertinent question to ask is, what institution is fit for what purpose? What law or procedure should it administer? There is an urgent need to look at the whole dispute settlement process as a social dynamic, specifically designed to introduce change not only to the parties before it – who may be primarily interested in the immediate outcome of the settlement – but also to the society at large which looks at them for guidance.

Conclusion

The problems and responses of the legal profession and the legal system generally can be traced back to colonial society. The development of a socially stratified society marked the beginning of unequal access to legal opportunities and services. The structure of the profession and its role in the present programme of socialist development should therefore be assessed in that light. The future seems to hold a lot of changes for the Bar. The very existence of the private Bar is in question, as the state gets more involved in determining who should get legal services and who should provide them. These will remain the major challenges for the future.

Appendix 1: Methods of Research

The research was initiated by preparing a comprehensive questionnaire, primarily designed to be posted to lawyers in government legal offices and private practice. Some were dispatched through the post, out of which about 30 per cent were returned fully answered, about 15 per cent half answered, and the rest were either

lost or the lawyers refused to respond. In view of this reluctance to reply by some of the advocates it was decided to rely on interviews. This was not particularly difficult as over 80 per cent of lawyers are in four major towns, with Dar es Salaam alone hosting more than 70 per cent of all the lawyers in the country. Initially, the concentration was on private practitioners and a few public lawyers in Dar es Salaam. It was not possible to get in touch with all public lawyers as they often tended to be away on some official business. For some lawyers the lengthy questionnaire provided an excuse to turn me away from their offices. I employed one Research Assistant to help administer the questionnaire and in a number of cases, we had to make several visits and appointments before a lawyer could surrender an hour or two to a battery of questions. I usually encountered less resistance from my former classmates and students now working as State Attorneys or Magistrates who tended to cooperate more easily than senior legal practitioners and other senior officers like High Court Judges and Senior State Attorneys.

In effect we turned the questionnaire into a guide, at most a check list, which we used in gathering relevant data. The questionnaire included coverage of the lawyer's personal and professional history, description, type and number of cases he handles and an evaluation by the interviewer of the lawyer's intelligence, ability and willingness to give truthful answers. Most lawyers resented being asked questions regarding their personal background, particularly those referring to their parents' education and occupation. A feeling of unease seemed to be common among lawyers of humble origins and backgrounds, though less so among successful private practitioners and senior government officials.

Formally, therefore, the questionnaire was divided into five parts. The first part covered the lawyer's personal and professional history. The second dealt with actual legal work or legal practice. It required a description of the number and type of cases the advocate handles, and whether there was room for specialisation. Other questions covered professional contacts with clients both before and after the cases, relative profitability (in income terms) of different cases, and the kind of clients to which he attends. In the third we posed questions on the distribution of legal services generally. Lawyers were requested to give an evaluation of the system of distribution of legal services and point out the bottlenecks where they exist. The questionnaire also included a number of questions on legal aid as an institution and the way its operation and administration could be improved. The fourth dealt with the problems of legal education both historically and in the context of socialist transformation. And the fifth addressed itself to the problems, prospects and possible reforms which might be introduced to bring the profession in line with the country's present political current.

Initial difficulties were many, particularly in obtaining an up-to-date roster of lawyers. The Roll of Advocates kept by the Registrar of the High Court was of help, but in certain cases it was out of date or misleading as when an advocate would be kept on the Roll even when he had already left the country or retired from actual practice. As for lawyers in public service, except those in the Judiciary and Attorney General's Chambers, it was much more difficult to locate their present places of

work. The interview usually lasted between one and three hours, depending on the willingness of the interviewee to continue the discussion. The discussion took place in the lawyers chambers and in a few cases, I would meet lawyers at a coffee shop. I noticed considerable resistance by a number of successful lawyers to interviews in their offices during regular working hours, but public lawyers were less reluctant.

Apart from interviews, I spent some time looking at documentary sources on the legal profession. Considerable time was spent in the research room of the Tanzania National Archives, the Office of the Law Society and the corridors of the High Court Registry and Attorney General. During the winter of 1974 and summer of 1975 I spent brief periods – about two months in all – working on files at the Public Records Office in London.

In Tanzania I encountered an initial problem in getting access to government files and other documents. Sometimes I had to wait for two weeks while my requests were being processed. In addition a number of files were withheld from me because they were classified as “confidential”. This was certainly the major stumbling block at the National Archives.

Once obtained, the files I examined were often of limited use. Yet despite these problems I made headway in certain areas. I was able for instance to come across documents dealing with the establishment of the legal profession in the colonial period and with the development of legal education during the transition to self-government. The period covered by the former was 1919 to 1961, that is the whole period of British administration. As for files after 1961, both legal and political obstacles were encountered. They were legal in the sense that the National Archives Act provides for a 35 year period before Ministerial files can be open to the public except on special exemption by the Minister in charge of the relevant Ministry. Although I managed to look at the Attorney-General's files under this kind of waiver, in most cases the rule was applied with unrelenting strictness. The problem was also political in the sense that although some of these files were no longer current, they dealt with living personalities some of whom held important positions in Government, or are held in high esteem in their social communities.

On legal education, I had unrestricted access to the files, Senate minutes, and Council memoranda of the University of Dar es Salaam which among other things included full details of the elaborate discussions which preceded the establishment of the Faculty of Law.

These were the major approaches of my inquiry but they were by no means the only methods I used. They do not include, for example, the many hours I used to spend talking to lawyers, judges or even students informally about various aspects of the legal profession. These interviews usually did not proceed in a structured way, but tended to focus on current legal problems mainly calling into question the role of the legal system in socialist transformation. I made frequent visits to friends working for the Tanzania Legal Corporation, the former Director of Public Prosecutions, law graduates on legal internship, and of course my colleagues at the Faculty of Law who are intimately associated with legal education in Tanzania. In a number of instances, I sat in court, merely to see lawyers in action, and sometimes

talked to prospective and past clients. I found this latter approach especially useful as a way of counterchecking some of the answers given by the advocates.

Notes

1. Nyali Ltd. v. Attorney-General (1955) 1 A.E.R. 646 as per Denning L.J. at p. 653.
2. Morris and Read, *Uganda: The Development of its Laws and Constitution* (London: Stevens & Sons 1966) 237; Roberts-Wray "The Adaptation of Imported Law in Africa" 4 J.A.L. 66 (1960). Seidman R., "The Reception of English Law in Colonial Africa Revisited" 2 *Eastern Africa Law Review* 47 (1969).
3. The historical description of the colonisation process is discussed by K. Ingham, *A History of East Africa* (London, 1962); W. Morris-Hale, *British Administration in Tanganyika from 1920 to 1954 with Special Reference to the Preparation of Africans for Administrative Positions* (Geneva 1969) R. Oliver and G. Mathew (eds.) *History of East Africa Vol I* (London, 1963). L.H. Gann and P. Duignan (eds.) *Colonialism in Africa, Vol. II: The History and Politics of Colonialism 1914-1960* (Cambridge, 1970).
4. J. Iliffe, *Tanganyika under German Rule* (London and Nairobi 1969).
5. B.T.G. Chidzero, *Tanganyika and International Trusteeship* (London 1961).
6. Morris and Read, *Indirect Rule and the Search for Justice* (Oxford, Clarendon Press, 1972), p. 40.
7. Sir Kenneth Roberts-Wray, *Commonwealth and the Colonial law* (London 1966); W.E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the Crown* (Oxford, 1894). For an elaborate discussion of the constitutional anomalies introduced by the Foreign Jurisdiction Acts, see Morris and Read, *op. cit.*
8. Tanganyika Order-in-Council 1920, article 17 (2).
9. A full discussion of indirect rule is presented by Morris and Read *op. cit.* particularly Chapters I, V, VII and VIII. See also D. Cameron. *My Tanganyika Experience and Some Nigeria* (London, 1939).
10. Morris and Read *op. cit.* Chapter 9 p. 286.
11. *Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika in Criminal Matters* Cmd. 4623 (1934); Morris and Read *ibid.* p. 311-323.
12. Tanzania National Archives, File No. 25686.
13. J. Iliffe "Agricultural Change in Tanganyika", Historical Association of Tanzania Paper No. 10 East African Publishing House pp. 12-43.
14. According to the pioneer African advocates whom I interviewed the first marketing cooperative was the Bukoba Bahaya Union, formed in 1924: H. Bienen, *Tanzania, Party Transformation and Economic Development* (Princeton, N.J. 1967) p. 25 ff.
15. For a discussion of education in the colonial period see D.R. Morrison, *Education and Politics in Africa - The Tanzania case* (Heinemann, Nairobi 1976).
16. E. Cotran, Integration of Courts and Application of Customary *East African Law Journal* Vol. 1 p. 108. For a discussion of the situation before the Act see A. Allott (ed.) *Judicial and Legal Systems in Africa*, London, Butterworths 1962 p. 98-105.
17. For arguments for and against counsel in primary courts see McAuslan J.P.W.B. "The Problem of Representation in the Primary Courts", *East African Law Journal* Vol. 2 p. 84.
18. It is now an offence as a matter of law for public servants earning a certain salary, to have two sources of income. There has been established a Leadership Code Enforcement Committee - see The Committee for the Enforcement of Leadership Code Act 1973 Act No. 6 of 1973.
19. For a discussion of the legal implication of these nationalisations see: A.W. Bradley "Legal Aspects of the Nationalisation in Tanzania", *East African Law Journal* Volume 3 No. 3 p. 149. For a penetrating study of the nationalisation see I.G. Shivji, *Class Struggles in Tanzania* (Tanzania Publishing House 1975) particularly part III; L. Cliffe & J.S. Saul, *Socialism in Tanzania* (Vol. 2 (East African Publishing House, 1973) pp. 304-354; D.D. Nsereko "The Tanzania Nationalisation Laws", *Eastern Africa Law Review* Vol. 3 No. 1 p. 1.
20. The Tanzania Legal Corporation was established by Government Notice No. 32 of 1971.
21. Government Notice No. 162 of 1972.

22. For a policy statement on nationalisation measures see Julius K. Nyerere *The Arusha Declaration* (Government Printer, Dar es Salaam, 1967).

23. Cap. 341 of Tanganyika Laws as amended by Advocates Ordinance (Amendment) Act of 1969 Act No. 39 of 1969.

24. Sect 4, 13 and 24, 24A of Act No. 39 of 1969.

25. This monopoly is vis-a-vis other professions like Accountants, Chartered Secretaries. It does not mean that the Bar has monopoly vis-a-vis lawyers in government service who can perform some of these functions without necessarily belonging to the Bar.

26. The Kenya Law Society was very active when the Law Faculty was part of the University of East Africa. The Society insisted on the inclusion in the syllabus of commercial subjects. Kenya now has its own Law School and the Tanzania Law Society has not been very effective in the area of legal training.

27. There has been a remarkable public opposition to the abolition of private medical practitioners. However, such opposition emanates more out of the scarcity and ineffectiveness of medical services rather than from sympathy with the private medical practitioner as such. The Medical Association has also strongly resisted the move to the extent of confronting the Minister for Health.

28. Government Notice No. 162 of 1972.

29. The most the Corporation could do in such a case would be to negotiate for the individual informally with the agency concerned. At present the Tanganyika Law Society would allocate a request for legal assistance of this kind to a private practitioner rather than the Legal Corporation.

30. By a Circular from the Attorney-General, all parastatal organisations were directed to obtain all their requirements for legal services from The Tanzania Legal Corporation. The Circular was dated 15 June 1971. It was followed by a directive from the Standing Committee on Parastatal Organisations when it was found that some parastatals were still taking their cases elsewhere. See Directive No. 26 of 20th November 1975.

31. Professor R.W. James, in an article on the role of the legal system in Tanzania points out the dangers which may arise out of such a multiplicity of tribunals dealing with the same subject matter. See R.W. James, "The Arusha Declaration: The Role of the Legal System", *African Review*, Volume 3, No. 2, p. 179.

32. See E. Cotran, *op. cit.* p. 108, 114; and J.P.W.B. McAuslan, *op. cit.* p. 84 ss. R.W. *op. cit.* p. 84 ss. R.W. James, *op. cit.* pp 189-194.

33. See Law of Marriage Act, 1971 Act. No. 5 of 1971. See also comments on the proposals generally by F.M. Kassam in *Eastern Africa Law Review*, Vol. 2, pp. 319, 329.

34. These include amongst others, The Rent Restriction Board established under the Rent Restriction Act, Acquisition of Building Appeal Tribunal established under the Acquisition of Buildings Act 1971, Act 13/1971.

35. For a discussion of Ten-Cell leaders see J.H. Procter, *The Cell System of the Tanganyika African National Union*, (Tanzania Publishing House, 1971).

36. For discussion of Ombudsman – See, Report of the Presidential Commission on the establishment of a Democratic One-Party State (Dar es Salaam, Government Printer 1971); Y. Ghai, "The Ombudsman", *East African Journal*, Volume VI No. 8 August 1969; H. Kjekshus, The Ombudsman in the Tanzania One Party System, *African Review*, Vol. 1 No. 2 p. 13.

37. See James, *op. cit.*

Legal Profession in the Sudan

A Study of Legal and Professional Pluralism^{*}

The Socio-Political Roots

In the Sudan the diversity and pluralism of Sudanese society have been reflected in its plural legal systems and in its pluralized legal profession.

In its present boundaries, the Democratic Republic of the Sudan is a relatively recent entrant to modern political history, and like most other new nations, it is a geographical or political rather than a religious, ethnic or linguistic unit. The 1973 Census shows a total population of about fifteen millions scattered over one million square miles. According to the 1956 Census (the Census Bureau did not use religious, linguistic, racial or tribal categories when conducting the 1973 Census) more than two-thirds of the population adhere to the Islamic religion; and about five percent are listed as Christians. There are eight major tribal groupings, five of which reside in the northern part of the Sudan and constitute about four-fifths of the entire population. More than half of those four-fifths are Arabs and a large part of the rest are Arab-aculturated. The Arabic language, being spoken by the largest portion of the population in the North, has been confirmed as the official language in all the constitutions in the post-colonial era.

The other one-fifth of the population resides in the South – now referred to as the Southern Region – and consists of the Nilotic, the Nilo-Hamitic and the Sudanic groups. However, these groups are subdivided into a large number of heterogeneous tribes with different norms, values, religious beliefs, language and economic, political and social organization.

Seventy-one percent of the population according to the 1973 Census, are listed as rural people, dependent on agriculture which is the basis of Sudan's economy. They include the sedentary and semi-sedentary societies of the south. Eleven percent are nomadic, moving around the extensive pastoral desert and semi-desert areas of the north. Both the rural and nomadic groups have little contact with the remaining eighteen percent of the population, which has more than doubled in recent years. Floods of emigrants are pouring into Khartoum, the capital, whose

^{*}The data upon which this paper is based is part of data collected for a doctorate thesis and are current up to September 1975. Its main sources are archival materials, judicial records, interviews, questionnaire and observation method. For more on the methodology used and its problems, see Salman M.A. Salman, *Judicial Administration and Organization in the Sudan: The Impact of Political and Socio-economic Factors*, 3 (1977); (unpublished J.S.D. dissertation submitted to Yale Law School). The passage of time might have brought about legislative changes affecting parts of the data. However, this paper does not take into account any changes thereafter.

population has increased by more than one hundred percent in the last decade. This flow of emigrants enhances the already existing socio-economic problems and creates new patterns of conflicts.

Illiteracy is another aspect of disparity and heterogeneity. The 1973 Census again did not address this issue. Although the 1956 Census shows a figure of eighty-eight percent; unofficial figures published in 1968 lower it to eighty-two percent. The country's lack of integration has also been enhanced by poor transportation which is a major impediment to social and economic development.

The first central political establishment in the Sudan came into existence in 1821 when the Turks and Egyptians conquered the small scattered Kingdoms and gradually moved southward. It is true that a "modern" state was inaugurated, but the price was more than the Sudanese people could tolerate. Exorbitant taxes, corruption and oppression resulted in the outburst of a religious national movement, led by the Mahdi – a religious leader from whom the movement took its name. This movement started in 1881 and culminated in the capture of Khartoum in 1885 and the establishment of the Mahdist state. The primary goal of Mahdism was the proselytisation of Islam throughout the world. Accordingly, the new Mahdist state was immediately engaged in wars on all fronts. Little attention was paid to the economic, political and social problems that were present or emerging. Famine, internal conflicts for power and the consequences of the multi-faceted war opened the way for the British and Egyptian expedition which succeeded in occupying the Sudan in 1898.

It may appear difficult to understand how Egypt, which was itself a British colony participated as a partner in a colonial expansionist mission. The situation, however, has to be visualized within the framework of the colonial powers' tactics in their scramble for Africa in the nineteenth century. Egypt at that time claimed the Sudan as one of its historical components and considered the Mahdist revolution as an internal rebellion against its central authority. For Egypt, the 1896 expedition was for the purpose of putting down that rebellion. The British appropriated this idea and exploited it in their dealings with the other rival powers.

The conquest was followed by the inauguration of the Condominium Agreement of 1898 which was the basic constitutional document of the era. From the start it was clear that the Egyptians were partners only in name and financial burden, whereas the British were the actual rulers. Despite the concessions that the British gave, or were forced by the circumstances to give, they maintained throughout the colonial era the upper hand in the affairs of the Anglo-Egyptian Sudan.

The war against the Mahdist military establishment proved far easier than the one against Mahdism as a religious belief. As a religious belief, Mahdism had succeeded in the period immediately prior to colonial rule not only in eliminating the other religious orders, but in establishing itself as the only religious sect or tariga. The idea of a religious sect or tariga is based on the belief that man, in his search for spiritual perfection, needs the guidance of a devout person to act as an intermediary between him and God. The Mahdi and his successors were believed by their followers to be such intermediaries. The British believed Mahdism to be a

potential unifying factor and therefore a source of political resistance to their rule. They therefore resorted to the tactic of divide-and-rule by favoring the Khatmiyya, a religious sect that had been the principal rival of the Mahdists. This policy also pleased the Egyptians, who had given the Khatmiyya leaders refuge during the Mahdist revolution.

However, British animosity towards the Mahdists was shortlived. A rapprochement resulted when the British succeeded in getting them mobilized against the Turks during the First World War; a mobilization which was significant because the Turks were considered at that time as the leaders of the Islamic world. The inter-war period witnessed the consolidation of the rapprochement between the Mahdists and the British. Finding that they had been abandoned by the British, the Khatmiyya resumed and strengthened their ties with Egypt.

One of the consequences of the Second World War was the growth of nationalism in many of the colonies. The Sudan was no exception. The elites – most of them graduates of Gordon Memorial College¹ – provided leadership and conducted the political struggle against the colonial administration. These graduates were united and their struggle was initially peaceful. However, gradual divisions among them emerged by reason of differences in strategy and tactics. As the end of colonial rule was coming into view, a split emerged between those who favored independence and those who believed in affiliation with Egypt. This division corresponded broadly with the cleavage between the two religious sects. For the Mahdists, Egypt was a colonial power and an enemy like Britain. For the Khatmiyya, Egypt, their old patron, was undergoing a similar struggle against Britain, and as such could be allied with and relied upon. The split, enhanced by the Egyptian claims over the Sudan, was manifested in two opposing political alliances. On one side was an alliance between the united valley elites and the Khatmiyya, and on the other was an alliance between the pro-independence elites and the Mahdists. Writing about the religious sects and their role in politics in the Sudan, Ruth First correctly notes that,

The greater part of the contemporary Sudanese political history turns on the axis of these two opposing sects and their opposite orientations. Political party moves and allegiances, seemingly unexplicable, were a mirror of their conflicts. In its turn, even the unity of the army command was rent by opposing sectarian allegiances. Every government of the traditional parties has had to come to terms with, or break under, the all-pervasive influence of the two major tarigas.²

The Sudan attained its independence on the first day of January, 1956. This was preceded by an eventful period of more than two years. In 1953 the Sudanese political parties, the British and the Egyptians agreed on the right of the Sudanese people to determine their future. The choice between independence and affiliation with Egypt was to "be decided by a popularly elected parliament. A basic enactment termed "The Self-Government Statute, 1953," accommodating this agreement was passed. This Statute was recognized by the Mahdists, the Unionists (those favoring unity with Egypt), the British and the Egyptians as the constitution for an interim period of two years during which the right of self-determination would be exercised. Though the Unionist got the majority in the parliamentary elections of 1954, they

could not proceed to implement their goal. The sequence of events was rapidly flowing against the idea of unity with Egypt.

With the achievement of independence, all the divisions that were held under the surface by the existence of a common enemy erupted. One of those major events was the sudden explosion in 1955 of the situation in the South. The cultural, racial, linguistic and religious differences between the two parts of the country had been enhanced by the British policy which had originally envisaged the separation of the Southern from the Northern part of the country. The decision to reverse this policy of separation was taken in 1947, following a conference between representatives of the North and the South that opted for unity. However, the rift had become so wide that it was difficult to bridge. After seventeen years of civil war, ending in 1972, an agreement was signed granting the South a larger degree of regional autonomy as a separate Southern Region.

The Western democratic framework transplanted at the time of self-government only aggravated the diversity of Sudanese society. Shifts of parliament members from one party to another were frequent. In less than three years, four cabinets ruled the country. Lack of stability and of consistency in policy was a natural result of the strange and sometimes even grotesque coalitions that dominated the political scene, including a period of coalition between the two main rival parties since neither of them had the majority to rule. No constitution was passed and therefore the country continued to be ruled by the Transitional Constitution of 1956 that was tailored in a hurry from the defunct Self-Government Statute of 1953, a few days before independence.

Realizing that he would shortly be thrown from office by a vote of no confidence, the then Prime Minister handed over power to the army in November, 1958. The army ruled from that time until 1964. These six years were characterized by oppression, corruption, and mal-administration emanating, *inter alia*, from the excessive concentration of powers in one body. Though the Transitional Constitution of 1956 was suspended, no permanent constitution was passed. The military rulers were too busy consolidating their power in the face of threatened counter coups (two of which materialized but were aborted) to introduce positive changes into the legal or judicial systems. The country continued to be governed by decrees. The establishment of a so-called "Central Council" to act as a parliament under the umbrella of guided democracy was met with apathy and indifference. The civil war in the South intensified, mainly because the government perceived the problem as a military one. The economy was collapsing due to the fall in cotton prices, and frequent strikes and protests which were dealt with in a brutal manner. The reaction to this was more demonstrations and protests, which eventually culminated in a complete civil disobedience that toppled the military government in October 1964.

A "United Front" representing the professional and trade organizations was formed in which members of the legal profession constituted the single largest professional group. Its members agreed, *inter alia*, on the revival of the Transitional Constitution and the formation of a transitional civilian non-partisan government,

to be succeeded by an elected one. However, shortly after the overthrow of the military government, the country was again torn by political unrest. The caretaker government, frustrated with the political atmosphere and the pressure of the major parties, succumbed to the politicians and surrendered power to them even before the elections were held. The Sudan was once again in the same atmosphere it experienced between 1956 and 1958. Periodic cabinet reshufflings were the norm. Clandestine cooperation between one group in the opposition and another in the government was frequent. Between November 1964 and May 1969 five cabinets ruled the country, and at one time, two rival governments existed, each claiming legality. The High Court was flooded with constitutional cases, but many of its decisions, to the dismay of the Court and the public, were disregarded. Political freedom was abused, and strikes and demonstrations were daily phenomena. These strikes, coupled with the reliance upon cotton as a main source for hard currency, resulted in severe economic problems. "The Round Table Conference", which was set for discussing the southern problem and in which both northern and southern political figures participated, collapsed and the war went on.

The main actors in the political scene ranged between the extreme right and extreme left, radicals and conservatives, Islamic and secular groups and pan-Africanists and pan-Arabists. The tribal leaders who had been institutionalized by the policy of indirect rule emerged as a political power, having previously become a reliable ally of the soldiers during the period of military government, when they had been able to consolidate and expand their judicial and administrative powers. It proved impossible to reach a national consensus of all the political and ideological groups. No constitution was agreed upon, there being no consensus whether the state should be a secular or religious one; whether the government should be parliamentary or presidential; or whether the assembly should be uni- or bi-cameral: The same dilemmas faced the Law Reform Commission that was established in 1965 to revise the legal and judicial systems. Most of the Commission's time was consumed in debates over fundamental issues such as whether to adopt civil, common, Islamic, or customary law, or whether to draft eclectic codes incorporating elements of all of these.

On May 25, 1969, the army, in a bloodless coup, took power again. With the experience of the preceding five years in mind, not many Sudanese shed tears for the collapse of Western-type democracy. A "Revolutionary Command Council" composed of nine army officers and a civilian assumed exclusive legislative and executive powers. The Transitional Constitution was again suspended and the existing political bodies and parties were dissolved. The suppression of political and ideological differences finally made it possible to formulate and adopt a constitution, the Permanent Constitution of 1973. The structure of government prescribed by the Permanent Constitution includes a single monolithic party, the Sudanese Socialist Union headed by the President of the Republic, who is nominated by the Party and is confirmed by a plebiscite. The President has extensive executive powers and shares legislative powers with the legislature, the People's Assembly.

Some of the issues on which there had been lack of national consensus have been

solved by compromises. The constitutional article dealing with the religion of the state guarantees the place of both Islam and Christianity, and stipulates in regard to each of these religions that "the state shall endeavor to express its values." Arabic has been designated as the official language of the country, and English as the working language in the Southern Region.

However, the post-1969 era has not witnessed the achievement of a final formula for the legal and judicial systems. Major shifts in the political ideology and programs of the establishment have taken place resulting, inevitably, in shifts and changes in the legal and judicial systems and perpetuating, as we shall see, pluralism and tensions within the legal profession.

The Rise of Legal and Judicial Pluralism

The Islamic judicial system established by the Mahdist state was so centered around the Mahdi and later his successor, that the collapse of that state meant the automatic collapse of its judicial organization. Accordingly, the Anglo-Egyptian colonial administration had to start from scratch. The fact, however, that the new establishment succeeded a theocratic state, coupled with the deep degree of religiosity among the population could not be easily overlooked. The policy to be pursued towards Islam was explicated by Lord Cromer, the British Consul-General in Egypt, in a speech he delivered to the Sudanese religious notables during his visit to the Sudan, shortly before the proclamation of the Condominium Agreement of 1898. He repeatedly asserted that there would be full respect and no interference with the Islamic religion. When asked whether this commitment implied the application of Islamic law, Lord Cromer, strangely enough, gave an affirmative, rather than a diplomatic answer.⁴ A few months later, Lord Kitchener, the first Governor General, wrote to the provincial governors, directing them to see to it that, "religious feelings are not in any way interfered with, and that the Mohammedan religion is respected."

The dissimilarity between the British common law and the Egyptian civil law was a major obstacle to an agreement on the kind of judicial and legal system to be inaugurated. The Condominium Agreement expressly stipulated against the transplantation of Egyptian law because that would have given the Egyptians an upper hand in the legal arena. On the other hand, Egypt considered the Sudan as a province and was shouldered with the lion's share of the financial burdens. The austere economic conditions of the Sudan at that time, coupled with its vastness and its poor transportation system, were other factors to be taken into consideration.

It was not until several years after the occupation of the Sudan that the government was able to achieve a formula for judicial and legal systems accommodating these and other factors. The major problem of the place of religious *vis-a-vis* secular laws in the judicial and legal systems was solved by establishing a partnership between them. This partnership extended both to the laws to be applied and the machinery to apply them. Two divisions within the

judiciary were established; one called the Civil Division⁴ and the other the Sharia (Islamic law) Division. The courts of the former Division have been known as the Civil Courts and of the latter as the Sharia or Mohammedan Courts. Suffice it here to generalize that the latter were endowed with the power of applying Islamic law in cases of personal status⁵ involving Moslems. The Civil Division was headed and manned by British staff, whereas the Sharia Division was headed by an Egyptian called "the Grand Kadi," and manned by a group of Egyptian and Sudanese religious notables. Though this partnership might not have satisfied all the groups, it certainly did take all of them into consideration.

In the early years of the colonial era, the law to be applied by this newly established dual machinery in the Sudan substantially fulfilled the Sudanese and Egyptians' expectations. Since the Governor General and the Legal Secretary were not knowledgeable in Islamic Law, the Grand Kadi was authorized to issue circulars stating the law to be applied in the Sharia Courts. In matters not covered by those circulars, the Sharia Courts were directed to apply the authoritative doctrines of the Hanafi jurists.⁶

A comprehensive criminal code on the Indian model was passed. Few enactments were passed in the civil law area outside the law of personal status. The Bankruptcy Ordinance, 1917, was mostly an Egyptian law, whereas the Companies Ordinance, 1925 was a reiteration of the British Act. The law to be applied in other civil matters was left undecided. The Civil Justice Ordinances, 1900, and later the 1929 Ordinance, stipulated that in cases not covered by any enactment, the courts should act according to "... justice, equity, and good conscience." One of the reasons for the introduction of this vague formula was to assuage the fears of the Egyptian and Sudanese that common law might be imposed. Theoretically speaking, this formula would allow the introduction of Egyptian, Islamic, or customary law equally and properly as the introduction of common law. However, many factors contributed to the gradual introduction of common law. The Civil Division was manned by British judges for a long while. Being British and having been reared in common law traditions, it was inevitable that those judges would apply common law only. Moreover, the establishment of a law school under the auspices of a British staff and a loose compliance with the common law principle of *stare decisis* have been other contributing factors. So, this vague formula resulted in a comprehensive reception and institutionalization of common law.⁷

The chief judgeship of the Sharia Division represented the most important post that an Egyptian occupied in the government. It offered the Egyptians an important channel for participation in the administration that was denied them in other branches of the government and provided them with a direct means for transplanting Islamic Law as interpreted by Egyptian religious authorities into the Sudanese legal system. The British also made other concessions to the Egyptians. Egyptian advocates were allowed to practise in the Sudan and to appear before the Civil Courts. The Sudanese court system was not subordinated to the Judicial Committee of the Privy Council, which was the apex of the judicial pyramid for other British colonies, protectorates and Commonwealth countries.

The Birth of the Sudanese Legal Profession

Following the establishment of the court system and the prescription of the law to be applied, the Legal Practitioners Rules of 1904 were passed. This was a short enactment which purported to establish and organize a legal profession in the Sudan. It preconditioned the right to practise law and appear before Civil Courts on having a law degree from a recognized law school and obtaining the approval of the Legal Secretary of the colonial establishment in the Sudan. The practical effect of this enactment was the confinement of the practice of law to foreigners including British, Greek and Egyptian lawyers. It was neither politic nor possible for the British to prohibit Egyptian advocates from appearing before Sudanese Civil Courts despite the fact that they were not trained in the British common law.

However, the Anglo-Egyptian relationship as regards the administration of the Sudan was at no time during the colonial era a smooth, congenial one. It was always characterized by conflicts and tensions that gradually eroded the Egyptian influence in the Sudan and relegated their role to that of a nominal partner. A few months after the conquest of the Sudan, the Egyptians found themselves excluded from all important posts; and there was a systematic process of eliminating their presence at other levels.

Shortly after the passage of the Sudan Mohammedan Law Courts Ordinance, 1902, a college for training Sharia judges was established, called the Kadis' College. The main purpose was to make possible the eventual elimination of Egyptian judges, who were financially and politically expensive. One author has argued that the reason for the establishment of the Kadis' College was the dissimilarity between Egyptian and Sudanese law: "As the [Sudanese] legal system was unlike that of Egypt, and no Sudanese had received legal training, there was an urgent need for the supply of legal assistants. A training college for the training of Sharia judges was therefore established. . ."¹⁰ This argument is certainly incorrect. Although it is true that the Islamic schools of thought adhered to in the Sudan and Egypt are not the same, nevertheless, the rules in the family law area have been by and large similar, and there has been a systematized process of cross-transplantation of Islamic law enactments. This process had been facilitated by the Egyptian judges who manned the Sharia courts in the Sudan. It might also be remembered that the Grand Kadi and the senior Sharia judges continued to be Egyptians until the nineteen-forties.

The courses in the Kadis' College concentrated on Islamic Law and classic Arabic studies. The period of studies was two years, followed by one year of apprenticeship training, after which the graduates would be appointed as Sharia district judges. The College soon became very popular and the number of applicants increased steadily. The number of graduates rose from five per annum in 1905 to twelve in 1911. Besides the gradual elimination of the Egyptian judges and their replacement by Sudanese ones, the establishment of the Kadis' College had the effect of institutionalizing the dualism of the civil and Sharia divisions and widening the gap between them.

The process of displacing the Egyptians was speeded after a pro-Egyptian revolt had been crushed in 1924. Following the assassination in Cairo of Sir Lee Stack, the Governor General of the Sudan and Chief of Staff of the Egyptian Army, the British Government ordered the withdrawal of all Egyptian officers from the Sudan.¹¹ The British Government moved further towards eliminating the Egyptian influence in the legal system too. That influence was in the larger sense political, enhancing the calls for close ties with Egypt, and also in the narrower sense endangered the existence of the common law in the Sudan by replacing it by civil law as taught and applied in Egypt. Memoranda exchanged between the Legal and Civil Secretaries on the issue of legal education and the establishment of a civil law school in the Sudan, reflected this attitude. In 1928 the Legal Secretary wrote, "It is wrong and inadvisable that natives wishing to become lawyers should be compelled to go either to Egypt or England, and it might well be worthwhile to consider proper training courses which would remain under British tuition and guidance, *and would enable us to reject Egyptian qualifications.*"¹²

After seven years, the idea of establishing the law school became a reality. As the Governor General's Report put it:

In May 1935 the Khartoum School of Law Order was passed providing for the institution of a school of law under a board of legal studies, and laying down the conditions for entering to the school. . . Regulations were made by the board providing for a course of study of two years duration, with an intermediate examination during the first year in jurisprudence, contract, crime, and tort; and a final examination at the end of the second year in the subjects of intermediate examination and also the law of evidence, civil procedure, criminal procedure, land law, and commercial law. The primary purpose of the school is to open to Sudanese the profession of advocates in the courts constituted under the Civil Justice Ordinance and Code of Criminal Procedure; but it is also being used to train government officials for judicial posts.¹³

Despite the similarities in the reasons underlying the establishment of the Law School and the Kadis' College, there were many differences between them. In contrast to the Kadis' College the students recruited for the Law School were mostly government officials who already had a degree from another college. Each school adopted a curriculum that would only fit the legal division with which it was affiliated. Arabic was used as a means of instruction by the Egyptian staff in the Kadis' College for teaching Islamic law, whereas English was used by the British staff in the Law School for teaching British common law. Whereas the Kadis' College was designed primarily to train potential judges for Sharia Courts, the Law School was originally established to produce advocates for the Civil Courts.

Concomitant with the establishment of the Law School detailed measures were adopted concerning regulation of the practice of law. The Advocates Ordinance of 1935 consolidated and replaced the Legal Practitioners Rules of 1904. Like the latter, the 1935 Ordinance dealt only with practice before Civil Courts and made no mention of practice before Sharia Courts. But as the graduates of the Kadis' College multiplied, some of them began to explore the possibility of practising. Moreover, some of the civil advocates wanted to expand the meaning of practice to include appearance before the Sharia Courts too. In response the Advocates Ordinance was

amended to provide for the establishment of a dual advocacy system. The civil advocates, graduates of the Law School or any other recognized school, were competent to appear only before the Civil Courts, whereas the Sharia advocates, holders of degrees from the Kadis' College or any other recognized similar institution, could appear only before the Sharia Courts. Sharia advocates were, by and large, under the control of the Grand Kadi, who granted licenses to Sharia advocates and supervised them. Civil advocates were supervised by a committee representing the judiciary, and the Legal Department. This development was a landmark in the process of institutionalizing dualism.

A further development was the introduction of the notion of unrestricted practice in 1948. Civil advocates who wanted to appear before the Sharia Courts could take a special examination sponsored by the Grand Kadi. Those who passed would be allowed to appear before the Sharia Courts without prejudice to their rights as civil advocates. This procedure of unrestricted practice was not, however, reciprocated, Sharia advocates not being able to qualify for practice before the Civil Courts.

In 1956 the Khartoum Law School and the Kadis' College were combined as one of nine faculties constituting the University of Khartoum and were renamed the Faculty of Law. However, this merger was only an administrative one, as both educational systems continued to operate within the newly established Faculty of Law, but under different names. The Faculty of Law, Sharia Division, which succeeded the Kadis' College, continued to maintain a high degree of autonomy in administration and syllabus and awarded a Bachelor's degree in Islamic law. The Faculty of Law, Civil Division perpetuates the tradition of the Law School, and awards a Bachelor's degree in civil law.

In 1955 another development took place which further aggravated legal diversity. This was the establishment of the University of Cairo, Khartoum Branch, with a law faculty. The latter's curriculum is largely Egyptian civil law and instruction is in Arabic, by Egyptian staff. Enrollment is part time, as the University is an evening institution. The standard required for admission is far below that required by the University of Khartoum.

When the colonial era came to an end and independence was attained in 1956, the pluralization of the legal profession thus reached its apex. The different groupings of the Bar Association comprised:

(1) The Sharia Division of the Bar which was being fed by the Sharia Division of the University of Khartoum Law Faculty and the graduates of other similar institutions such as Al-Azhar University of Egypt. The members of this group were eligible to practice before the Sharia Courts only, with no bar examination requirement.

(2) The Civil Division of the Bar which was classified, as far as legal education was concerned, into two groups:

(a) Civil law-trained lawyers who have obtained their law degrees from Egyptian Universities or the University and the prospective graduates of Cairo, Khartoum Branch and who are required to pass the bar examination to practice and to become eligible for joining the Bar Association.

(b) Common law-trained lawyers who graduated from the University of Khartoum Law Faculty and who were eligible for joining the Bar Association without taking the bar examination.

(3) The Civil Division of the Bar Association was again subdivided between:

(a) "Restricted" lawyers who can only appear before the Civil Courts; and

(b) "Unrestricted" lawyers: who can appear before both Civil and Sharia Courts, subject to passing a certain examination administered by the Sharia Division.

What started as a division of legal labour between the British and Egyptian colonial administration in the Sudan and a recognition of the Islamic influence there, had gradually been entrenched in the form of an institutionally pluralized legal profession. Moreover, legal differences had become associated with political ideologies and programs, complicating the search for a national legal profession.

Legal Profession in the Post-Colonial Era

If the colonial era had witnessed, as we have seen, the rise and institutionalization of legal pluralism in the Sudan, the post-colonial era has been characterized by tensions and struggle between those different groups for the hegemony over the legal profession.

(a) Attempts to alter the structural organization of the Bar: The Islamists versus the civil and common law lawyers.

The seating of the traditional parties, with their Islamic orientation, in power immediately after independence and later in 1965, provided a suitable milieu for the Islamists to strengthen and expand their Division.

The first act in this direction was the amelioration and upgrading of an Islamic pedagogic institution called Omdurman Mahad Ilmi (Omdurman Scientific Institution) to serve this purpose. This Mahad started as a local mosque school for religious enlightenment in the early years of the Condominium. Later, its graduates were employed as teachers of Islamic religion in primary schools and also as Sharia Court clerks with insignificant chances for promotion as judges. The majority of these found their jobs below their aspirations and started pressing for an amelioration of their status. In 1957 a curriculum in Islamic Law was introduced in a separate department in the Omdurman Mahad. In the early sixties, some of the graduates of the institution achieved their aspiration by being appointed as Sharia judges and became eligible to practise as Sharia advocates. In 1963, the Omdurman Mahad was upgraded to become the "Islamic College" whose graduates had equal access to judicial posts in the Sharia Division. This helped the Sharia Division to strengthen its position. While most of the College's graduates opted for judicial posts, they were potentially eligible to join the Sharia Division of the Bar Association without the prerequisite of an examination.

The major, serious steps towards equalizing the Sharia Division with the Civil one and gradually extending the jurisdiction of the Sharia courts beyond that set during the colonial era, took place in 1965 as a consequence of the reseating of the

traditional political parties in power. Major constitutional amendments were adopted and implementing legislation was passed to put them into effect. A Supreme Sharia Court equivalent to a Civil one was established in 1967 and the administrative powers of the Chief Justice over the Sharia Division were transferred to it, thus converting dualism into complete parallelism of two independent, equal and separate hierarchies. Application of Islamic law in family disputes was extended to non-Moslems (these provisions, however, were never applied). Finally, a comprehensive draft constitution was prepared putting the state in all its aspects unequivocally under Islamic law. This draft provided that the primary source of legislation would be Islamic jurisprudence, and that all laws in force at that time should be amended to eliminate any discrepancy with Islamic law. Any law enacted in the future that contravened Islamic law would be null and void. The draft also provided that the principles of Islamic jurisprudence should be applied in cases not provided for by legislation. The struggle to promulgate the draft continued until 1969, when the military coup d'état abrogated these efforts.

Encouraged by the conversion of the dualism of the court system into a complete independence and parallelism, the Sharia advocates decided to push in the same direction in the Bar Association. Early in 1965 the Sharia advocates met and voted for the creation of an independent Bar Association, to be called, "The Sudanese Sharia Bar Association." They assumed that they had the powers to establish such an association and moved to adopt its constitution. Besides creating their own Bar association, the basic purpose was to put an end to the system of unrestricted practice, and hence to exclude the civil advocates from appearance before Sharia Courts. This was articulated in Article 36 of the Association's proposed constitution which provided that "Practice before the Sharia Courts would be restricted to Sharia advocates as defined by this Act." The Association then asked the Attorney General to take the necessary steps to amend the Advocates Ordinance of 1935, to dispel any doubts as to the legitimacy of their new association and to abolish the system of unrestricted licensing. In his reply in November 1965, the Attorney General parried those demands.¹⁴ He stated that the purpose behind establishing professional organizations is not the protection of the members of those organizations, but rather the protection of the public, and further, that the creation of organizations for protecting the public and regulating their needs is the duty of the legislative body. He went on to add that it was not within his jurisdiction to establish or dissolve organizations; and if they were interested in pursuing the matter, they should take it to the legislature.

Since most of the influential members of the legislature were civil lawyers, the lobby for the creation of an independent Bar Association for Sharia advocates was not met with enthusiasm. The Sharia advocates' proposal was incompatible with the interests of the civil lawyers who would have been denied the right to appear before Sharia Courts. Its effects would have been particularly drastic as the number of Sharia advocates was still small and much of the litigation before the Sharia Courts was conducted by civil advocates.

Having failed to establish an independent Bar Association, the Sharia advocates

accepted the unity of the Bar, but started lobbying for abolition of the unrestricted licensing system and demanding an autonomous status within the Bar. A long memorandum was submitted to the Commission that was formed to propose a new Advocates Ordinance. In that memorandum, the Sharia advocates proposed restriction of appearance before Sharia Courts to Sharia advocates only and the creation of a separate committee to be composed of Sharia advocates and judges to conduct the enrollment and disciplining of Sharia advocates. Those proposals were added to other proposals with which the Ministry of Justice was flooded. No agreement was reached on any version, and so the Advocates Ordinance, 1935, remained in force until 1970. Almost the only effect of the Islamists' activities on the legislation regulating the legal profession was a provision in the 1966 Legal Profession (Regulation) Act, which prescribed two Islamic law subjects of family law and succession as subjects in the Bar Examination to be taken before practice as a civil advocate.

The dualism of the Courts and of the Bar was also enhanced by a strengthening of the dualism of legal education. What had been Omdurman Mahad Ilmi, subsequently transformed into "the Islamic College," was elevated to a university in 1965 under the name, "the Islamic University." Its Sharia and Law Faculty doubled the number of its student body. Its graduates have been given equal access, with the graduates of the Sharia Division of the University of Khartoum Law Faculty, to judicial posts in the Sharia courts, and became equally eligible to join the Bar Association. This strengthened further the potentialities of the Sharia Division.

By 1969 it was clear that the Islamists had gradually strengthened their hold over the judicial profession and legal education, and that they had not given up their plans for a separate and independent Bar Association. However, the political changes that took place in May 1969, as we shall see, upset their plans and dealt a heavy blow to their achievements.

(b) Attempts to relax the rules regulating admission to the Bar: civil law versus common law-trained lawyers.

Despite the fact that the Sharia Division has been launching its struggle for separation against the Civil Division (both civil and common law lawyers) as a whole, the latter has at no time been a unified group. Conflicts in many areas, especially in regard to the admission to the Bar Association, surfaced shortly after independence.

Before 1956, the small number of the law graduates of the Egyptian universities were required, as we have seen, to take a bar examination in some basic common law courses – criminal law, criminal procedure, civil procedure, evidence, and contracts – before being eligible to practise as advocates. After the establishment of the University of Cairo, Khartoum Branch, with a law faculty, one might have assumed that this examination would be more systematized and organized to cover the common law that is being applied in the courts, and to protect the public and the profession. Unfortunately, what happened was the reverse. "Under political pressure the Advocates Ordinance was amended to abolish the examination. An applicant became entitled to be issued with a license after spending a one year

training period, after graduation from any law school."⁴⁵ This memorandum goes on to reveal the effects of this abolition, stating:

Last year [1961] the number of law graduates from the two universities in the Sudan, and other universities abroad, multiplied rapidly. Consequently, the number of advocates increased. The consequences of this proliferation without checking the legal skills of those lawyers was the lowering of the standard, in both aptitude and ethics. For that reason, and after consultation with the Chief Justice, we agreed that the situation necessitates a quick remedy. This will be done through a law, the object of which is to regulate admission to the legal profession, Ministry of Justice, or the Judiciary. Any law graduate who wishes to join any of those professions should take and pass an examination in the law applicable in the courts.

Accordingly, the Legal Profession (Regulation) Act of 1962, was passed, reinstating the Bar Examination, and extending it for the first time to the graduates of the University of Khartoum Law Faculty. The Act established a Council whose duties were to supervise this examination. The Council consisted of representatives of the Bar, the Bench, the Ministry of Justice and the Universities of Khartoum and Cairo (Khartoum Branch) Law Faculties. The Sharia Division was not a party to this struggle, and the graduates of the Faculty of Law, Sharia Division, were not required to take a similar examination. Despite the fact that this examination was a prerequisite for joining any of the branches comprising the judicial or legal profession, it still continues to have the title, "the Bar Examination."

However, in 1964 the common law lawyers successfully managed to challenge their equal treatment with the civil advocates. Graduates of the University of Khartoum Law Faculty were granted exemption from the Bar Examination on the ground that they had studied and already been examined in the subjects that comprised the laws applicable in the courts. This success was short-lived. Encouraged by the change in the government and the restoration of the Western-type democracy, the graduates of the other law faculties vigorously protested against the exemption holding it out as unjustified preferential treatment. After a series of demonstrations and political activities, the Ministry of Justice in 1965 suspended the application of the Legal Profession (Regulation) Act of 1962 to allow all graduates with law degrees to join the legal profession or to work as law officers without the need to take the Bar examination.

This situation lasted for a few months. In the same year (1965) the Legal Profession (Regulation) Act of 1962, was revived, but with significant changes. A blanket exemption was extended to the law graduates of the University of Cairo, Khartoum Branch, together with the law graduates of the University of Khartoum. Only those who have had their law degrees outside the Sudan were required to pass the Bar examination as a prerequisite for practice or for working as judges or law officers. (Scrutiny of the annual results of the Bar examination in this period reveals that at least one reason why the Egyptian Universities' graduates were pressing for its abolition was their low success rate.)

The staff members of the University of Khartoum Law School thereafter submitted a counter-memorandum to the Ministry of Justice. They denounced this unnecessary confusion and suggested that "... The right procedure is to require all

those who have not had adequate training in the Laws applied in the Sudan to sit for this examination. It is a pity that the approach to this problem has been a political one, motivated by political reasons. Professional considerations have been completely overlooked." The memorandum went on to suggest requiring graduates of *all* universities, including the University of Khartoum Law School, to take this examination if they wanted to join the legal or judicial profession, or to work as government attorneys." This proposal was accepted and incorporated in the Legal Profession (Regulation) Act of 1966.

Bar Examination or no Bar Examination, it was clear that the number of the civil law-trained lawyers was increasing rapidly in the legal and judicial professions and in the Attorney General's chambers. This result was encouraged by two factors, both of which relate to the rules regulating the Bar Examination (in the years when it was taken). First, any candidate who failed in one or two subjects could take a supplementary examination only in the subjects he failed in, and if he passed, he would be considered as having passed the whole examination. Second, there were no limits to the number of times an unsuccessful candidate could resit for the Bar Examination.

These struggles between Sharia and Civil Division advocates were complicated by acute political and ideological conflicts by which members of the Bar, like all other segments of the Sudanese elite, were divided. In 1966, after a stormy meeting of its general body, the Sudanese Bar Association split into two Bar Associations. The basis of the split was not the Civil vs. Sharia Division, or unrestricted vs. restricted licensing; rather it was a purely political dispute, a scramble between the so-called nationalist and socialist advocates for control of the Bar. Each group, claiming legitimacy, proceeded to elect its Committee. Faced with this problem, the Bar Admission Committee referred the whole matter to a province judge for consideration and opinion. The latter concluded that the socialist group was the legitimate and legal Bar Association. This decision enhanced the dispute and generated prolonged and tiresome controversy over the competence of the province judge to consider the matter, the nature of his conclusion, and the extent to which his opinion was binding.

When the Army took over power in 1969, it was clear that the struggle for the hegemony over the legal and judicial profession still had not been resolved. The political program of the regime was initially pan-Arabist. In the legal arena, the process of transplanting the legal and judicial systems prevalent in Egypt was facilitated by the presence in the profession of a large number of graduates both at Egyptian universities and of the University of Cairo, Khartoum Branch.

Table 1 shows that almost half the lawyers (excluding the Sharia advocates) were educated in civilian, as opposed to common law, faculties of law. Moreover, while the bench is overwhelmingly composed of lawyers trained in the common law, the bar is dominated by those trained in civil law.

In the attempts to introduce legal and juridical changes, the Law Reform commission established in 1971, undertook a major effort of codification. Three major codes, the Civil Code of 1971 (including chapter on contracts, torts, sale of

Table 1. Distribution of Judges, Advocates and Law Officers on the Basis of Educational Institutions attended as of 1971.

Legal Job	University of Khartoum Law Faculty Civil Division	University of Cairo, Khartoum Branch Law Faculty	Egyptian Law Faculties in Egypt	Other Universities	Total*
Advocates	81	108	48	4	241
Judges	133	26	6	3	168
Law Officers	52	39	3	4	98
Total	266	173	57	11	507

Source: Files of the Bar Admission Committee, the Roll of Advocates and the Judiciary and Attorney General's Chambers Personnel Files.

*It should be noted that these figures do not include the Sharia judges and advocates.

goods, agency and private international law), the Civil Procedure Act of 1972 and the Civil Evidence Act of 1972 were promulgated and others were drafted. Theoretically speaking, the common law, which used to be applied in all the areas in the Sudan, was uprooted and replaced by an Egyptianized form of the civil law.

These changes were accompanied by the promulgation of the Judiciary Act of 1972, overwhelmingly based on the Egyptian model which was transplanted without study of the environment and complexities that characterize the judicial structure and role in the Sudan.

The rise and fall of this attempt to impose the civil law in the Sudan is a long complicated story which is beyond the scope of this paper. One of the problems the Judiciary Act of 1972 attempted to confront was the dualism of the court system. Section 3 of that Act stated that the Sharia and Civil Courts would be unified and merged in one court system that would be endowed with the administration of justice in the Sudan. The word merger was not defined by the Act; so it should be taken to mean the reduction of dualism to unity. Such a major and long overdue reform cannot be established by a section in an enactment. The problem of dualism has been serious and the manner of dealing with it must be commensurate with that seriousness. That was not the case with this attempted merger. It was not preceded by empirical research or investigation as to the number of courts, their distribution, and the kind of litigation they had been handling; nor was its enactment followed by regulations or laws clarifying how the merger would be implemented. No suggestions as to how to bridge the gap of legal knowledge between each division were considered. It was simplistically assumed that, since the new codes would be in Arabic, then Sharia judges would easily apprehend and apply them. Nothing was done to unify legal education at the law faculties in order to guarantee the success of the attempted merger. In fact the Commission was completely isolated from legal

institutions and their personnel. This isolation misled them into thinking that a dual court system that had been institutionalized through long historical conflicts and tensions, and that was so deeply rooted in the interest groups associated with the various institutions of legal education, could be eradicated by the stroke of a pen.

Many factors contributed to the ultimate failure of the attempt to impose the civil law in the Sudan. Some reasons were the disguised or sometimes open opposition of the common law lawyers and the Islamists of the Sharia Division and the problems of the inadequacy of legal knowledge in civil law and of its jurisprudential foundations. However, the political conjuncture was, as always, the most decisive factor of all. The political factors allowing the restoration of the common law related to fundamental changes in the policies rather than the personnel or structure of the government. The year 1972 witnessed the withering of enthusiasm towards the proposed affiliation of the Sudan with Egypt and Libya. The public discussions of a draft constitution merging and organizing these three states, and the process of transplanting other Egyptian cultural influences were halted. The agreement ending the civil war in the South had, perhaps, contributed to this change. It is hardly an accident that the Permanent Constitution of 1973, and the Judiciary Act of 1973, were signed and promulgated on the same day. The common law lawyers who subsequently replaced the civil-law lawyers in some of the leading posts in the judiciary and the Attorney General's Chambers, lost no time in uprooting the foundations of the civil law. (It should also be noted, in passing, that the legal profession itself was not directly affected by these shortlived changes, probably because it was assumed that the introduction of the civil law codes would gradually and automatically result in changes in the legal personnel applying them.)

The Current Structural Organization of the Bar Association

Despite the sweeping legislative changes that have characterized the legal and judicial systems of the Sudan since 1973, the 1970 Advocates Ordinance which is, by and large, a reiteration of the 1935 Ordinance, is still in force. This Ordinance, like the previous one, establishes an integrated Bar Association though the division between Civil and Sharia Divisions continues to exist as does the unrestricted licensing system. In 1975 there were 248 civil advocates of whom 50 were "unrestricted" practitioners permitted to practice in the Sharia Courts as well; as contrasted with only 8 Sharia advocates; the relative distribution between the various categories of practitioners having changed very little over the preceding five years.

Dualism in the legal profession continues to operate in the same way it did in the previous periods. Unrestricted advocates usually start their career as civil advocates practising law before the Civil Courts. Later, if they decide to extend their right of appearance before Sharia Courts by acquiring unrestricted licenses, they apply to the Bar Admission Committee. The Committee decides applications in the light of

the applicant's record, following which candidates are required to take an examination sponsored by the personal status circuit of the Supreme Court. After passing this examination, they are required to practise for six months with a Sharia advocate before becoming finally eligible to appear before a Sharia court. However, since most applicants have been practising for quite a while before the Civil Courts, this last requirement is usually waived.

An advocate who qualifies for unrestricted practice is nevertheless still considered to be a civil advocate. He is not regarded as a Sharia advocate or a hybrid. He identifies as, and associates with, civil advocates. Partnerships can be found consisting of unrestricted and civil advocates, but there are none between Sharia and civil or unrestricted advocates.

But whereas civil advocates can qualify for unrestricted licenses, Sharia advocates cannot qualify for appearance before Civil Courts, being handicapped by their legal education. Legal education in Islamic pedagogic legal institutions, whether in the Sudan or elsewhere, concentrates on Islamic law and jurisprudence. Little attention is paid to other legal systems or comparative studies.

Another point which constitutes a major difference between the two groups of advocates is their career patterns. Most of the Sharia advocates have entered the legal profession laterally. They have served on the bench until retirement at the age of 55 and after retirement have started a Sharia advocacy career. Unlike the civil practitioners, Sharia advocates hardly ever opt for a career as an advocate from the start.

Despite the present stagnation in the number of Sharia advocates, I am inclined to think that in the near future more Sharia graduates will join the legal profession and their numbers will multiply, thus enhancing dualism of the legal profession. Many factors point toward this result. The number of graduates from Omdurman Islamic University Law and Sharia Faculty and from similar institutions outside the Sudan is steadily increasing. Concomitant to this is an increase in family disputes resulting from increased urbanization and industrialization, the growing disintegration of family life and the decline in the role of elders as arbitrators in family disputes which are taken to courts more than ever before. Resort to Sharia advocates is conspicuously increasing. In most of the sessions of the Sharia courts I attended, if one party is represented by counsel, then the other party will also seek representation.

This social change could increase the number of unrestricted advocates as well as the number of Sharia advocates. However, an increasing number of Sharia graduates are likely to be entering private practice because there is no commensurate expansion of judicial posts and, because of their training, they are not qualified to join the Attorney General's Chambers. This tendency is likely to be reinforced because of changes in the attitude of most Islamists towards the legal profession, most Sharia students no longer perceiving advocacy, by reason of the adversary nature, as a dishonest profession which offends their ethical and religious principles.

Nor has anything been done to bridge the gap between the civil law and the

common law-trained lawyers. About two-thirds of the civil advocates (including unrestricted practitioners) are civil-law trained lawyers, and their numbers are steadily increasing. Between 1959 and 1974, the number of the graduates of the Law Faculty of the University of Cairo, Khartoum Branch, reached 1,149, whereas those of the Civil Division of the University of Khartoum Law Faculty for the years 1938-1974 were 422." On the other hand, the number of active Sharia judges and advocates was 228 in 1974.

In the coming years, these factors may intensify the dualism of the Bar Association and the pluralism of legal education. Whether the ostensibly integrated Bar is going to remain one subdivided association or split into two or even three separate associations remains to be seen.

Internal Organization of the Bar

One important characteristic of the legal profession in the Sudan is that advocates play a relatively insignificant role in administering their own affairs. Less than half the members of the Bar Admission Committee are from the Bar Association, and this Committee has a wide range of powers over advocates' affairs. The Bar Admission Committee is headed by the President of the Supreme Court and consists of the Vice President of the Supreme Court, a Sharia associate justice; the Undersecretary of the Attorney General's Chambers; the President of the Bar Association; and one advocate chosen by the Bar Association. The chairman of the Committee is vested with the power to appoint a secretary to supervise all administrative and clerical work, including recording the minutes of meetings and executing the Committee's resolutions. The secretary has always been a judge, recently of the Court of Appeals.

The Committee's major functions include the power to grant licenses for practising as advocates subject to the rules and discretionary powers specified in the Advocates Ordinance, 1970, the power to discipline and to administer legal aid.

Advocates are disciplined by a Board of Discipline consisting of one judge, one law officer from the Attorney General's Chambers, and one advocate, following the recommendations of an Investigation Committee constituted in the same manner as the Board of Discipline. The decisions of the Board are appealable to the Bar Admission Committee, the decisions of which are final.

But what does the finality of the decisions of the Bar Admission Committee mean? Does it bar any dissatisfied party from seeking a judicial recourse? If it does not, through what procedure can such judicial recourse be sought? Though the Advocates Ordinance unequivocally leaves no room for any kind of intervention with the decisions of the Bar Admission Committee, recent court decisions have raised a host of questions about these problems."

In all such cases instituted against the Bar Admission Committee it is interesting to note that the latter has been represented by a law officer from the Attorney General's Chambers rather than by a member of the Bar Association which is what

one would have expected if the Committee were viewed as representing the affairs of advocates. The fact that the Committee is defended by a government lawyer, as part of this lawyer's duties, and that courts deal with the Committee through the Attorney General in such cases, suggests the Committee is a government agency similar to any other government department represented by the Attorney General's lawyers.

The Bar Admission Committee and the Attorney General also administer the process for providing legal aid to the needy. Neither the advocates as individuals, nor their Association play any role in this regard. Article 68 of the Constitution prescribes that "... in serious offences where [the accused] is unable to retain an advocate, the state shall appoint and pay the fees of such advocate. . . in accordance with the law." And Section 37 of the Advocates Ordinance states that:

"The Committee shall provide legal aid, including legal advice and appearance before the Court in the following cases:

(a) If any of the parties to a civil suit submits an application to the Committee requesting legal aid, and the Committee is satisfied that the applicant is a pauper and is unable to pay the fees of an advocate, and that there is a reasonable cause for the action;

(b) If the undersecretary of the Attorney General's Chambers or any criminal court requests the Committee to appoint an advocate to defend an accused person;"

However, there is a wide gap between theory and practice. There is no regulation elaborating these general principles and clarifying the procedure for providing and obtaining legal aid. Section 37(a) prescribing the right for legal aid in civil cases has been honoured more in the breach than in the observance. All applications for legal aid in civil cases have been dismissed and no party to a civil suit has ever been granted legal aid. Applications for legal aid in criminal cases follow a complex procedure. An application for legal aid is made by the accused person, through the court trying him, to the Attorney General. The latter in turn forwards the application with his recommendation to the Bar Admission Committee. If the latter approves the application, it designates an advocate to defend the accused, and requests the Attorney General to pay his fees. Very few accused persons have been provided with legal aid, all of them on charges of murder and most of them in Khartoum. In 1971 only 9 persons received aid, rising to 64 in 1974 (61 of these in Khartoum).

Conclusion

Why is it that the Bar Association in the Sudan has been so ineffective in administering its own affairs, and so indifferent to the larger socio-legal problems such as legal aid, legal reform and legal education?

One of the main reasons is the pluralism that has generated internal divisions and a struggle for hegemony within the legal profession, consuming most of the time and effort which could have been utilized elsewhere. The differences created by legal pluralism have been enhanced by political differences. As we may recall, one main reason for establishing the Khartoum Law School, and to a large extent the

Kadis' College, was to eliminate the presence of the Egyptian lawyers and to halt the training of Sudanese lawyers in Egypt. The reasons for this were both political and professional; political because of fears that Egyptian efforts to develop closer political ties with the Sudan might be channelled through legal education; professional in terms of the fear that the Egyptian civil law system might replace the common law.

These struggles have also been complicated by the divisions between the Islamists and the secular jurists of the Civil Courts. The graduates of the Kadis' College and the Islamists who gained influence within the political elites, who controlled the country between 1965 and 1969, started implementing a policy of Islamizing the legal and judicial systems, cut short by the overthrow of the civilian regime. The legal and judicial innovations based on the Egyptian civil law tradition, introduced and proposed in the early seventies, were a consequence of the predominance of the pan-Arabists, with whom most civil-law trained lawyers identify. Later, the restoration of the common law tradition was due to both the abandonment of the pan-Arabist theory and to a concomitant reemergence of the common law lawyers influences.

Perhaps one of the lawyers I interviewed is correct in suggesting that the manner in which the Bar Admission Committee is constituted and discharges its responsibilities has rescued the legal profession in the Sudan and lessened the tensions, which might have resulted in a splinter group if such a Committee had been constituted wholly by advocates. Yet, virtually all the practitioners interviewed voiced the pressing need to revise the Advocates Ordinance to guarantee advocates a larger share in the administration of their affairs such as admission to the Bar, reinstatement and disciplining of lawyers. They complained about the eclipse of Bar's independence and its absence of control over matters of potential concern, and they suggested the Bar Admission Committee decisions be subjected to judicial review.

Another reason that has caused the Bar Association to lag behind its responsibilities is its members normal career patterns. Time and again, advocates leave the bar for the bench or join the government as ministers or high officials. On the other hand, the number of judges leaving to practise is even higher. Such mobility is made all the easier because neither the Advocates Ordinance, nor the Judiciary Act imposes any restrictions on moving from a judicial position to private practice (as in some countries where judges who join the Bar are allowed to appear only before the highest court; or prohibited from practising). This mobility has also undermined the stability of the Bar Association by encouraging its members to perceive of advocacy as a temporary career, or a springboard for other positions, especially in the political arena.

It is difficult to predict what may be the structural organization of the Sudanese Bar Association in the near future. Similarly, it is hard to predict whether the idiosyncratic features described in this paper will continue to characterize the legal profession in the Sudan including the Bar Association's lack of control over its internal affairs and its failure to participate in broader socio-legal activities.

Notes

1. The need for trained administrative and professional cadres prompted the British authorities in the Sudan to establish training institutes immediately after the conquest of the Sudan. Those institutes were combined in one body called, "Gordon Memorial College." The name Gordon refers to the famous Charles Gordon, who was the last governor of the Sudan during Turko-Egyptian rule and was killed when the Mahdists conquered Khartoum in 1885.

2. Ruth First, *Power in Africa* 132 (1970).

3. *The Permanent Constitution*, 1973, Article 16.

4. Speech by Viscount Cromer to the Sheikhs and Notables of the Sudan at Omdurman, January 5, 1899; Central Archives Files, civ. sec. 42/1/1.

5. Memorandum from Lord Kitchener to the Governors of the Provinces, January 19, 1899, excerpted in MacMichael, *The Sudan* 76 (1955).

6. The word "civil" has many, sometimes confusing, connotations in the Sudanese legal and judicial systems. Civil here stands *vis-a-vis* Sharia. Another way in which it is used is *vis-a-vis* criminal. A third way of common use is when dealing with civil law as opposed to common law. The Civil and Sharia courts are collectively referred to as, "ordinary courts of law." This is to distinguish them from the so-called local courts that comprise the native and chiefs' courts.

7. By personal status cases I am referring to the cases that are, as a general rule, adjudicated by the Sharia Courts only. Those cases are: marriage, divorce, guardianship of minors, wakf (mortmain), gift, succession, inheritance, wills, legacies and interdiction.

8. The Hanafi School is one of the four recognized schools of Islamic jurisprudence. The other three comprise the Maliki, the Shafii, and the Hanbali. However, this School is not a homogeneous body. Within this School there are competing views of the different jurists who belong to it.

9. A lot of literature has been written about this formula, the most comprehensive of which is, Z. Mustafa, *The Common Law in the Sudan* (1973). See also, C. Thompson, "The Sources of Law in the New Nations of Africa: A Case Study of the Republic of the Sudan," 1966 *Wisconsin Law Review* 1146; see also 1965 *Sudan Law Journal and Reports* 474.

10. M.O. Beshir, *Educational Development in the Sudan 1898-1956*, 40.

11. See M. Abdel Rahim, *Imperialism and Nationalism in the Sudan* 104 passim (1969).

12. Note on Legal Education, Khartoum, 14/4/1928; Central Archives Files SGA/DAKHILIYA/17/2, (emphasis added).

13. Governor General's Report 32 (1928).

14. Letter From the Attorney General to the Sharia Advocates, November 28, 1965; Files of the Attorney General's Chambers, J./A/2-1/2.

15. Letter Addressed to the Council of Ministers from the Minister of Justice. M/J/Legis/436 Dated 14/4/1962. Files of the Attorney General's Chambers. Origin in Arabic, translation is mine.

16. In 1964 after the exemption of the graduates of the University of Khartoum Law Faculty from taking the Bar Examination, only 10 out of 66 candidates passed that examination. Source, Files of the Bar Admission Committee BAC/2-1, the Judiciary.

17. Memorandum from the Staff of the Faculty of Law, University of Khartoum to the Ministry of Justice, October 15, 1965; Files of the Attorney General's Chambers, M. of J./A/2-1.

18. Information obtained from the files of the Law Faculties of the University of Khartoum and that of Cairo, Khartoum Branch.

19. See Mohamed Abdalla El-Mishawi v. The Bar Admission Committee, 1968 *Sudan Law Journal and Reports*, 128; and Mohamed Abdalla El-Mishawi v. The Bar Admission Committee, civil appeal No. 218, 1974; (unreported).

The Malaysian Legal Profession in Transition

Structural Change and Public Access to the Legal System

The first lawyers trained in Malaysia¹ graduated from the University of Malaya Law Faculty only in 1976, nearly twenty years after their country became independent of British colonial rule. The major changes in the patterns of recruitment and training of lawyers following from the establishment of the Law Faculty must be understood as part of broader government policy aimed at "restructuring" Malaysia's multi-ethnic society "to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function"² and as a specific effort better to meet national legal needs.³ Hence our general interests are in the consequences that the changes in the patterns of recruitment and training of lawyers may have both for socioeconomic change and for the structure of the legal profession and the operation of the legal system. This paper reflects primarily the latter concerns. Here we attempt to describe the changes beginning in the structure of the legal profession and to analyze the implications these changes may have for public access to the legal system.

The foregoing questions have become increasingly important in recent years, because the rapid pace of socioeconomic change in Malaysia has been accompanied by a growing demand for legal services. Changes attendant to urbanization and growth in both the modern and the agricultural sectors of the economy have created new relationships and stimulated new conflicts that are subject to legal regulation. Business and housing booms and an expanding, consumer-oriented middle class have greatly increased demands in the areas of commercial law and

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conveyancing. Rising land values in areas recently brought under irrigation have spawned many land disputes. A growing number of motor vehicle accidents and personal injuries have accompanied a growing volume of road traffic. An increasing incidence in crime and political violence and zealous government efforts to curb them have put the issue of citizens rights into increasingly sharp relief. Many new areas of life have been brought under regulation since independence, and this has created needs for legal assistance in coping with state requirements in such diverse activities as transferring land, buying on credit, defining employer-employee relationships, and dissolving marriages. These changes have been taking place in a context of rising literacy and educational levels, which have also contributed in a general way to the growing demands for legal services. These recent developments have, then, given added importance to the question of public access and to the role of the legal profession in Malaysian society.

Public Access and Professional Structure

Before turning to our analysis, we will briefly discuss the concepts of public access and professional structure and how the two are related. Citizens may be said to have access to a legal system only if the system itself is reasonably fair and only insofar as they are able to participate effectively in formal legal processes should that be necessary or desirable. Effective participation does not necessarily mean that the citizen will be successful, but that he or she will be able to take full advantage of whatever opportunities or protections the legal system offers. Even when possible, involvement in legal processes is often unnecessary or undesirable. In any society, only a small portion of problems, disputes, or claims that might conceivably reach the formal legal system ever do. This is in most cases a good thing and not indicative of an access problem. For example, many persons do not take valid claims to the legal system simply because they are able to settle matters to their satisfaction without doing so. On the other hand, persons may fail to take valid claims to the legal system when that would be a reasonable thing for them to do were it not for some obstacle(s). And such obstacles may also stand in the way of effective participation in legal processes initiated by the state or by other parties.

Obstacles to access may be found in attributes of: 1. the legal system itself; 2. potential participants in legal processes; and/or 3. more or less specialized intermediates between participants and legal institutions. If, for example, the law fails to afford protection to persons in certain categories, or if it favors some kinds of interests at the expense of others, persons in those categories or persons whose interests are ignored will lack access. If the personnel of the legal system are overly dependent on those who wield political power, biased, and/or, or totally corrupt, those who do not already enjoy or cannot buy their favor will have poor access. If legal procedures are too costly, inconvenient, or slow, then the access of potential participants is inhibited. If an individual is ignorant of the fact that he has a legal problem or of his legal rights, or if he lacks the skills or resources necessary for participation in legal processes, then he will have poor access. If cultural values

and/or social pressures cause one to accept exploitation by others (i.e. an employer or landlord) when there are possible remedies, then that person lacks access. If specialized intermediaries have little interest in certain kinds of persons or certain kinds of problems in which their services would be valuable, then the access of persons in the categories they prefer to ignore or of any person with a problem they choose to avoid is restricted. To the extent that skilled intermediaries must be used in dealing with matters that really need not require their services, the costs of access are increased for persons who are concerned with such matters.

A comprehensive examination of public access to the legal system of any state requires consideration of a great many factors. These include: the availability and acceptability of means for dealing with problems outside the legal system; the general level of public knowledge concerning legal matters; prevailing norms concerning the role of formal legal processes; the distribution of resources necessary to support participation in legal processes; the organization, orientation, and manner of operation of the various specialized intermediaries, including both professionals and non-professionals who provide legal advice or services or who solicit business for persons actually providing legal services; the organization and operation of the legal institutions; and the substance of the law itself. The structure of a country's legal profession is, then, only one of many factors that affect public access. It is always an important one, however, because lawyers are often seen as the "gatekeepers" of the legal system. Their numbers, the fees they charge, their location in the socioeconomic structure of their society, where they choose to practice, the professional prerogatives they effectively demand, and the kinds of problems they choose to concentrate on are related to the questions of who will receive legal services, for what purposes, and at what costs. Again, however, *we emphasize that professional structure is not the only factor determining the quality of access to a legal system.*

Purposes and Data Sources

In this paper, we will analyze the current structure of the Malaysian legal profession and how it has been changing in recent years in terms of the aforementioned variables. Throughout this analysis, some of the consequences of the current structure of the profession for public access will be considered. Then, the potential results of the emergent pattern of recruitment and training of lawyers for professional structure and public access will be examined.

What follows is based on four primary data sources. We collected quantitative data on the structure of the profession from the Roll of Advocates and Solicitors and from the records of annual practise certificates issued, which are both maintained by the Registrar of the High Court. We surveyed 100 lawyers during the months of January through April, 1976. Our sample was not, of course, large enough to permit us to generalize about the profession as a whole with great precision, but it was the largest we could manage in the time available. And because we were able to ascertain a good deal about the attributes of the whole profession from the

aforementioned records before we began, we were able quite carefully to choose a representative sample. Our sample was designed to approximate the composition of the profession with respect to ethnicity and number of years in practice. It was also designed to ensure representation not only of lawyers in the federal capital and the major west coast towns, where most of them are concentrated, but also lawyers in secondary towns and in areas of the country where they are less concentrated. We thus surveyed 25 of 350 lawyers in the Kuala Lumpur metropolitan area; 35 of 298 in west coast capital towns; 20 of 49 in far north and east coast capital towns; and 20 of 40 in secondary towns. We are reasonably confident that despite the obvious limitations of our small sample, the results of the survey that we report here are representative of the basic attributes of the profession. We administered a questionnaire to the students at the University of Malaya Law Faculty in December, 1975. We did this during classes required of all students in each year and got a 77 percent return. We also conducted detailed interviews with a small number of law students. Throughout the course of the fieldwork, we interviewed a number of other persons involved in or especially knowledgeable about the legal system, such as: government lawyers, lawyers' clerks, law professors, court interpreters, former policemen, petition writers, insurance claims executives, and hospital personnel.

Current Structure of the Profession and Public Access

Malaysia's legal profession is quite small in relation to the country's population, mainly trained in England, predominantly Chinese and Indian, overwhelmingly urban based, engaged to a very large extent in solicitor's work, organized to serve institutional clients better than individual ones, and professionally very conservative. These attributes are related to each other and to the degree of access to the legal system enjoyed by different sectors of Malaysian society.

Size

Compared with that of many countries, Malaysia's legal profession is quite small in relation to its total population. In 1975, the population of the peninsula was approximately 10 million.⁴ In the same year, there were about 1700 legally qualified persons in Malaysia.⁵ Not all of them had been called to the Bar, and only around 1000 of them were actually in practice.⁶ Hence there was only one practising lawyer for approximately every 10,000 Malaysians, and this is a comparatively low number of lawyers in the population.⁷ Moreover, the profession has reached its current size only through quite rapid growth in the past decade. As Table I shows, there has been a steady increase in the number of persons called to the Bar each year since 1947, but the biggest increase has been since 1968. Indeed, over half (54 percent) of the lawyers practising in 1974 had been called to the Bar only since the beginning of 1968.⁸

We would be the last to argue that a surfeit of lawyers is a virtue in any society. Underemployment among lawyers no doubt encourages a larger portion of them

to promote unnecessary litigation or engage in other improper activities than would otherwise be so. But, too few lawyers in relation to the demand for services can be a major source of access problems. We would contend that this is the case in Malaysia, despite the notion cultivated by a minority of the Bar that the profession is overcrowded.' The situation in Malaysia is very like that described by Barry Metzger as prevailing in many developing countries. He argues that

Economic development may adversely affect the supply of legal services to lower-income groups . . . The price of legal services has been bid up substantially as a result of the increased demand by government and upper-income groups. The legal profession tends to gravitate toward the most lucrative work – in a developing society, the rapidly growing commercial work – with a resultant decrease in legal services available for purchase at the lower margin. The extent to which economic development results in a contraction of services at the lower margin depends upon the ease and rapidity of entrance into the legal profession."

Table I. *Number of Persons Called to the Bar During Five Year Periods since 1947*

Years	Average Number Per Year	Total Number
1947 (one year)	9.0	9
1948–1952	11.0	55
1953–1957	26.2	131
1958–1962	36.6	183
1963–1967	57.8	289
1968–1972	87.6	438
1973–1974 (two years)	99.0	198
Total		1303

Source: Roll of Advocates and Solicitors maintained by the Registrar of the High Court.

Certainly the growth of the Malaysian legal profession has barely kept up with the rapid pace of economic development in that country in the past decade, and one result has been that access for lower-income persons with problems that do not permit collection of contingency fees" has not expanded.

The comparatively small size of the profession has generally limited competition for individual clients, making legal services quite dear. It has also made it possible for many new lawyers to move into the most profitable growth sectors of the economy early in their careers and to concentrate on commercial work and conveyancing. Lawyers have done this at the expense of providing less profitable services for lower-income clients, such as defending the criminally accused or handling divorce cases. In our survey, lawyers repeatedly told us that they had stopped accepting low return cases for individual clients just as soon as they could afford to, and this time was frequently said to be only one or two years. Those lawyers who complained of stiff competition meant competition for positions with the best firms, for the most profitable work, and for work in what they regarded as the most desirable areas in the country – the federal capital of Kuala Lumpur and the other large west coast towns. Competition, however, was not stiff enough to keep many lawyers interested for very long in marginally profitable cases.

One indication of how well Malaysian lawyers are doing financially is the rapidity with which they achieve economic viability. In our survey, nonsalaried lawyers were asked how long it was after starting on their own before they were able to cover their costs and to make whatever they regarded as enough to live comfortably. As Table II shows, there was considerable variation by region. Even in the regions where lawyers reported that they advanced more slowly, no less than 45 percent achieved economic viability within six months, and close to 65 percent had achieved it within one year.

It should also be noted that most Malaysian lawyers enjoy working conditions that would be envied by colleagues in other Asian countries. There was not one lawyer in our sample who did not have an office outside his home and some kind of regular clerical help; nearly all had telephones and many had air-conditioned offices.

Another indication of the lucrative nature of law practice is the kind of incomes Malaysian lawyers have in relation to the national distribution of incomes. Table III shows the national distribution in 1970. Between 1970 and 1975, there was an inflation of about 40 percent," a fact which must be taken into account when considering 1975 income figures. In 1975, new lawyers working as salaried assistants made between M\$600 and M\$1000 per month. Even considering inflation, the former figure put them in the top sixteen percent and the latter, in the top six percent of households. A number of lawyers were also asked what the comfortable income level they had attained soon was, and the most common response for those recently called to the Bar was around M\$2000 per month. This figure places them in the top one and one half percent of households. Many lawyers, of course, made substantially more than M\$2000 per month. Three quarters of the lawyers in our survey owned their own houses, and about two thirds of them had travelled outside the country again after returning to Malaysia following their legal studies." The high income enjoyed by many Malaysian lawyers reflects the fact that opportunities are very good in the expanding sectors of the economy. From the standpoint of access, however, it would be desirable for competition to be keen enough to force more lawyers to accept economically marginal cases in order to attain income levels they would regard as satisfactory.

The comparatively small size of Malaysia's legal profession is partially a reflection of the restrictive requirements for being called to the Bar and the lack of a Malaysian Law Faculty until recently. Requirements for entry to the Bar as well as other regulations governing the legal profession are established by statute, the most recent of which is the Legal Profession Act of 1976. The first version of this Act was drafted by a committee of the Bar Council, an elected body that acts as chief spokesman for practising lawyers, but before passage it was revised in some respects in the Attorney General's Chambers.⁴ In any case, throughout the colonial period and up to 1962, virtually the only persons who could be called to the Bar were those qualified as Barristers or Solicitors in England." In 1959, a Law Faculty was established at the University of Singapore,⁵ and since 1962, those with the LL.B. from that institution have been permitted to enroll in the Bar. As a qualification on the point about the lack of local training for lawyers until recently, it should be noted

that Singapore was part of the Federation of Malaysia from 1963 to 1965. There has been a steady influx of Singapore trained lawyers into the profession since 1962, and between 1972 and 1974, approximately one third of all new entrants to the Bar were trained in Singapore." The availability of this legal training is the primary explanation for the accelerated growth of the profession during the past decade. It was not until 1972 that a Law Faculty was finally established at the University of Malaya in Kuala Lumpur". The first class of 46 students graduated early 1976 and some of them were called to the Bar the same year. Limiting entrance to the Bar to those with British professional qualifications or LL.B.'s from the Universities of Singapore and Malaya excludes a number of Malaysians with LL.B's from universities in the UK, Australia, and New Zealand."

As Table IV shows, in 1974, three-quarters of the practising Malaysian lawyers were British trained, and about one quarter were Singapore trained. All of the most senior members of the Bar are, of course, still British trained. Nevertheless, by 1975, one sixth of the members of the Bar Council were Singapore trained lawyers." Virtually all of the British trained lawyers are Barristers. Only a very small fraction have been trained as Solicitors. Of the British trained lawyers, seven percent had LL.B.'s and five percent had some other kind of university degree in addition to their professional qualifications.

Table II. *Length of Time After Going on Own Before Becoming Economically Viable by Region*

Length of Time	Region KL Metropolitan			West Coast			Far North and East Coast			Secondary Towns		
	Num- ber	%	cum.	Num- ber	%	cum.	Num- ber	%	cum.	Num- ber	%	cum.
Less than 6 Months	10	48	48	20	65	65	10	53	53	9	45	45
6 Months to 1 Year	5	24	72	4	13	78	2	11	64	4	20	65
1 to 3 Years	5	24	96	3	10	88	3	16	80	3	15	80
More than 3 Years	0	—	—	2	7	95	2	11	91	2	10	90
Not Yet	0	—	—	1	3	98	2	11	102	1	5	95
Unknown	1	5	101	1	3	101	0	—	—	1	5	100
Totals	21	100		31	100		19	100		20	100	

Table III. *Percentage Distribution of Households by Income,^a Peninsular Malaysia, 1970*

Income Range (per month)	%
M\$ 1— 99	27.1
M\$ 100— 199	31.4
M\$ 200— 399	25.9
M\$ 400— 699	9.6
M\$ 700—1,499	4.7
M\$ 1,500—2,999	1.1
M\$ 3,000 and above	0.3

a. Income includes cash income and imputed income for earnings in kind.

Source: Government of Malaysia, *Mid-Term Review of the Second Malaysia Plan, 1971–1975* (Kuala Lumpur: Director General of Printing, 1973), Table 1–1.

Table IV. *Qualifications of Practising Lawyers, 1974*

Qualification		Number	%
British Training		620	75
Barrister	610		
Solicitor	6		
Advocate (Scot)	4		
LIB, University of Singapore		200	24
Undetermined		6	1
	Total	826	100

Source: Record of practise certificates issued, 1974 and Roll of Advocates and Solicitors maintained by the Registrar of the High Court.

Socioeconomic and Ethnic Composition

Given these qualifications for being called to the Bar, it is not surprising that a large portion of the profession is drawn from upper and middle income, urban families which can afford to send their children to England for studies. The fathers of a substantial majority of lawyers in all regions were in the professional-managerial class, self-employed businessmen, or middle-income salaried employees. (See Table V) This is consistent with the fact that approximately two thirds of the lawyers in our survey reported that their parents or other members of their families had financed their legal educations and that they had not had to work at all while studying law. Nevertheless, more than one third of the lawyers in three of the four regions came from families of modest means or from poor families. Some of them were scholarship students, but most were persons who had worked from five to 15 years, normally as teachers, civil servants, or policemen. They had financed their studies with savings, part-time work, or spouse's income. Opportunities for the less affluent to take law were enhanced by the facts that until recently one could enter the Inns of Court after completing only a secondary education and that, depending on the amount of work completed before going, one could finish law studies in the Inns in only 18 months to three years. Thus, law has been an avenue of upward mobility for a sizeable minority of Malaysian lawyers. For most, however, law has been a means of maintaining the middle or upper income status into which they were born.

Many, but certainly not all, Malaysian lawyers are set apart from the population at large both in terms of class background and foreign education to a greater extent than their counterparts in numerous other Asian countries. We frequently heard that lawyers have customarily been considered hard to approach, but this has become less the case in recent years. The social distance may contribute to an access problem in some degree, but we would not place too much stress on it. A potential client's first encounter in approaching a lawyer is almost always with a clerk, who is far less forbidding than the lawyer and the clerk often continues to play an important role as an intermediary between the client and the lawyer.

The most important point about the life experience of most but not all Malaysian lawyers, is the extent to which they have been insulated from the realities of most of their countrymen's lives. When, for example, we brought up the question of legal

services for the poor in our survey, a sizeable number of respondents simply asserted this was an insignificant matter because poor people have few or no legal problems. This was a myopic view as we will indicate in other contexts.

There is a marked relationship between ethnicity and the legal profession in Malaysia. Practising lawyers are overwhelmingly Chinese and Indian, and only a very small minority are Malay. As Table VI shows, half of all practising lawyers were Chinese, one third were Indian, and less than one tenth were Malay in 1974. In relation to their numbers in the population, Indians and Chinese are both over-represented. There are about three times as many Indian lawyers in practice as there are Indians in the general population, and there are just less than one and a half times as many Chinese lawyers as Chinese in the population. Malays, on the other hand, are underrepresented; there are about six times as many Malays in the population as in the practice of law. The pattern of ethnic distribution is more than reversed in the much smaller public sector, where almost 70 percent of the lawyers are Malays (See Table VII).

The ethnic distribution of practising lawyers reflects several characteristics of Malaysia's social and economic structure. The commercial sector of the Malaysian economy which has traditionally had the greatest need for legal services is largely Chinese controlled. These opportunities have provided the motivation for many Chinese to take up law. Indians are less involved in large-scale commercial undertakings, so the professions have offered them the best opportunities for a lucrative and prestigious occupation. A much larger portion of Chinese and a somewhat larger portion of Indians than Malays are found in the upper and middle-income brackets, and they are better able to afford study abroad. Prior to the recent change in the medium of instruction in schools to the national language, Chinese and Indians also had better access to educational opportunities in English than did Malays. This is because a large majority of Chinese and a sizeable minority of Indians are concentrated in urban areas, while Malays are found overwhelmingly in rural areas. Mastery of English is, of course, prerequisite to the study of law in both England and Singapore. A disproportionate number of Indian lawyers are Ceylonese Tamils. The latter are more likely to be found in the middle income bracket than other Indians, and hence they are better able to finance legal education.

The ethnic distribution in the public sector is very different. It reflects the application of a quota favoring Malays in recruitment to the civil service. It also may stem from the fact that in the Malay community, high-level government service has traditionally been regarded as the most prestigious career.

The limited number of legally qualified Malays, the ethnic quotas employed in recruiting civil servants, and the more lucrative rewards in private practice as compared with government service, have all combined to deprive the public sector of legal talent. The Judicial and Legal Service has chronically been ten to twenty percent below its authorized number of personnel.²¹ In 1975, the government was finally obliged to train seventeen Malay Administrative Service officers as lay Magistrates in order to fill longstanding vacancies.²² Because opportunities for

Table V. *Father's Occupation*

Occupation	Region KL Metropolitan		West Coast Capitals		Far North and East Coast Capitals		Secondary Towns	
	Number	%	Number	%	Number	%	Number	%
<i>URBAN OCCUPATIONS</i>								
Professional- Managerial ^a	4	16	4	11	4	20	3	15
Self-Employed Businessman ^b	7	28	17	49	5	25	6	30
Middle-Income Salaried ^c	6	24	3	9	8	40	2	10
Modest-Income Salaried ^d	6	24	7	20	2	10	5	25
Laborers	0	—	1	3	1	5	1	5
<i>RURAL OCCUPATIONS</i>								
Farmers/Agricultu- ral Laborers	1	4	1	3	0	—	2	10
Estate Supervisors	1	4	2	6	0	—	1	5
Totals	25	100	35	100	20	100	20	100

a. Professionals, Managers, Senior Civil Servants.

b. Large and small combined.

c. Government Officers, Teachers, Semi-Professionals, Technical Workers.

d. Clerical/Secretarial Workers, Semi-Skilled Workers, Petty Service Occupations, Police or Low Level Military.

lawyers are so much better in private practice, the government has had a hard time holding them in service and thus faces the administrative problems associated with a high turnover of personnel. These kinds of problems have slowed down the administration of justice in Malaysia, thereby aggravating the lack of access. The small number of Malay lawyers in practice has also contributed to another kind of access problem. To the extent that persons may find it easier to communicate with a lawyer of their own ethnic group concerning some kinds of matters, Malays have fewer choices.

Geographic Distribution

Law is overwhelmingly an urban profession in Malaysia. As Table VIII shows, nearly one half of all practising lawyers in 1974 were located in the Kuala Lumpur metropolitan area and another forty percent were located in the five main west coast state capital towns: Penang, Ipoh, Seremban, Melaka, and Johore Bahru. Conversely, there were few lawyers practising in the far north and east coast state capital towns or in secondary towns. This pattern of geographical distribution reflects the distribution of business, mining, estate agriculture, and banking, but not the population distribution. The far north and east coast states are the home of thirty percent of the Malaysian population but the base of less than seven percent of the

Table VI. *Ethnic Composition of Members of Legal Profession in Practice, 1974/Ethnic Composition of Total Population, 1975*

Ethnicity	Lawyers Number	%	Population Number	%
Malays	76	9	5,330,000	53
Chinese	416	50	3,550,000	35
Indians	269	33	1,060,000	11
Others or Undetermined	65 ^a	8	90,000 ^a	1
Totals	826	100	10,030,000	100

a. Lawyers in this category are persons with European or largely European names. A few are Europeans. Most are Eurasians. A few are Indian Christians. Persons in the general population in this category are Europeans and Eurasians only. Hence the figures in this category are not strictly comparable. The result of the inability to distinguish certain Indians on the basis of their names is to understate the portion of lawyers who are Indians and to overstate the number who are others.

Source: Ethnicity determined by names of persons in records of practise certificates issued, 1974, maintained by the Registrar of the High Court. Population estimates from, The Treasury, Malaysia, *Economic Report, 1975-76* (Kuala Lumpur: Director General of Printing, 1975), p. 6.

Table VII. *Ethnic Composition of Lawyers in the Public Sector, 1971*

Ethnicity	Number	%
Malays	126	69
Chinese	27	15
Indians	27	15
Others	2	1
Totals	182	100

Source: Department of Statistics, Malaysia, *Principle statistics on ownership and participation in commerce and industry, west Malaysia, 1970/1971* (Kuala Lumpur: Director General of Printing, 1972), Table 1.4A.

practising lawyers. While Malaysia is predominantly a rural country, ninety-five percent of all lawyers are based in Kuala Lumpur and nine state capital towns. The concentration of lawyers in urban areas has meant that for most Malaysians, physical access to legal services is a problem. It is true that Malaysian lawyers do take clients in areas, including rural areas, other than the towns where their offices are based, and some travel extensively as a part of their practices, but this increases the cost of their services to persons in such areas and does little to alleviate the lack of geographical access for most people.

It should be emphasized that the small number of lawyers in the far north and east coast, and in secondary towns does not reflect a lack of demand for legal services in these areas. It simply reflects the fact that demand was much higher in urban areas for many years. The movement of lawyers to the far north and east coast and to secondary towns is quite recent. Our interviews show that it is partially a result of the growing competition in Kuala Lumpur and other larger towns. Some of the younger lawyers in these outlying areas said that they were starting there because

Table VIII. *Geographic Distribution of Practising Lawyers – Mid-1974*

Location	Number of Lawyers	%	Population of Surrounding State(s)	%
<i>KL Metropolitan Area</i>	350	47	1,629,386	18
<i>West Coast (Excluding Kedah and Perlis)</i>				
<i>Capital Towns (5)</i>	298	40	4,674,349	52
<i>Secondary Towns (12)</i>	40	5		
<i>Far North and East Coast Capital Towns (5)</i>	49	7	2,671,584	30
Unknown	16	2		
Totals	753	100	8,975,319	100

Source: Locations determined by records of practise certificates issued 1974, maintained by the Registrar of the High Court. Population from Times Publishing Sdn. *Malaysia Yearbook*, 1973/74 (Kuala Lumpur: Times Publishing Sdn. Bhd., 1973).

it was increasingly difficult to start on their own in, say, Kuala Lumpur, Penang, or Ipoh, but that they hoped to move to one of these larger towns once they were established. To that end, some were trying to develop a clientele in one of the larger towns as well as the place where they had begun practice to give them a base when they made the move.

Patterns of Practice

Few Malaysian lawyers are highly specialized, but many of them tend to emphasize one type of work while still practising at times in a wide variety of fields. If half or more of their work was of one particular type, we considered them to have at least some degree of specialization. As Table IX shows, there is some regional variation in this pattern of practise. Kuala Lumpur lawyers are more likely to be *somewhat* specialized than those in other areas of the country. In all but the far north and east coast capitals, however, a sizeable portion (37 percent to 56 percent) of lawyers have practices devoted mainly to either conveyancing or serving corporate needs. More than one third of the lawyers surveyed who have a general practice are also engaged primarily in solicitor's work, including conveyancing, the drafting of agreements, and other types of business related work. Parenthetically, we note that in most states, the bulk of conveyancing appeared to be so routine as not really to require a lawyer's services, and that in these instances, the costs of access were unnecessarily high because of the profession's monopoly over conveyancing.

The most common generalization made by Malaysian lawyers about the organization of private practice was concerned with the ethnic division of labor. Our survey results tend to support this as Table X illustrates. This table combines the results from all regions and because of regional variations, it is no more than

roughly suggestive of the basic tendencies in the ethnic distribution of lawyers in different types of practices. Chinese lawyers are found almost wholly in conveyancing, corporate work, or general practices devoted primarily to solicitor's work and rarely to litigation. Their clients tend to be Chinese banks, commercial houses, and business firms. Many of the Malay practitioners are also engaged in this type of work, but their clients tend to be public agencies and private bodies enjoying public support, such as government banks, statutory bodies, and state economic development corporations. These entities are required by the government to take their legal work to law firms with majority Malay control. Indian lawyers are engaged in a broader range of legal activities, but most of the litigators, particularly in the criminal field, are Indians. Indians with general practices are normally engaged in a wide variety of advocacy.

Less than one fifth of Kuala Lumpur lawyers, but between half and two thirds of lawyers in the other regions of Malaysia, primarily serve individual clients. The problem of access for individuals depends largely on the kind of legal problem they have and their capacity to pay. If their problem involves large enough sums of money and can be handled on a contingency basis, they will have no access problem. An accident victim, for example, will almost immediately be found by a lawyer through the extensive network of touts which reaches into hospital emergency wards. Lawyers frequently "invest" in these cases by paying the victims' hospital bills and assisting their families financially if they are out of work. In accident cases, the lawyers' share is generous (25 to 35 percent) and the victim may be exploited by the lawyer and his touts, but poor and ignorant accident victims would have little access at all if the laws against contingency fees and touting were actively enforced.

An individual who lacks the capacity to pay and whose legal problem will not generate a contingency fee has little access; (e.g., lower-income persons accused of crimes, having a small estate to settle, or seeking a divorce, if not a Muslim). Because lawyers can do so well without taking these marginal cases, they are prone to avoid them. A recent study by a University of Malaya law student, Lim Heng Seng, showed that even in Kuala Lumpur, which has the heaviest concentration of lawyers, many criminally accused before the lower courts go unrepresented.² Lim found that two-thirds of them were unrepresented at the time they entered their plea, and that almost 80 percent of the accused without representation simply pled guilty. This seems particularly serious in light of the fact that police coercion of detained persons is not uncommon in Malaysia. Lim found that one third of the accused who reached the hearing stage were still unrepresented. Over 80 percent of those who pled or were found guilty were still unrepresented at the time of sentencing, so they had no professional advice on claiming mitigating circumstances. Lim also presented evidence that unrepresented accused persons were not very competent at handling their own cases and that the Magistrates seldom complied with the statutory provisions intended to safeguard the accused's rights. These points are illustrative of the serious access problems in the criminal justice process.

Table IX. *Types of Practice of Malaysian Lawyers by Region*

Type	Region KL Metropolitan		West Coast Capitals		Far North and East Coast Capitals		Secondary Towns	
	Number	%	Number	%	Number	%	Number	%
<i>General Practice</i>	3	12	11	34	7	35	8	40
<i>Some Degree of Specialization</i>								
Conveyancing	9	36	10	31	4	20	10	50
Corporate	5	20	2	6	1	5	0	—
General Civil								
Litigation	3	12	4	13	3	15	0	—
Accident Cases	1	4	1	3	1	5	0	—
Land Cases	0	—	0	—	3	15	0	—
Criminal	3	12	4	13	1	5	2	10
<i>Unknown</i>	1	4	0	—	0	—	0	—
totals	25	100	32^a	100	20	100	20	100

a. 3 of the 35 lawyers in our sample of West Coast Capitals were not actually engaged in law practice.

Table X. *Types of Practice of Malaysian Lawyers by Ethnicity*

Type	Ethnicity Malay		Chinese		Indian		Other	
	Number	%	Number	%	Number	%	Number	%
<i>General Practice</i>	2	22	16	39	10	25	1	14
<i>Some Degree of Specialization</i>								
Conveyancing	3	33	21	51	7	18	2	29
Corporate	1	11	3	7	2	5	2	29
General Civil								
Litigation	0	—	1	2	8	20	1	14
Accident Cases	1	11	0	—	2	5	0	—
Land Cases	2	22	0	—	1	3	0	—
Criminal	0	—	0	—	9	23	1	14
<i>Unknown</i>	0	—	0	—	1	3	0	—
Totals	9	100	41^a	100	40	100	7	100

a. 3 of the 44 Chinese lawyers in our sample were not actually engaged in law practice.

Professional Conservatism

Malaysian lawyers are protective of their privileged position and professional prerogatives. As mentioned above, restrictions have been placed on entry into the profession, so that those with the LL.B. from British, Australian, and New Zealand Universities cannot practice. While a case can be made for excluding those with only LL.B.'s from British universities on the ground that this is not a sufficient qualification for practice in the U.K., it cannot be made with respect to Australian

and New Zealand degree holders, as the LL.B. is designed to prepare one for practice in those countries. These restrictions serve primarily to limit the growth of the profession and to inhibit competition. Probably for the same reasons, the Bar Council was unenthusiastic about the establishment of the new Law Faculty at the University of Malaya.¹⁴ Efforts have consistently and, to some extent, successfully been made to restrict the activities of nonprofessionals, such as petition writers¹⁵ and free-lancing law clerks. While admittedly persons in the latter groups may sometimes lack the necessary training and may at times exploit clients, they are often quite capable of providing basic routine legal services. When queried on the role of petition writers, nearly every Malaysian lawyer has a story to tell about how he has had to take over a matter botched by a petition writer and straighten it out at considerable added trouble and expense to his client. Nonetheless, we made a rather detailed examination of the role of petition writers and found them to be providing useful, low-cost services, including legal services, such as the preparation of agreements, land transfer papers, and pleadings for civil suits. In some secondary towns, petition writers do a considerable amount of conveyancing work and pay lawyers to attest the papers for them. They serve primarily lower and middle income persons. If the bar would permit it, their roles could be expanded with a net improvement in access.¹⁶

The professional commitments of Malaysian lawyers tend to be conservative. Using a distinction made by Black, they tend to have a reactive rather than proactive approach to legal action.¹⁷ That is, they are inclined to wait for clients to come to them with whatever problems the latter think are important rather than seeking out new clientele and giving legal voice to groups which may have poor access. These findings are not surprising and they probably describe lawyers everywhere but it is worth noting that the few lawyers in our sample who claimed to be fundamental critics of the Malaysian status quo also tended to adhere to this approach. We tried to explore this issue with them and found little indication that they had given such ideas any thought. This lack of legal activism probably stems from the fact that there is not much scope for persons outside government to promote change, especially in unauthorized directions, or for citizens to challenge the government in court. Nonetheless, there are areas in which more aggressive efforts to secure enforcement of existing laws, such as the Padi Cultivators Act or the Hire-Purchase Act, could be of some value.

General Assessment of Public Access

We have attempted to identify certain dimensions of the access problem that follow from the structure of the legal profession. Most notably, the pace of socioeconomic change has, at present, outstripped the growth of the profession. This has limited competition in certain respects, and most of the access problems that are rooted in the structure of the profession are directly or indirectly related to this fact. Rapid development and growing complexity in Malaysian society have created new needs for legal services in many areas, and most members of the comparatively small profession have gravitated to the more profitable legal work in the expanding

sectors of the economy. They have done this at the expense of providing less profitable services for lower income persons. As indicated, this problem is perhaps most acute for the criminally accused. It is also a problem for many others, such as heirs with small estates to be settled, non-Muslims requiring divorces, and farmers of modest means involved in the transfer of small pieces of land. For persons with these or any other kinds of legal problems who do not live near the federal capital or one of the state capitals, where most lawyers are practising, the costs of legal services as well as the time and energy required to see a lawyer are substantially increased. The small number of Malay lawyers and the attractive opportunities in the private sector have created personnel problems in the Judicial and Legal Service, and this has, in turn, impeded the administration of justice. The background and training of many Malaysian lawyers have not disposed them to regard many of these matters as problems. To the extent that the bar has opposed measures that would more rapidly increase the size of the profession, they have aggravated the lack of access.

As we emphasized at the outset, professional structure is only one factor determining the quality of access in any society. There are many other factors that inhibit access in Malaysia as elsewhere. The substance of the law is one such factor. For example, the fact that divorce for non-Muslims is exclusively a High Court matter insures that it will be costly. Similarly, some provisions of the Criminal Procedure Code seem to weight the administration of justice in favor of the prosecution at the expense of rights that an accused might have in some other nations. In each of these examples, the law undoubtedly serves values that are thought by its makers to be more important than access, but they are inconsistent with the latter value.

Obstacles to access are also rooted in many features of a country's socioeconomic and political structure. In Malaysia, as elsewhere, many persons are poor and powerless. Such persons have problems that are basically a condition of their poverty and powerlessness. Their problem may stem from exploitation by employers, landlords, merchants, middlemen, money-lenders, or unscrupulous officials. While legal remedies may exist for some such problems, they are rarely of value to the poor. This reflects an access problem, but it also represents a problem with roots far beyond the legal system. It is inherent in the distribution of wealth and power in society and can only effectively be approached by altering that distribution.

Despite the aforementioned problems, access to the legal system in Malaysia is probably better than it is in a great many comparable countries simply by virtue of the fact that the institutions involved in the administration of justice tend to be comparatively independent, even-handed, even if harsh, and uncorrupted. Moreover, there are factors which attenuate the access problem in some areas. Traditional means of settling less serious disputes outside the formal legal system are well-developed and still widely accepted. Petition writers are found in most towns of any size, and despite the limitations placed upon them, they play an important role in facilitating access for persons in need of routine legal services. There is a system of Islamic courts in Malaysia which deal with domestic relations

and inheritance problems in the Malay community. A recently established government Legal Aid Bureau deals with only a very limited range of legal problems and maintenance cases comprise the bulk of its work. With the help of field personnel of the Welfare Ministry, Legal Aid is at least expanding access in this area. There has also been some movement in the direction of simplifying legal procedures. Recently, for example, serious consideration was being given to adopting an automobile accident claim plan, patterned on the New Zealand scheme, which would provide compensation to victims without the necessity of litigation. However Malaysia may rate comparatively, it is clear that there is ample room for improving public access to the legal system. The questions we address here are what structural changes may be forthcoming in the profession as a result of the influx of locally trained lawyers and whether these changes will contribute to any significant improvements in public access.

New Lawyers, Structural Change, and Access

Even though the University of Malaya Law Faculty is now producing graduates, we do not expect that there will be much, if any, increase in the professions's growth rate as a whole or a rapid expansion in the number of practising lawyers in the near future. This is partly because the University of Malaya Law Faculty will, to a large extent, be replacing rather than supplementing the two other sources of legally qualified persons. Recent changes requiring the LL.B. for admission to the Inns of Court combined with the forthcoming termination of the University of London External Degree Program in law should substantially reduce the number of Malaysian students who will be able to qualify in England. In addition, the University of Singapore has drastically reduced the intake of Malaysian students to a mere handful. Since 1968, about 90 Barristers and University of Singapore LL.B.'s have been called to the Bar annually. Within a short time, however, the University of Malaya will be producing the majority of new lawyers. At present, the Law Faculty is accepting approximately 50 new students per year. While it is authorized to accept up to 100 students per year, this is contingent on the availability of funds which makes it difficult to predict the school's growth rate.

For the next few years at least, a sizeable majority of new Law Faculty graduates will be headed for government service and only a small portion for private practice. As Table XI shows, over seventy percent of the students who completed our questionnaire expected their first employment to be in government service, and only twelve percent expected to enter law practice immediately upon graduation. In part, this reflects the fact that sixty percent of the students responding are obligated to government service because they have accepted scholarships, and a majority of these students are obligated to ten years service. In the past, it has been fairly easy for such students to buy out of their obligation to the government by paying back in cash whatever portion of the scholarship remained unpaid in service or even freely to opt out. This is now becoming much more difficult, so it is quite likely that most of these students will remain in service for the required period.

Table XI. *Expected First Employment of University of Malaya Law Faculty Students, 1975*

Expected First Employment	Number	%
Government Service	114	71
Law Practice	20	12
Private Sector Legal Work	23	14
Other	4	2
Totals	161	100

With respect to their ultimate careers, more students expect to be in government service than in law practice. As Table XII shows, forty percent of the students expect that their careers will be in government service while only twenty-three percent expect ultimately to practise law. If we add the other nine percent that expect careers in politics, on the ground that they will also be practising law at least part time, less than one third of the students expect to be in practice. Moreover, it is quite likely that some of those students who expect to leave government service, especially after ten years, and go into private practice will find the change more difficult than they anticipate. When the time comes, many will have families and a good deal tied up in the pension scheme. Considering these facts, it seems unlikely that there is going to be a sufficient increase in the number of practising lawyers in the near future to foster the type of competition needed to expand public access to any degree.

Table XII. *Expected Careers of University of Malaya Law Faculty Students, 1975*

Expected Careers	Number	%
Government Service	65	40
Law Practice	37	23
Private Sector Legal Work	32	20
Politics	14	9
Other	13	8
Totals	161	100

The emergent pattern of recruitment and training of lawyers will significantly increase the proportion of Malays among the legally trained. It will, however, have less effect on the proportion of Malays in the practice of law, at least in the short run. Ethnic quotas are applied in selecting students for places in Malaysian universities. Hence as Table XIII shows, 115 or 55 percent of the students in the Law Faculty in 1975 were Malays. The combined number of Malays in government service and in practice, as shown in Tables VI and VII, was only 202. The number of students in the Law Faculty in 1975 was over half that number. But as Table XIV shows, only thirteen of the students expecting ultimately to practise law are Malays. Another ten

Table XIII. *Ethnic Composition of Student Body of University of Malaya Law Faculty, 1975*

Ethnicity	Number	%
Malays	116	55
Chinese	62	30
Indians	19	9
Other or Undetermined ^a	13	6
Totals	210	100

a. Primarily indigenous people of Borneo states.

Source: Senari Penasihat-Mahasiswa/Tahun Akademik 1975/76, Fakulti Undang-Undang, Universiti Malaya, mimeo.

Table XIV. *Ethnic Composition of University of Malaya Law Faculty Students Expecting to Practise Law or go into Politics*

Ethnicity	Practice		Politics	
	Number	%	Number	%
Malays	13	35	10	71
Chinese	16	43	0	
Indians	5	14	1	7
Others	3	8	3	21
Totals	37	100	14	100

of those who plan eventually to enter politics are also Malays, and no doubt some of them will also practise law on at least a part-time basis. Most of these students, however, will not be able to enter practice for several years, and some for as many as ten years if the government holds them to their current obligations.

The new Malay lawyers will have excellent opportunities in the most lucrative areas of the economy for some time to come. As already noted, firms which are predominantly Malay controlled are given preference in handling the legal work for government banks, statutory bodies, and businesses and joint-ventures set up under the auspices of the state economic development corporations. Established firms are also increasingly interested in taking in Malays simply because it is generally desirable to have a Malay presence in any undertaking that must deal with the government. As a result new Malay lawyers may be even less likely than others to enter the areas of practice that are less profitable but that are important from the standpoint of public access.

The increase in Malay lawyers may be as important for social change as it is for legal change. As indicated at the outset, the creation of the Law Faculty and the attendant changes in the patterns of recruitment and training of lawyers has to be understood as part of a broader socioeconomic policy intended to redistribute wealth and to break longstanding links between race and occupation. There is no

question that the increased output of Malay lawyers will, in the long run, contribute to the expansion of the Malay middle-class. This will contribute to change in the racial composition of the middle-class and, very likely, contribute to further magnification of class differences within the Malay community. To the extent that new Malay lawyers concentrate their energies in the most rapidly developing sectors of the economy, serving principally corporate clients, the latter tendency may be accelerated.

The increase in the number of legally qualified Malays should mean an increase in the availability of legal talent for the public sector. The fact that so many of the new lawyers will be obligated to government service means that requirements for legally trained personnel in the public sector will be met more fully than in the past. For example, one half of the recent group of forty-six Law Faculty graduates were immediately appointed as Magistrates." The Attorney General's Chambers and the Legal Aid Bureau will no doubt have similar demands for new lawyers in subsequent years. To the extent that these developments facilitate the administration of justice, particularly by speeding it up, or extend the capacity of the Legal Aid Bureau, they will ease these aspects of the access problem.

Malaysian judges and other high ranking officials concerned with the administration of justice regularly encourage new lawyers to establish practices in areas where there are few lawyers rather than in Kuala Lumpur or the other main west coast towns." Despite the widespread recognition of the maldistribution of lawyers, it is not likely that large numbers of new Law Faculty graduates will be setting up practices in the less urbanized areas of the country in the near future. As Table XV shows, over two thirds of those students who intend to go into practice prefer eventually to work in Kuala Lumpur or one of the main west coast towns. We have already mentioned the opportunities for new Malay lawyers. For some time to come, far more of them will be making their way to carpeted, air-conditioned suites in the new office buildings sprouting up in urban Malaysia than to secondary towns. Without a substantial intensification of competition, the movement of other lawyers to secondary towns and the less developed areas of the country will continue to be slow.

As the requirements of the public sector for legal talent are met, the number of lawyers entering practice may begin increasing more rapidly, but it is difficult to make predictions about this. For one thing, it seems likely that there will be a growth in demand for legally trained persons in new areas of the private sector. Given the rapid pace of development, the increasing diversification, and the growing complexity of the Malaysian economy, it would not be surprising to see business and industry recruiting legally trained personnel for responsible positions. If so, the numbers taking up practice will not increase as rapidly as otherwise.

We can only speculate on the question of whether or not the graduates of the Law Faculty will be as professionally conservative as the current members of the Bar. The students are not as concerned about restricting the intake of new lawyers as the leaders of the Bar. Sixty percent of those expecting to practise endorsed the view that those with British and Australian LL.B.'s should be permitted to practise on the

Table XV. *Preference of Place to Work of University of Malaya Law Faculty Students Expecting to Practise Law or to go into Politics*

Location	Practice		Politics	
	Number	%	Number	%
<i>KL Metropolitan Area</i>	14	38	3	21
<i>West Coast (Excluding Kedah and Perlis)</i>				
<i>Capital Towns</i>	11	30	2	14
<i>Secondary Towns</i>	1	3	0	—
<i>Far North and East</i>				
<i>Coast Capital Towns</i>	6	16	3	21
<i>Borneo Capitals</i>	3	8	5	36
<i>Other or No Response</i>	2	5	1	7
Totals	37	100	14	100

same basis as themselves. We also asked an open-ended question which invited criticisms of the profession, and few responses indicated any orientation toward the kind of legal activism mentioned above. Forty percent of those expecting to go into practice indicated that too many of the lawyers currently in practice were lacking in social responsibility, but whether they will be any more socially responsible remains to be seen.

There are two final points about the changing pattern of recruitment and training of lawyers that bear on the question of access and, more generally, on the role of the profession in Malaysian society. The first relates to language and the law, which is only a small part of a much larger problem. The second concerns the more intangible consequences of local training. These are far more difficult to analyze than the previous points, but we can offer a few observations.

The dominant Malay political elite is bent on converting the language of court to Malay. For practical reasons, they have backed off on this several times, and they may continue to do so for awhile, but we believe that this will inevitably occur. The entry of the locally trained lawyers into the profession will probably hasten the change. A great many of the current members of the profession are not proficient in Malay. And, as Table XVI shows, only a minority of lawyers in three of the four regions of the country claimed to be proficient enough in it to be able easily to use it in court. Law Faculty students are, however, receiving a bi-lingual education, and many, but not all, will be able to work in Malay. The consequences for access of converting the language of court to Malay cannot be considered independently of the question of the ultimate success of the national language policy and whether there ever will be a viable society populated by Malaysians rather than one that is compartmentalized ethnically.

Under prevailing conditions, it seems certain that an across the board change in the language of court would create more problems than it would solve. Much of the

Table XVI. *Language Proficiency of Malaysian Lawyers by Region*

Proficiency	Region KL Metropolitan		West Coast Capitals		East Coast Capitals		Secondary Towns	
	Num- ber	%	Num- ber	%	Num- ber	%	Num- ber	%
Could easily use Bahasa Malaysian in court	4	16	7	20	11	55	6	30
Might be able to use Bahasa Malaysian in court with some additional effort, but probably in lower courts only	5	20	1	3	2	10	4	20
Could not use Bahasa Malaysian in court	7	28	13	37	2	10	5	25
Do so little court work that it makes no difference	8	32	13	37	3	15	5	25
Unknown	1	4	1	3	2	10	0	—
Totals	25	100	35	100	20	100	20	100

population is still not proficient in the national language. While Malays would be able to participate more effectively in court proceedings, English speaking Chinese and Indians would be less effective, and the large majority of non-English, non-Malay speaking Chinese and Indians would be no better off than they are now. Most practising lawyers in our survey viewed the language change as a potential impediment to the administration of justice in a variety of ways. The fact that many are not proficient in the language gives them a self-interested reason for taking this position, but we found this view was also shared by a significant number of lawyers, including some Malays, who were proficient in the language. Over half of the students planning to go into practice were of a like mind. We are persuaded that at present, gains in access for Malays flowing from a better understanding of court proceedings would be more than offset for Malays and non-Malays alike by the problems that would be created in the administration of justice. If we make an optimistic assumption about the long-range success of the national language policy and the emergence of a real Malaysian identity, an assumption that can only be made on the basis of faith at present, then conversion of the language of court should improve access for coming generations.

The eventual replacement of England and Singapore trained lawyers by Malaysian trained ones should lead to a profession somewhat more firmly anchored in national life. As graduates of the University of Malaya, they will be involved in, or at least exposed to, main currents of thought and controversy in their own society. It was, for example, clear from our interviews that the extensive involvement of

Law Faculty students in the political turmoil on the campus in 1974 had had an effect on their critical understanding of the realities of power in their society. Their curriculum is more closely related to Malaysian conditions than that in universities outside the country; this is particularly so in such areas as land law and family law. The research projects required of fourth year students as graduation exercises have led a number of them to explore critically the role of law and lawyers in Malaysian society both in the library and in field research. While the new lawyers will not be as cosmopolitan as some in the profession today, they will on the whole be in closer touch with trends in Malaysian society. We think it more likely that creative and innovative ideas about improving the legal system will emerge from such a group than from among those whose professional socialization occurred outside Malaysia.

Notes

1. Malaysia is used here to refer to the peninsular states only. The Borneo states of Sabah and Sarawak each have their own Bar, and they were not included in this study.
2. Government of Malaysia, Second Malaysia Plan, 1971–1975 (Kuala Lumpur: Director General of Printing, 1971), p. 1.
3. See University of Malaya, Report of the Board of Studies on Law, November 1971, mimeo., pp. 3a–5a on the need for a Faculty of Law.
4. The Treasury, Malaysia, Economic Report, 1975–76 (Kuala Lumpur: Director General of Printing, 1975), p. 6.
5. This was the estimate of the late Deputy Law Minister, Datuk Athi Nahappan, *New Straits Times*, Malaysia, 13 January 1976.
6. This figure was provided by the Bar Council, private communication.
7. Comparable ratios of practising lawyers to population for some other countries are: U.S. – 1:861 (1970); U.K. (both Barristers and Solicitors) – 1:1896 (1970); Philippines – 1:6500 (1973); Japan – 1:12,000 (1971); Ghana – 1:15,000 (1970). Such ratios are only significant when considered in relation to the requirements of specific countries for legal services. Hence we do not place too much emphasis on this kind of comparison.
8. Calculated from information contained in the Roll of Advocates and Solicitors and the record of practise certificates issued in 1974, both of which are maintained by the Registrar of the High Court.
9. See, for example, the views cited by Lakshmi Natarajan, "A Bleak Future for Young Lawyers," *New Straits Times*, Malaysia, 10 June 1975. Only a minority of the lawyers in our survey, however, gave unqualified endorsement to the view that the profession is over-crowded.
10. Barry Metzger, "Legal Services to the Poor and National Development Objectives," in *Committee on Legal Services to the Poor in Developing Countries, Legal Aid and World Poverty* (New York: Praeger, 1974), p. 9.
11. The collection of contingency fees is illegal in Malaysia, but it is extensively practised.
12. The Treasury, Malaysia, Economic Report, 1975–76, cited, Chart 27, page 63.
13. Travel to Singapore only was not considered in this calculation.
14. Interview with Mr. P. Cumaraswamy, Secretary of the Bar Council, 13 November 1975.
15. The qualifications are established by the Advocates and Solicitors Ordinance 1947.
16. For background on the establishment of the Law Faculty in Singapore, see Ahmad Ibrahim, "Legal Education in Malaysia," in *The Bar Council, The Report of the First Malaysian Law Conference* (Kuala Lumpur, The Bar Council, 1971), pp. 92–130.
17. Calculated from the records of the High Court, cited.
18. For background on the establishment of the Law Faculty in Kuala Lumpur, see Ahmad Ibrahim, "Legal Education in Malaysia," cited.

19. The number of such persons is unknown, but the largest group among them would probably be those who have earned the LL.B through the University of London External Degree Program.

20. Calculated from list of names of Bar Council in *Warta Kerajaan Persekutuan*, Jil 19, No. 13 (19 June 1975), p. 1732 and information contained in records of the High Court, cited.

21. Tan Sri Mohamed Suffian, "Bench, Bar, and the Government," a paper presented at the Sixth Asian Judicial Conference, 1975, cited in *New Straits Times*, Malaysia, 28 February 1975. Tan Suffian is Lord President of Malaysia.

22. *New Straits Times*, Malaysia, 25 May 1975.

23. Lim Heng Seng, "Unrepresented Accused Persons in the Lower Courts," A Project Paper submitted to the Faculty of Law, University of Malaya, October 1975.

24. See Stephen T.H. Goh, "Some Fundamental Issues of Legal Education in Malaysia," *INSAF: The Newsletter of the Bar Council*, Vol. V, No. 1 (June, 1972), p. 7.

25. Petition writers are usually found seated with their typewriters at small outdoor tables or in coffee shops near public buildings all over Malaysia. They fill out official forms, prepare various kinds of documents, and write letters for people. They are licensed and regulated by local authorities.

26. This issue has been examined by Alizatul Khair Bte O. Khairuddin, "Incorporation of Paraprofessionals into the Legal Aid Structure," A Project Paper submitted to the Faculty of Law, University of Malaya, September 1975.

27. Donald J. Black, "The Mobilization of Law," *Journal of Legal Studies*, Vol. 2 (1973), pp. 125-149.

28. *The Star*, 19 March 1976.

29. See, for example, remarks of Mr. Justice Hashim Yeop Sani, reported in *New Straits Times*, Malaysia, 20 August 1970.

Part II

Comparative, Historical and Other Social Perspectives

Professions, Professionalism, and Law

Some Reflections by a Political Economist

History at all times draws
Strangest consequences from remotest cause

– T.S. Eliot

Those who cannot remember history are doomed to repeat it
– George Santayana

The first thing to do is to form the committees:
One Secretary will do for several committees.

* * * * *

We demand a committee, a representative committee, a
committee of investigation
RESIGN RESIGN RESIGN

– T.S. Eliot

Do not cover up the scars
... lest it prove a hollowed shell
And lest the feet of new-torn lives
Sink in voids of counterfeiting.
Do not swell earth's broken skin
To glaze the fissures in the drum.

– Wole Soyinka

I

To present a few remarks on the legal profession and the law as perceived by economists would appear relatively easy. It is not. First there is the problem that economists are hardly a homogeneous category (profession?) in ideology, level of abstraction, time perspective or concern with institutions. To narrow the field somewhat one can limit it to political economists in the classic sense – those concerned with the applied reality of analysis in actual socio-political and institutional contexts.

Not even all political economists think alike. What follows, therefore, is something of a cross between points on which a fairly broad array of political economists would agree and the writer's own stance with which many of them would take issue. Hopefully the context will usually make clear which is which.

One problem of interdisciplinary or, indeed, intermodel discussions is a tendency to engage in "irregular declensions." For example:

I pick out key variables.
You tend to oversimplify.
He is a crude reductionist.

or:

I see the reality of complex interactions.

It is hard to see what you are driving at.

He can't see the wood for the trees.

Yet the inverse of this problem is a gain if all participants can remove their noses from the knotholes in their favorite trees and see the dangers of reductionism inherent in their own brutal simplifications.

Many political economists would perceive the standard Anglo-American sociological model of professions as an ideological survivor of the rationale for the medieval guilds and not as an analysis of the dominant characteristics of any profession today. This may be unfair, but the "liberal professions" are in fact those guilds (or specialized sections of monastic orders if one includes university teachers as a profession) which survived because they could adapt to new political, economic and institutional contexts.

Like almost all approaches to knowledge which believe their field includes some general organizing principles, political economists do not tend to see much merit in leaving any important area entirely to its own specialists. Planning is too important to be left solely to planning technicians (rather ill advisedly usually called planners), war to generals, the legal profession to lawyers. Unfortunately, political economists are also quite likely to make their own speciality an exception: to see economists as the only legitimate guardians (in the platonic sense) of political economy. This exception should be resisted precisely because the general contention is sound.

II

It is critical to realize that the political economist concerned with planning or manpower uses the words "profession" and "professional" very differently from the sociologist concerned with the sociology of professions. Unless this is realized a dialogue of the deaf is likely.

By and large the political economist's approach to professions is much more akin to that of manpower planners, administrators and managers than to that of sociologists.

The key characteristics of a profession (or an identifiable cluster of positions using high level manpower) for him normally are:

1. specialized competences;
2. competences including some intellectual component and transferable over a range of related activities;
3. competences whose effective application is critical and whose practitioners (certainly in terms of small groups and possibly even of individuals) are not easily done without or substituted for, either by more "homogeneous" unskilled or semi-skilled labor, or by members of another profession;

4. an embodiment of not inconsiderable amounts of "knowledge capital" in the professional person;

5. a range of activities many (not necessarily all) of which are not easily controlled in a routinized manner because of the nature of their "product" and the adverse effect of attempted standardization on the quality of this "output".

"Colleague control" is noticeably absent from this list. Few political economists would deny that the power and profit positions of members of a profession differ depending on their patterns of organization and relations to employers. But even fewer would see the colleague-oligarchic-corporate control division as integral to defining a profession as opposed to analyzing its role and power in a particular mode or sub-mode of production.

Therefore, the division of professionals versus technocrats is one which is startling to political economists. From their perspective lawyers, engineers, economists, doctors, managers and army officers are all professionals. That, of course, does not imply the absence of struggles or clashes between professions as some do adapt better to changing sub-modes of production and their institutional embodiments (superstructures) or are inherently advantaged or disadvantaged by the change. But this does mean that such struggle is among different branches of the professional sub-class not between professionals and technocrats.

Whether professionals have significant general power in a modern capitalist (or socialist) economic system and if so, what types of power subject to what limits is an issue on which there is little agreement among political economists. The extreme view of the technocracy (composed of professionals) as an emergent dominant class – adumbrated (with enthusiasm) by Galbraith in the neo-liberal tradition on the one hand, and, with alarm, by the intellectual heirs of Kautsky and Luxembourg in the social democratic and Marxian tradition on the other – is not a majority one. The other extreme view that the limited degree of power that professionals have over their own rewards and working conditions is being eroded for most by routinizing ("deskilling") previously professional posts and co-opting the remnant professionals as junior members of the (capitalist or socialist) decision taking coalition is also a minority one.¹

The tendency to class professionals as *petit bourgeois* (a tendency, if not a terminology, by no means limited to Marxian or quasi-Marxian political economists) is probably best interpreted as based on a recognition that knowledge can be capital and can be embodied in a person. In that sense professionals are small capitalists and ones whose capital is critical to the operation of larger agglomerations of (private or state) capital. That they can be a dominant class on this base seems unlikely² (not incredible) but that they can be a secondary member of almost any capitalist, social democratic or socialist ruling coalition of sub-classes seems probable. If this is a correct view, then professions are likely to retain some ability to define their own qualifications, work conditions, areas of competence and rewards whether the formal structure of control is one of professional autonomy, oligarchic or corporate patronage, with or without state mediation.

III

By and large political economists concerned with institutions and processes would not see concepts such as justice as being confined to law or laws. They would see the law as embodying the particular concepts of justice held by the dominant decision takers; and the individual laws and legal institutions and processes as among the ways in which these concepts were more or less imperfectly articulated, popularized, mystified, reproduced and enforced.

This is quite different from saying that political economists do not operate on the basis of some (admittedly highly divergent and often implicit) concepts of justice. Ironically, many see justice as more inherently involved in political economy than in law, even if more formally and overtly presented in the latter.³ For all but a few political economists, law and laws are perceived as functional and value embodying rather than as philosophical and integrally moral.⁴ It is critical to realize this because a lawyer's view of political economy is often almost the inverse and again the danger of a dialogue of the deaf arises.

Many political economists do not make a distinction between laws and the law.⁵ Indeed, most of them it should be said, do not have any articulated views as to either law or laws (whereas a majority do have some analytical approach to professions and/or high level manpower). The positions sketched, therefore, are "minority" ones, albeit fairly typical of political economists – including those of European socialist states – who have devoted attention to the topic.

As a system, law is seen as serving several functions:

1. legitimization of decisions and avoidance of controversy (political economists are by and large biased against litigation and view a major role of laws and lawyers as being the avoidance not simply of violence but also of the formalized "violence" of litigation);
2. mobilization of resources (including class or subclass support) for the purposes chosen by decision takers and (presumptively) embodied in the legal system;
3. facilitation of administration and management by setting reference frames for decisions requiring judgment and laying down procedures for routine ones;
4. control through sanctioning (whether by requirement or prohibition, reward or penalty) particular classes of acts.

To carry out these functions the system must possess certain characteristics:

1. comprehensibility to decision takers, practitioners and those required (or forbidden) to act. (This does not mean all laws or all clauses need to be comprehensible to everyone, e.g., if price control is to be enforced by "man in shop" reporting, then the price schedules and reporting procedures, but not necessarily the detailed principles and procedures of price setting must be comprehensible to him);

2. predictability in the sense that legal process or legal process determined decisions (in courts but equally by lawyers, managers, administrators acting with reference to the legal framework) are largely coherent, compatible with each other

and consistent with legal provisions. (This does not exclude discretionary powers, but it does exclude taking decisions without reference to the legal provisions);

3. routinization of "decisions" or actions which are seen to require uniformity and (subject to review provisions) to need little judgment at the initial action level – for example, many branches of tax assessment and licensing;

4. setting clear lines of authority (including locus of discretion and review) in public sector administration, management and decision taking;

5. means to resolve conflict – preferably by methods not involving formal litigation (especially again in the public sector administration, management and decision taking fields);

6. deterrence of undesired actions (with prosecution of those who act in the undesired ways, seen primarily as a means of deterring others).

Political economists thus tend to be "legal realists" concerned with the law in action and perceiving tensions between that law and the law on the books as representing either a failure of systemic "discipline" (in Myrdal's sense of a "soft society") or a failure to adapt the law to reflect present systemic decision-taker goals. They are concerned with how the law affects "real people", "real events" and "real decisions" much more than with legal theory (or as some would say in a disparaging tone, legal "theology").

This approach implies that any individual law, legal institution or legal process can and should be modified if it becomes even moderately dysfunctional from the point of view of decision takers, so long, that is, as decision taking coalition membership does not change so rapidly and cyclically as to make this a recipe for chaos. However, at the macro level, more stability is usually seen as desirable because rapid and repeated changes in the entire legal system (the law as opposed to individual laws) have high costs in terms of its ability to legitimate, mobilize and control and also tend to pyramid the difficulties of comprehensibility, predictability and action deterrence related to even micro changes.

Evidently, several criticisms can be made of this approach to analyzing law and laws:

1. the division between administrative rules/procedures and law is unclear and varies from political economist to political economist with few clear criteria advanced;

2. the interaction of institutional structures and practices with modes of production and dominant decision taking coalitions is ruthlessly simplified – often to the point of crude reductionism;

3. while law is clearly not seen as value free in operation, the highly instrumental approach to it tends to conceal the fact that legal forms as well as their use have embodied values and that, therefore, significant changes in the class nature of decision taking coalitions usually require changes in legal processes and forms as well as in specific laws, crimes, requirements, and sanctions;

4. the approach is to some extent trans-disciplinary but it is rarely truly interdisciplinary and tends to be economic.

IV

Political economists are not particularly given to simple "reading off" of the "proper" form of institutions and professions from some single dominant characteristic. They do – not surprisingly – tend to view economic relations (sub-modes of production) as central and probably ultimately decisive but are not – as a group – particularly prone to crude reductionism.

In examining any set of institutions and relations in any one economy, most political economists would consider the sub-mode of production (patterns of production and ownership), international economic relations (dominance, sub-central status, peripheral dependence), technology (both in the economy and in the global system), institutional patterns (especially of the state and of the major directly productive sectors) and the history of the economy to be critical. The interaction of these forces is seen as determining possible and implausible, efficient and inefficient (in terms of dominant decision taker or identified class or formation goals⁶), stable or unstable institutional and relationship patterns. Most political economists would content themselves with specifying ranges, not arguing that there is complete determinism and no autonomy as to institutional and superstructural patterns and evolutions.

Ideology is not an area in which applied political economists are usually very articulate or expert. Presumably, this is because they operate on largely implicit ideological premises. Certainly this characteristic cuts across ideological divides and is very evident in many Socialist European political economists. The evident danger is that the implicit, unexamined ideology may be quite inconsistent with the actual sub-mode of production, place in the international economic order, level of technology, history or overall superstructure to which it is applied.

In a "class" state one would normally expect to find "competing" ideologies. Because these are articulated by specialized groups more complex than simple economic classes, their interaction is not subject to an easy "reading off". Lawyers (and for that matter political economists) tend to set a high value in order and predictability, no matter what their broader (supra-professional) ideological perspectives. This can create conflict, even in situations far short of armed revolution. In Chile under Allende lawyers of the left tended to advise the narrowest possible action and the least violation of form in order to achieve the goals of the *Unidad Popular*; without perceiving that their advocacy of cautious constitutionalism was, in many respects, arguably inconsistent with these goals.⁷

The sub-mode of production has major effects on the legal system and on legally trained personnel as to:

1. what transactions they are involved in and in what way (as negotiators, advisors, adjudicators, or combatants);
2. how law and legally trained personnel are organized in terms of institutions, selection and training, relationship to other institutions;
3. which individuals, units, sub-classes or formations are served (or controlled) by legal processes and legally trained personnel;

4. and – probably most critical – what goals the legal institutions and personnel serve and how they participate in shaping, articulating and implementing these goals.

The importance – as perceived by others – of the legal profession is likely to turn largely on how they relate to the last point. Unless legally trained personnel see “real problems” as perceived by “real people”, they are likely to be relegated to increasingly narrow areas of activity and, especially, to implementation rather than decision advising or articulation.

For example, in Tanzania the creation of Ujamaa (semi-socialist) villages was perceived by several members of the judiciary and the law faculty at the University of Dar es Salaam as raising problems. They identified the latter as:

1. means to acquire land for villages lawfully;
2. forms of secure legal tenure for villages over the land they used;
3. legal status for villages especially in respect to getting credit and to installing a legal frame giving the central administration control over village rule setting.

Unfortunately, these were not the problems as perceived by the President or the Chief Parliamentary Draftsman, the Prime Minister or the commercial and investment banks, the Economic Advisor to the Treasury or the villagers. As a result the “legal” input both slowed movement toward the subsequent legislation on village land tenure and village self-government and reduced respect for the legal profession as a source of advice.¹

Land for villages could have been acquired quite lawfully under either the “eminent domain” or “traditional tenure” legislation already in force and advice on how to do so in a less cumbersome and quicker way might have been useful. Since villages *de facto* held land under traditional “use” tenure, they were (and saw themselves as) secure, barring a radical reversal of party policy. As the major credit sources were public sector financial institutions and did not see the presumptive “unregistered partnership” status of most villages as a barrier to lending to them, that issue was a mare’s nest. In the absence of clear views on how villages could and should evolve by village decisions, experience was wanted before setting guidelines. Central control over, or detailed patterns for, village rule making was emphatically not wanted either by villagers or by party leaders although many middle-level administrators shared the lawyer’s different perceptions on this issue. The advice therefore was, and was perceived as, a distraction from facing the problems of creating and legislating an institutional framework for multipurpose, self-governing communities and for their progression by stages from being fairly standard local governmental bodies through to becoming cooperative social and production units.

V

For those political economists seriously interested in legally trained personnel and legal institutions (a distinct minority!), a key question is “what do legally trained personnel do?” At least nine areas may exist:

1. court clash roles in respect to the criminal law;
2. clash avoiding roles in respect to the criminal law (advisory, plea bargaining, educational, etc.);
3. court clash roles in respect to the civil law;
4. clash avoiding roles in respect to the civil law;
5. managerial, organizational and administrative roles (beyond purely legal system administration) whether traditionally "legal" or not;
6. negotiating roles in respect to transactions, contracts, etc.;
7. institution creation roles: for example, the contribution of the Chief Parliamentary Draftsman to the articulation of the decision taking framework, procedures and enforcement provisions of the Tanzania Prices Act;
8. institution validation roles: for example, the preamble and the public presentation of prices, public reporting and special evidential provisions of the same Act;
9. institutional system validation roles: for example, the Tanzanian legislation to enforce the Leadership Code (which barred public office holders from engaging in private business); to establish in law the already existing policy making supremacy of party institutions; and to create a clear framework for a series of decentralized self-government bodies from the village to the national level.

The traditional emphasis of the legal profession (shared by many social scientists studying law and lawyers) on the first four roles is almost the inverse of the concerned political economist's. At the micro level he is likely to be most concerned with the fifth and sixth and at the sectoral and macro levels with the last three.

These areas – except perhaps negotiation – are harder to study than the first four. By their nature they do not throw up public records and by the nature of state bureaucracies they tend to be shrouded in secrecy. However, both qualitatively and even in some cases quantitatively, such roles are often more critical than the traditionally studied ones in the sense of being more closely related to key decisions and to significant changes in the institutional structures, social relationships, and the sub-modes of economic production. A drafting section which is more than just a "legal translation service" can have an impact different in kind from any number of prosecutors, defense lawyers and magistrates dealing with routine criminal offenses.

Questions of diversification and specialization are of interest to the political economist both as analyst and as advisor. The requirements in terms of formal legal education for different legal roles – e.g., magistrates, negotiators with transnational corporations, parliamentary draftsmen and managers, part of whose functions make use of legal training – would appear to be rather different. Certainly in some states like Tanzania, distinct specialization seems to be developing in work and in post-employment training, albeit to date to a much lesser extent at the law school level.

Diversification is related to specialization. The greater the diversity in legal roles the less the likelihood that a "general practitioner" can fill all of them. At least four aspects of diversification can be identified:

1. provision of traditional legal services to non-traditional users (legal aid or other forms of broadening "access");

2. provision of some elements of legal education (not merely those relating to the standard criminal/civil roles of the bar – though not necessarily excluding these) for non-legal professionals (such as managers, negotiators, engineers, economists) at university and/or post-employment course levels;

3. creation of new technically complex legal services to meet new needs, for example, in respect of negotiations with transnational corporations;

4. creation of new, broad based legal (or paralegal) services, for example, in support of participation or community self-government.

Analysis of the need for diversification requires attention to both the qualitative and the quantitative nature of the unmet or potential demand but it requires more than that. It is also necessary to assess to whom the "gap" is critical, why it is not met by legally trained personnel, what substitutes for legally trained personnel are being used (if any), what the consequences (in socio-political and political economic more than in formal legal terms) of the gap are. Further, it is critical to consider whether the diversification can or should be carried out through "standard" legal institutions and using "standard" legal professionals or whether modifications and transformations are appropriate.

Paraprofessional is a term subject to abuse. It should not mean inferior or sub-professional (the abusive connotation given to it by threatened professionals). Equally it should rarely (and law seems unlikely to be an exception) be viewed either as a total substitute for professionals in all roles or as the creation of a homogeneous cadre. For example, a political economist, with no formal legal training, but a good deal of self teaching and experience acquired by working with legal professionals, who acts as a consultant to a draftsman, is probably a legal paraprofessional. But he is neither a sub-professional, a substitute for the draftsman nor a typical example of a legal paraprofessional.

Paraprofessionals are likely to have to fill quite particular roles. Because these typically may range over several different areas – for example, negotiating with transnational corporations and advising draftsmen on substantively complex legislation, and for another example, resolving community level disputes and representation before primary courts (where this is barred to lawyers by law, economic reality and/or the number of lawyers) – so too should the paraprofessional's education, recruitment, institutional position and means of remuneration differ accordingly. Probably the major needs for paraprofessionals fall into two broad categories: on the one hand, highly specialized professionals, part of whose training is legal; and on the other, individuals serving in a framework of institutions designed to further participation, community self-government and the simple and equitable resolution of conflicts.

Clearly the demand – if any – for legal paraprofessionals will depend on the nature of the mode of production, dominant decision taking coalition," and of the state framework. Almost equally clearly their effective introduction and use will require significant institutional and procedural changes not limited to the legal field.

For example, in Tanzania there are distinct village and ward level medical paraprofessionals; several types of district and regional medical personnel who are either new professionals or (by traditional medical standards) paraprofessionals; and a number of types of major hospital, research and educational institution-based medical professionals. These operate through a variety of both specialized and mass, formal and informal educational programs, hospitals, outpatient centers, dispensaries, consulting places, public health campaigns, research programs; with a corresponding variety of institutional structures. These are intended to meet basic human needs, both for preventative and curative medicine, and other things like pure water, nutrition and environmental sanitation; and to do so within a context of broad, popular participation in the taking and carrying out of decisions.

In the Tanzanian context an appropriate pattern for legal and paralegal institutions, training and personnel might be similar to this in broad outline with communal conciliation and equitable adjudication procedures manned by part-time paraprofessionals" at the mass level; and a variety of specialized institutions and personnel at the national end of the spectrum. Complex issues of articulation will arise: of the role of assessors or jurors (who have recently been given more power relative to magistrates in primary courts); of representation for parties in disputes (now barred except for the state at primary court level and limited to lawyers, again except for the state, at other levels); of the appropriate role of specialized quasi-judicial tribunals (which have multiplied at the expense of lower court jurisdiction, though appellate jurisdiction has usually remained with the High Court); and of the proper scope for appeals against the discretionary decisions of officials, ministers and individual party office holders to judicial, conciliation or ombudsman type bodies (the last does exist in Tanzania but in practice does not reach most workers and peasants). But in the Tanzanian context, one particular ideological framework within which to grapple with such individually diverse questions can be identified.

By contrast, in a country such as Kenya, with a centralizing state, dominated by a coalition of domestic capitalist and professional sub-classes, and with a growth strategy keyed to integration into transnational capitalism as a regional sub-center, a quite different set of constraints and questions would be appropriate: if, that is, one is talking of change within the present system and not of the requirements of a different decision taking coalition with a different development strategy introduced after a revolutionary change in the system. Nevertheless, there are some types of paralegal institutions and personnel which would be consistent with the present Kenyan system: including perhaps some type of conciliation service at the community level; and certainly including personnel with the right combination of legal and economic skills for negotiating with transnational corporations. The Kenya pattern answers are likely to be of relevance more in Third World states than those relevant to Tanzania would be.

VI

The presentation of some of the ways in which political economists may look at law, legally trained personnel and the legal profession does not imply that other ways of looking at these areas are inaccurate; nor even that all elements in any (let alone all) political economic approaches are sound. Political economists are too prone to taking the standard court and bar centered roles of law and lawyers as being useful – like say those of dustmen – but also of perceiving them as neither central nor a useful area for analysis. Equally, their tendency to say that both the standard Anglo-American sociological and the standard lawyers' models of professions are reductionist and exclude almost everything that is genuinely significant about professions (as political economists define them), is in itself a form of reductionism. Finally, the use of the economic structure and production relations (sub-mode of production) as the starting point for the analysis of law and legal systems does incline toward an unduly mechanistic view of law as something to be "read off" or to an unduly cynical view of law as pure mystification designed to conceal the nakedness of economic power as exercised or mediated through the state.

These are not trivial criticisms (nor does the author claim to be immune from them simply because he sees the dangers) and they do point to the need for approaches from multiple starting points. Rather more constructively it can be noted that each of these weaknesses in political economic approach flows from a strength in tackling areas not central to, or not very satisfactorily analyzed in, legal writing on law or in much of the other social sciences' study of law. These include the critical functions of legally trained personnel in roles other than court combat; the characteristics of professions and clusters of high level manpower in technologically advanced capitalist and socialist modes of production; the necessity of relating study of the law and legal system to the underlying economic relationships.

Notes

1. The "deskilling" debate itself is confused. On the one hand deskilling is seen as reducing the average level of labor skill and therefore as a means of increasing capitalist control (e.g., by Palloix). In this version there seems to be some confusion as to what skill means – in at least the technical sense to argue that even present unskilled workers have lower levels of skill than medieval peasants or the bulk of early industrial revolution mine and mill workers appears to be empirically unsound. Equally, to argue that the factory worker today is less free and more at risk than the peasant farmer is somewhat misleading – more controlled by human institutional frames and more subject to man imposed constraints would appear a better stating of the situation. The reverse assertion that "deskilling" (deprofessionalization) is critical to liberate (e.g., by Illich and in a much subtler and more modulated form by Chairman Mao) starts from the premise that there is an existing or potential dominant professional class against whose monopolization of knowledge "deskilling" is a means of struggle.

2. Army officers may be an exception because they do have access to the power of the gun as well as of the pen. However, the reality of power distribution under military regimes is not simple. Many are

arguably dominated by classes (sub-classes) other than the army officers themselves or represent an attempt by the officers to transform themselves into a capitalist class.

3. The advocates of "value free" economic "science" are not normally political economists and even when they are – for example, Milton Friedman – tend to reject the title. Nor are their formulations in fact value free but that is a different issue.

4. This is an example of "irregular declensions". It is remarkably easy for any discipline, profession or vantage point for analyzing and ordering reality to perceive itself as central, value determining and able to develop and propound truth and to view all others as secondary, functional and apt only for serving and enforcing.

5. This is not usually the same as the Jeffersonian distinction between law and men or natural and man-made law. In any event, Jefferson was not so naively complacent as some critics assume – he believed an armed revolution every decade necessary to attain a renewed institutional synthesis, a view more a forerunner of Chairman Mao than of Milton Friedman.

6. True, neo-liberal and neo-Kenyensian political economists are prone to speak of the national interest. This is either a defense of the *status quo* (more accurately the existing trajectory of change in the *status quo*) or an assertion that there are issues on which some consensus among relevant (i.e., powerful) formations or classes is possible. The more specific the analysis, the less likely are such generalizations and the more frequent examinations of specific sub-class or formation (however titled) interests and aims.

7. True, a case can be made that the UP had no option but to seek to set in motion an irreversible process of change by using clearly lawful means. With support by about half the electorate, no control over the legislative or judicial branches and with foreign enemies waiting to insert wedges in any cracks which opened, it may not have been in any position to be more radical in its attitude to laws, legal processes and the legal system. The point is that most radical lawyers apparently did not even consider more radical options because they were ruled out by their "professional" ideology.

8. The judiciary's tendency to defer all cases *sine die* had similar effects. That tactic neither underscored a need to revise laws nor did anything to enhance anybody's respect for the law or legally trained personnel.

9. In Tanzania the private bar is probably about one sixth of legally trained personnel. The State Legal Corporation, Attorney General's Chambers, law school, legal advisors or technocrats in other institutions (e.g., in revenue and the external finance division of Treasury) and legally trained managers and administrators in roles not overtly "legal" in any traditional sense encompass at least twice as many.

10. Granted that if one is thinking of a liberation movement (e.g., SWAPO in respect of Namibia), of a counter legal system (e.g., the transitory "peoples courts" in Portugal) or of a rural parallel system which is neither lawful nor unlawful, neither positively or negatively sanctioned by the state, then the reference group of decision takers changes. But it is still critical to relate to *some* set of decision takers' goals (e.g., SWAPO's Congress or Executive, Portugese sharecroppers; an isolated peasant community).

11. Now partly but not completely satisfactorily provided by party units.

The Political Economy of Legal Professions: Toward a Framework for Comparison

I Problems of Comparative Analysis

One of the prerequisites of comparative analysis is an adequate definition of the concepts to be used. What is the law? What is a profession? And the legal profession? What do I mean by the Third World? And what are the nature and scope of the comparisons to be made?

Definition is difficult because such concepts are shaped by the very history we use them to analyse. We talk about the Third World in terms evolved from the theoretical practice of law and social science developed in the advanced capitalist countries over the past several hundred years.

There seem to be two remedies to this, the intellectual legacy of imperialism. One is to construct a general, cross-cultural, value-free language for talking about law and society. Yet attempts to provide general definitions of law, like any other social phenomenon, are seldom illuminating. They tend either to be so broad as to be virtually meaningless; or they smuggle in assumptions based on a limited number of social formations during specific periods of their history. Their function is usually in some measure ideological: to secure social acceptance of principles of legality which rise above the battles for power and material rewards fought through the medium of the law.

Alternatively one may make selective use of the historically-determined concepts already in use: avoiding the tyranny of ideas by keeping their history and ideological content in mind; choosing those which offer the greatest critical understanding both of the grammar of legal discourse and of the historical struggles for wealth and domination that are concealed in legal and social forms (for an illuminating discussion by one of the leading Marxist theoreticians of law, see Pashukanis).

What we are interested in is not law in general, but that particular normative ordering of social relations which took root during the transition to capitalism, backed by the coercive apparatus of the modern nation-state which it helps to legitimise. Modern legal systems are comparable not so much because they represent varying responses to problems of social ordering shared by *all* human societies but because they have emerged from a common historical matrix of international interaction, beginning with the flow of goods, scholars, Roman law and the law merchant in medieval Europe. (For an interesting but extremely loose discussion of this process, see Tigar and Levy.) The wholesale imposition of Western law in Asia, Africa and Latin America during the era of imperialism was but one aspect of this international process.

Even within these historical confines the concept of law is problematic. How does one analyse the custom or customary law administered in informal tribunals beyond the reach of the imposed legal framework of the modern State? What is the legal character of authoritarian rule? What would be the implications for law of the withering away of the state in socialist countries, if this ever in fact occurred? In what respects does international law have a legal character beyond the mere fact that it legitimises the *de facto* relations that exist between nation states?

The legal profession, with which this paper is concerned, is historically still more narrowly circumscribed. Of course there have been legal specialists of one kind or another in social formations from the ancient societies onwards. And sociologists have formulated general definitions of the professions derived from functionalist general theory (as self-regulating occupational communities which control socially important skills for the mutual benefit of themselves, their "clients" and "society": see particularly Carr Saunders and Wilson; Goode; and Parsons 1951 and 1954) without specifying the historical circumstances to which they apply. Nevertheless, such definitions presuppose societies which have undergone a particular *kind* of transition to capitalism in the course of which the guild-like forms of occupational control evolved in medieval Europe could be adapted to control and reproduce certain kinds of skilled labour-power in modern capitalist societies. (For more detailed critiques of the theory of the professions on similar lines to that sketched here, see Johnson, 1972 and Larson.)

Only social formations of some technological and social complexity require the specialised labour-power that professionals supply. Only where there has been substantial surplus production and where markets for commodities and labour have developed could professions succeed in organising monopolistic markets for their scarce and specialised skills and thereby acquire an increased share in the available surpluses. Only in such societies could there be a "problem" as the functionalist analysis conceives it (see particularly Parsons, 1954) of reconciling the power and material interests of the professions, their fiduciary responsibilities towards the "clients" to whom they provide their skills and their accountability to "society" as a whole. Only in societies where there was simultaneously present a well differentiated system of state administration and independent economic and social bases of support for the emerging professions, could the "solution" to this "problem" be the express delegation of powers of self-regulation by the State. Only where there was a substantial bourgeoisie able to purchase their talents and lend them political support could the professions establish their heteronomy, in other words their ability to control their own remuneration and conditions of work relatively independent of State or client control. Even though some of these conditions may have existed in a number of ancient societies, they were not all present simultaneously and did not give rise to the dialectical interrelationship between State and capital accumulation in the troubled interstices of which the modern professions arose.

Yet even advanced capitalist societies did not undergo precisely the same transitions to capitalism, still less professionalisation. In many countries of

continental Europe, the State played a more important role in the process of capital accumulation than in Britain or the USA. The social fractures opened by the French Revolution made it more difficult to bring about the fusion of archaic forms and modern functions that is especially characteristic of Britain. On the continent, a self-sufficient bourgeoisie on the one hand and independent professions on the other emerged later than in Britain and were less closely allied. Indeed, the very idea of "a" homogeneous legal profession was and still remains problematic within civil law jurisdictions, since the establishment of a single occupational community is impeded by the separation of the training and career lines of the different legal specialisms (Berlanstein; Merriman; Rueschemeyer).

But even within common law jurisdictions, where there is more interweaving of the careers of judges and advocates, of the private and the public sectors of law practice, the ideology of a professional community is punctuated by historically created divisions of labour (such as that between barrister and solicitor) and by sharp gradations in status, wealth and professional function (such as those which divide the legal profession in the USA: Berle; Carlin 1962 and 1966).

How can one then *compare* legal professions? Should one abandon the concept altogether in favour of some less historically contaminated category such as "persons in legal roles"? This is not particularly helpful, for what may be gained in generality is lost in the imprecision of historical reference. Words like "lawyer", "profession", "class" or "capitalism", which are shaped by the historical realities associated with the expansion of commodity production and the rise of the nation state, give one a better understanding of these realities than more abstract categories of analysis, such as "legal specialist", "occupational group", "stratification", or "modernization". They force us to think more clearly about what is to be included in definitions and what is to be excluded. Should one in a developing country classify family or village elders who hear disputes, judges and pleaders in customary courts, letter writers, touts, "bamboo lawyers" and other paraprofessional intermediaries as "lawyers"? The answer is clearly no, and it is no because they are the groups that the State, with the support of the "real" lawyers, the members of the organised legal profession, has progressively deprived of a role in the authoritative hearing of disputes. For some purposes, to be sure, it is useful to lump them all together with lawyers as "legal specialists". But to use categories of analysis which obscure the differences between them is to fly in the face of the realities of historical change.

Similarly with the issue whether or not there is a legal profession in socialist countries such as the USSR, Hungary or East Germany. The historical differences from Western capitalist societies are such that one might argue that the concepts of law and profession cannot be used in the same way. Nevertheless, they still retain certain features of European civil law. Many of the things a legal specialist does in socialist countries would be quite familiar to his Western counterpart. This is hardly a matter for surprise, since socialist countries arose out of the historical matrix of capitalism and retain many of the latter's social and legal forms.

In sum law, lawyers and the legal profession can be compared because they are

the product of forces of history – the accumulation and export of capital, the expansion of trade, imperial conquest, the development of an international system of nation-states, the bureaucratisation of social relationships – which increasingly operate at a world level. Nowhere more so than in the Third World, where entire legal superstructures were borrowed or imposed in order to create a frame for external economic penetration or the erection of a minimally effective nation-state. The fact that different legal systems are linked through a process of transnationalisation means that history is at the crux of many of the differences between them.

Historically specific comparisons can replace the functionalist analyses (which pervade much of the literature on professions) with theories better able to deal with critical issues of change, power and economic interest. Furthermore, they are better suited to policy prescription or political action than more abstract or “value-free” theories. The possible effects of change can be more easily identified by contrasting societies which share common historical experiences or similar economic structures; but differ in some critical respect such as major reform of the legal profession or socialisation of key sectors of the economy.

On both theoretical and practical grounds, therefore, it is with *variations* in response to *common* historical impulses that comparative analysis of legal professions in the Third World must be concerned. Take, for example, Ghana and Kenya, both described in case studies in this volume. Both were penetrated by British capital during the late nineteenth/early twentieth centuries. They share the common-law tradition and a similar kind of colonially-created bureaucratic State but there are crucial differences, particularly in their incorporation in the world economy. In Ghana, there was a rapid increase in agricultural production for export by indigenous peasants, with little foreign settlement and with foreign corporate enterprise limited to relatively few sectors (particularly the import-export trade and mining). In Kenya, European settlers dominated the modern sectors of the economy in the colonial period, measures were taken to *limit* cash-crop farming by Africans to prevent competition with Europeans and ensure them a labour supply, and external capital dominated the economy both before and after independence.

These things had important consequences, it may be argued, in terms of the rate at which the legal profession developed (earlier and with a substantial number of indigenous practitioners in Ghana; later and with a profession racially monopolised by Asians and Whites in Kenya); whose needs it catered for (indigenous bourgeoisie and Chiefs in Ghana; settlers and foreign enterprises in Kenya); the organisation of law practice (typically the individual legal entrepreneur in Ghana; the small law firm in Kenya); the ideology of the profession (outward-looking, highly politicised in Ghana; inward-looking, focussed on narrow professional interests in Kenya); and its relationship to the State (defence of civil liberties against encroachments of both colonial and post-colonial State, tendency of lawyers to move into political opposition to the government of the day in Ghana; lack of interest in defending rights, subservience in Kenya).

Further hypotheses might be developed by making internal comparisons

between different periods of Ghana's and Kenya's history. What has been the effect on the Ghanaian legal profession of the transfer of surpluses from rural production to urban spending and industrial investment carried out by successive post-independence regimes? Will the differences between the Kenyan and Ghanaian professions be reduced by changes now taking place in the former (see Chapter 6 above) including the movement of Africans into commercial farming and small business and the removal of racial restrictions on entry to law practice?

The comparisons could then be extended to questions that cannot be settled with two countries alone. Consider Tanzania where, despite the presence of settler enclaves, there was greater emphasis than in Kenya on peasant commercial farming. Why, in contrast to Ghana, was the precolonial legal profession nevertheless based on Asian and European law firms? Why was the colonial government able to exclude lawyers from cases including Africans? Was it because economic expansion based on peasant farming was less vigorous and the nascent African petty-bourgeoisie smaller and less able than in Ghana to press its demands (including representation in the courts) on the colonial government? Or because the latter had learnt from experience in West Africa the dangers of allowing the emergence of a class of African lawyers? What does Tanzania's post-colonial experience with implementing a socialist strategy of development tell us about the future of the legal profession? To what extent have efforts to increase popular participation in the administration of justice required deprofessionalisation, the exclusion of lawyers from certain categories of disputes? How difficult would it be to bring about such a process of deprofessionalisation in Ghana where the vested interests of lawyers in practice before the courts from the highest to the lowest levels are much greater? What has been the effect of the nationalisation of key sectors of the Tanzania economy on legal roles? Would the effects of similar measures in Kenya or Ghana be any different?

Now consider Colombia, where the legal profession has quite different historical origins from any of the African countries discussed above. To what extent are the strikingly divergent career patterns described by Lynch in Chapter 2 above because of a civil rather than commonlaw heritage? To what extent are the greater size and the internal stratification of the profession because the class structure to which it belongs is older and better developed? To what extent are technocratic lawyers more in evidence in large firms and government bureaucracies in Colombia than in black African countries of comparable size? How far is this because the latter are less heavily industrialised with lower levels of foreign investment? Are there nevertheless any similarities in the role of particular *sectors* of the legal profession – like those servicing the legal requirements of foreign corporations in Kenya, say, as compared with Colombia – despite the differences in the overall composition and structure of their respective legal professions?

I do not suggest that it would at this stage be feasible to carry out a truly comprehensive survey. But studies of the legal profession should be designed both to explore the sources of historical variations; and to spell out their implications for future changes. Fairly modest two or three nation comparisons would probably be

quite enough. Indeed case studies of single countries such as those presented in this volume are usually based on a number of *implicit* comparisons, and there is much to be learnt by spelling them out. How, for example, would the emergence of a local legal profession have been affected if the expansion of Ghana's economy had been based entirely on the mining of gold and diamonds, not on cocoa? Would property relations and production for export have been any different if lawyers had been totally excluded from all cases involving Africans, as happened elsewhere in British Africa? Would a racially segmented legal profession have developed in Malaysia if it had not been colonial policy to give special treatment to particular racial groups?

How would the Colombian profession be different if the codifications of the mid- and late-nineteenth century had not occurred? And if development had been based to a greater extent on local capital accumulation than on foreign investment? Would the nationalisations in Tanzania have been more difficult to implement if there had been a strong local Bar (rather than a weak Asian and expatriate one) willing to litigate over them in the courts? Have these nationalisations in fact made much difference to the present structure of the Tanzanian profession?

One of the major obstacles to such analysis is the shortage of relevant empirical material, a shortage which this book is intended to remedy. On the whole the analysis of underdevelopment has ignored the role the legal system plays, whether as a superstructural frame for external economic penetration or for the creation of an effective nation-state. And legal scholarship has been largely concerned with the law in the courts, the legislatures and the books rather than as an integral part of dependence and under-development.

The purpose of this chapter, therefore, is to pose questions and construct an inventory of variables comparative analysis might consider further – rather than summarise what little is known already. Although I have attempted to do this as systematically as I can, I do not wish to suggest it would be feasible for a particular project to research all or even many of them at once and certainly not world-wide. Empirical research is for good reasons piecemeal and selective. Yet it is well to keep in mind the questions which *could* be raised if the political economy of the legal profession were more comprehensively treated.

II Imperialism and the Historical Formation of Law and the Legal Profession

1. The Transfer of Legal Ideology

Ever since Roman times the development of law has been truly international in scope: rooted in but transcending the nation-state and local jurisdictions; and associated with the expansion of first trade and ultimately capital on a world scale. Thus, for example, the association between Roman law, trade and *imperium*; the connection between Islamic law, trade and the military *jihads* which pushed forward the frontiers of the Moslem Empires; the transnationalisation of Roman law and the

law merchant as a result of the increasing mobility of goods, merchants and scholars in medieval Europe; and the wholesale imposition of law (along with other attributes of State power and capitalist rationality) during the era of Western imperialism.

To be sure, international law itself has always rested on shaky foundations, depending heavily for its enforcement upon the decisions of individual States and sometimes appearing to be little more than a pale reflection of international power politics. Nevertheless the States which form the building blocks of this precarious world order are themselves the product of international trade, capital accumulation and conflict; and have emerged with many uniform structural characteristics. Nowhere is this uniformity better documented than in their legal systems, which almost without exception derive from one or more of the four major systems of legal ideology (common law, civil law, Islamic law and socialist legality) although these are often blended with purely local sources of law (Hooker).

In Europe this homogenisation of legal ideology arose slowly out of an economic and political interaction between States that were being formed at more or less the same time. In the Third World on the other hand legal ideologies were directly imposed by internationally dominant States and their ruling classes. The imperialist powers indeed created the very form of the colonial State, its boundaries, its bureaucratic administration and its legal framework. It is from this historical starting point, therefore, that analysis of Third World legal professions must begin.

A superficially attractive method of comparison would be to analyse the legal roles which typify each system of transferred law, as in Smith's (1965) discussion of the consequences of transferring French, British and Islamic legal models to Africa. Nevertheless this does not help explain *why* legal cultures and legal role paradigms have been internationally so limited. It obscures important differences *within* each tradition, as for example between American and British common law, or for that matter between "French" civil law in France and the Ivory Coast. And it ignores the differences in function, and in the struggles for power, wealth or recognition *behind* superficially similar legal structures and ideologies.

If it be true that "shared" legal ideas mask underlying differences in the actual social uses of the law, then it might make sense to hold these ideas constant, so to speak, and compare societies and their legal professions *within* one or other of the major legal traditions. Nevertheless this would still assume that legal ideology *per se* is an important and analytically distinct variable. Further, the comparison would not mean very much without an adequate historical understanding of the *relationships between* the societies "sharing" a common set of legal norms. To take an obvious example, the common law "transferred" to colonial Africa was shorn of many of its most intrinsic features (Seidman), including the protection of individual rights and the benefits of the welfare State. Hence one may question whether it could be regarded as the "same" as British common law even in terms of formal content, still more in terms of its real purpose, namely to establish British colonial rule.

But why did the metropolitan countries feel the need to legitimise their rule in

the form of law? Could one argue that the ideological function of law has been to obscure the inequality *between* societies operating within the same international framework of legal ideology? How precisely was the export of legal models from each colonial metropolis associated with the export of capital and the establishment of domination in other regions of the world? How did international law legitimise this process?

Some of these issues could be clarified by contrasting the international transmission of common and civil law on the one hand and Islamic law on the other. Why was the latter not associated in the same way as the former to the international expansion of capital? Was it because Islamic law and religion were incompatible with the capitalist ethic, or merely as Rodinson (1974) argues because Islamic societies were not those in which, for various *other* reasons the initial development of capitalist production took place?

In some Islamic societies, such as Turkey, Iran, Malaysia or Egypt, Western legal and political norms displaced Islam as the ideology of State power, but in others, like Saudi Arabia, it did not. Even where Islam was temporarily displaced it often gained strength as an anti-colonial ideology, like in the Sudan (Chapter 8), or as a basis for opposition to the overwhelming power of a secular modernizing State. Islamic law is interesting precisely because it has both functioned as a State ideology and yet has been used in many Islamic societies to mobilise opposition against those who have controlled the modern State.

2. Historical Variation in the Formation of Nation-states

Although legal ideologies have been imposed worldwide in each society the process has taken a different historical course. In Table 1, very broad classifications are made on the assumption that the two most critical differences are:

First, variations in the process of state formation: between the core European nation-states (e.g., Britain and France); those which were reconstructed on the basis of European or Islamic models to meet the economic and military challenge of capitalist expansion (e.g., Japan, Turkey, Iran, Egypt, Saudi Arabia); States established through European settlement (as in the Americas and Australasia); those imposed by direct colonial domination over a large indigenous population; and those which (in subsequent historical phases) were reconstructed as a consequence of socialist revolutions.

And second, the main international inequalities which have arisen behind the common legal-political form of theoretically equal nation-states: between those which emerged by virtue of economic expansion and *force majeure* as the main sources of capital accumulation, power and ideology; and those that did not.

Of course such a classification offers little in the way of an *explanation* of the dynamics of the changes producing such patterns. Furthermore there are historical variations within each category, and it is difficult to fit every case neatly in one box. It is enough, however, if the classification can help show the dangers of generalising. For much of the existing literature on the legal profession is based on

a very limited range of historical experience, for the most part that of the major capitalist countries and within these confines largely that of the Anglo-American rather than continental paradigms of professional organisation.

3. Decolonisation and Legal Dependence

Third World legal systems (basically those categorised in boxes 6–8 of the Table) are almost all based on the imposition or reception of the legal ideologies of the dominant or previously dominant world powers. Yet decolonisation was symbolically marked by rupturing the legal links binding metropolis and former colony; and the autonomy of each national jurisdiction is closely identified with the history of a particular State. Hence they closely reflect the contradictions between theoretically independent nation-states and the international forces which account for their creation and continued existence. These contradictions require careful assessment at three levels.

(i) How much is professionalisation still reproduced by external links (Johnson and Caygill, 1972)? Does it result from the retention of historic ties, such as the training of law reporters or legal draftsmen in the excolonial metropolis, the use of British “external examiners” in African law schools, or transnational professional associations like the Commonwealth Legal Bureau? Or has it been associated with new transnational links with bodies such as the International Legal Center or the International Commission of Jurists? Are international professional ties as important for lawyers as for other professions, like doctors or agronomists, whose work is more closely tied to the transfer of technology from advanced countries; or like accountants, who often work for international firms; or, like engineers and architects, who tend to share both characteristics? Are there specialised groups of lawyers, such as the local counsel of international firms, or the government lawyers who negotiate with such firms, whose skills and training make a real difference to political or economic dependence?

(ii) How much is the ascendance of the legal profession sustained by the use of an ex-colonial language in the courts; by the retention of imported metropolitan law through codes or *stare decisis*; or by the defence of long-guarded professional privileges and symbols, like wigs and gowns? Does such a legacy make a real difference to how the legal system works and whom it benefits?

(iii) Under what conditions does the decolonisation of the legal system and profession make a difference in the decolonisation of other economic and social relations? Can one meaningfully distinguish on the one hand between countries which have confined their attempts to develop a truly “national” legal system to the level of legal ideology alone; and those on the other hand that like Tanzania (see DuBow; Ghai, 1975; and Rwelamira in Chapter 7 above) have taken more sweeping measures, such as using a local language in the courts, deprofessionalising legal roles and developing alternative mechanisms of dispute settlement outside the courts? How far is changing the legal system possible without a broader restructuring of the

economy and society of the kind attempted in Tanzania since the Arusha Declaration? How much success are similar attempts to democratise the legal system such as that undertaken in Papua New Guinea, (explicitly based on the Tanzanian model) likely to have if there is not a corresponding attack on the foundations of a capitalist economy? To what extent are even the Tanzanian reforms open to the objection (Shivji; Saul) that these changes indicate a shift in the locus of class power – towards a bureaucratic bourgeoisie based on State rather than private capital – but not a fundamental alteration in class relationships?

4. Domination and Legal Pluralism

What is often called legal pluralism arises from the inclusion of precapitalist social formations within the framework of the modern state; imposition of law on the one hand and a diversity of local legal cultures on the other. (For one of the classical expositions of the concept of pluralism see Furnivall; and for its application to legal systems see Smith; Hooker.) The legal profession is often said to reflect this pluralism in its composition and structure (see Chapters 6, 9 and 10 above on Kenya, the Sudan and Malaysia).

However pluralism cannot be analysed in terms of the diversity in legal ideologies and structures alone. This would be to ignore the use of such ideologies to legitimate economic exploitation and political subordination. Three basic situations can be distinguished, each with different consequences for the use of law and the role of lawyers.

(i) First, *racial or ritual domination*, which has been most obvious in societies created by the appropriation of territory and resources by settlers from Europe; though it was also a feature of all other colonial societies (Furnivall) and indeed of some pre-colonial societies. A distinction has to be made between societies, like South Africa or colonial Kenya in which the dominant group, the sociological majority (Balandier), is or was a numerical minority; and those like Sri Lanka or Israel in which a dominant majority faces resurgent minorities. In the former, one may argue, the prime function of law is to protect the privileges of the dominant group; and equality before the law is but a marginal note, the administration of justice being of necessity particularly tightly integrated into the repressive apparatus of the State. And yet even in this situation there is a pervasive contradiction between the use of law to control and exploit the majority (e.g., through pass laws, prison without trial, censorship or labour laws) and the need to legitimise domination, to appear to mediate between oppressors and oppressed under a framework of legal rules accepted (or at least not actively contested) by both. The role of lawyers in such societies is particularly interesting because the contradictions present in one form or another in most legal systems (see section VII) between their roles as servants of the State, as mediators between the ruling class and the ruled, and as occasional champions of the oppressed are particularly sharply posed.

Where settlers were or became numerically as well as sociologically dominant, the converse has usually obtained: equality before the law to bring minorities within

the framework of the State; with special treatment of these minorities a marginal note. Yet there remain considerable variations for comparative analysis to explore. Was the dominated minority exterminated like the Indians in large areas of North and South America, displaced like the Palestinians, or assimilated like the Indians and blacks in Latin America (in theory if not always in practice)? Is it like the Australian aborigines numerically and socially weak, or is it like the Palestinians able to make its presence felt? How has its labour power been exploited? How far has its position been defined by a separate legal regime like that applied to Indians in the USA, Aborigines in Australia or the Palestinians in Israel? Do such legal provisions protect the minority, like some present-day US Indian legislation, or discriminate against it as in Israel?

(ii) Second, *ethnic or regional pluralism*, based on diversities of language, tribe, religion, locality etc., existing within (rather than imposed upon) a particular nation-state. Neither these diversities nor the legal pluralism which may result from them can, however, be analysed as "givens" (Geertz) which arise independently of the conditions of economic exploitation and the political history of the societies in question. In most post-colonial nations, for example, where such pluralism is endemic, it arises only partly from the "artificial" framework of the State, bringing within it previously unrelated groups. Divisions are also sharpened because of uneven development between regions, classes and social groups; and because colonial and post-colonial ruling classes have often manipulated ethnic loyalties to win support and obscure the colonial or class character of their rule. As the case studies of Sudan and Malaysia in this volume demonstrate, different legal traditions in a plural society do not simply coexist, but are an ideological representation of real social struggles; which in turn have tended to be reflected in the segmentation of the legal profession itself into specialised (and in the case of Malaysia racially compartmentalised) groups.

(iii) Third, *class domination* as it is expressed in the gap between the legality espoused by the State (and hence the dominant or ruling classes as well as the legal profession) and the legal norms and social practices of those (the mass of the population) at or beyond the margins of State control. Underlying this is, of course, a profoundly contradictory process. Several scholars have emphasised the increasing penetration of the State, "the modernisation of law", the expropriation of "traditional" or "customary" law and its transformation into a strand of official or state legality. (See particularly Galanter 1966 and 1968; and the recantation made in Trubeck and Galanter.) Yet it is also argued with as much cogency (sometimes indeed by the same persons) that there are limits to the law's ability to effect basic alternations in the norms and social *mores* by which people regulate their lives (see for example Galanter, 1974; Pool and Starr; or Beckstrom).

Neither one view nor the other is wholly correct, for they portray different aspects of a single struggle between the classes which create the prevailing definitions of law at the centre and those they seek to incorporate under them at the periphery. The legal profession, as the guardian of the dominant forms of State legality cannot but be deeply involved in such a struggle.

Table 1. *Historical Formation of States, Legal Systems and Legal Professions*

PROCESS OF STATE FORMATION	RELATION TO INTERNATIONAL INEQUALITIES OPENED UP BY CAPITALIST DEVELOPMENT	
<i>A. European Nation-States</i>	<i>A. Centres of Accumulation and Political Expansion</i>	<i>B. Peripheries</i>
State formed through effect of capitalism on the historical matrix of feudalism.	<p>1. Early Capitalist Centres:</p> <p>Legal profession formed by process of professionalisation associated with commodity production, differentiation of legal system, increase in power of State and transformation of its functions as it responded to capitalist production, emergence of new social classes and subsequent development of welfare state. However, major differences exist in role of State, smoothness of historical transformation and organisation of legal roles within different capitalist legal ideologies.</p>	<p>5. Early Capitalist Failures</p> <p>Professionalisation of kind that occurred elsewhere blocked by failure of capitalist expansion, ossification and disintegration of absolutist monarchy, and ultimate emergence of corporatist authoritarian forms or rule (e.g., Franco regime in Spain, Salazar in Portugal). Lawyers emerged initially as bureaucrats and only later and secondarily as private practitioners, following the delayed emergence of a bourgeoisie and its incorporation in the corporatist structure of the State. However, a degree of professional autonomy has existed and this has increased to the extent that capitalist re-development has taken place as in presentday Spain.</p>
<i>B. Late Developing States</i>	<i>2. Late-Developing Capitalist Centres:</i>	<i>6. Late-Developing Capitalist Peripheries:</i>
State crystallised and economy developed in response to economic and military challenge of earlier developers.	<p>State and legal superstructures reconstructed on European models (e.g., Meiji Japan) and actively used to promote rapid capitalist development. Formation of legal profession part of this process of state formation and external borrowing. Consequently legal roles bureaucratised and their autonomy circumscribed, at least until later phases of capitalist development.</p>	<p>Piecemeal reconstruction of state and legal superstructures following collapse of precapitalist production and of state under external pressure (e.g., Egypt after collapse of Ottoman Empire: Ziaadeh). Paradoxically, however, development of class of legal practitioners favoured by weakness of state, conflict over property rights and demands by foreign capital that disputes be adjudicated according to "their" (i.e., Western) law and procedure.</p>

C. States of Settlement

States created by settlement of citizens of Europe at periphery, taking with them laws and institutions of home country.

3. New World Capitalist Centres:

State and legal superstructures taken with them by settlers from Europe, providing institutional frame for self-generating capitalist expansion and ultimately a charter for formation of new States independent of former metropolis (e.g., USA, Australia etc.). Professionalisation analogous to core capitalist European countries, with some critical differences e.g., less central role of the State, less use of feudal forms to establish monopolistic boundaries for the control of professional work.

7. New World Capitalist Peripheries:

State and legal superstructures exported with settlers, but self-generating capitalist expansion blocked, partly by a parasitic metropolis (Spain or Portugal) and partly by the expansion of capital from elsewhere (e.g., the penetration of Latin America by European and American capital after independence). After independence new codifications of law undertaken on European models (sometimes more a matter of form than substance) both to "modernise" state apparatus and to provide legal frame for expansion of (foreign) capital. Tendency for legal profession to be traditionalistic and subservient to corporatist State.

D. Post-Colonial States

States created by imposition of metropolitan laws and institutions to establish a framework of domination over non-European peoples.

8. Post-Colonial Capitalist Peripheries:

States and metropolitan laws initially imposed to provide political-administrative framework for trade, capital and economic exploitation. Self-generating capitalist expansion blocked by colonial regulation and (after formal independence) by nature of neocolonial links. Depending upon *particular* patterns of colonial regulation and economic exploitation, legal profession emerges as intermediary between groups and classes called into being by the process of economic expansion and the colonial State. Professionalisation heavily conditioned by state sponsorship and control (Johnson, 1973). Structural characteristics of colonialism (bureaucratism, authoritarianism, etc.) often recur in post-colonial state, with corresponding implications for development of legal profession and difficulty in asserting its autonomy.

PROCESS OF STATE FORMATION	RELATION TO INTERNATIONAL INEQUALITIES OPENED UP BY CAPITALIST DEVELOPMENT	
<i>E. Post-Revolutionary States</i> States formed or reconstructed through socialist revolutions.	4. Socialist Centres: State reconstructed (rather than smashed); bourgeois law and the legal profession displaced from their privileged position. Controversy over nature of socialist legality and variations in extent to which "legal" rather than other techniques of social ordering retained. Lawyers regarded as members of bourgeoisie, and deprived of ability to practice privately in a state-controlled economy. Legal (or analogous) experts retained in specialised roles in state bureaucracies, though not usually recognised as belonging to a <i>single</i> occupation, still less an organised "profession".	9. Socialist Peripheries and ex-Peripheries: Similar to other revolutionary states in reconstruction of State apparatus legal roles. However deprofessionalisation sometimes (but not always: compare China with, say Algeria) carried further because of difference in character of revolutionary transformation – its agrarian rather than industrial base, the popular mobilisation required for long periods of revolutionary war. Thus distrust of legal-bureaucratic methods of social ordering (red vs. expert) and adoption of at least the rhetoric and sometimes the practice of popular justice.

III The Economic Base of Law Practice

1. Interrelation between Law Practice and Capitalist Production

In the preceding section it was suggested that the development and transfer of law was closely associated with the accumulation and internationalisation of capital. Yet what precisely is the nature of the relationship between legal work and the economy? Lawyers do not themselves engage in material production. Nevertheless they play a role in the mobilisation and redistribution of the surpluses created by production and this in turn shapes the organisation of law practice, indeed influences whether there is a lawyer class at all. To put this very simply, the mode of production affects the nature of the legal services required, and together they shape the relations of law practice, including the markets for legal skills and the organisation of legal work.

In a capitalist society the output of legal services is related to capitalist production at three levels. First, in creating or sustaining the myths or ideologies – such as formal equality before the law, freedom to contract and to be bound by contract and so forth – by which both capitalist relations of production and the State which assures the cohesion of capitalist order as a whole are legitimised. Second, in settling disputes by reference to legal norms which establish the parameters for capitalist property and production, such as commercial or corporation law, land law or indeed large sections of criminal law. And third, in providing specific skills in putting

together social and economic relationships; for example processing commercial disputes, negotiating contracts or international agreements, or providing suitable legal frameworks for the operation of industrial firms.

Lawyers may in sum be regarded as productive in the sense that they facilitate the appropriation of the surplus labour of others under capitalist relations of production. Yet it is virtually impossible to say *how* productive. For the complexities of a country's constitutional regime, of its system of property ownership, of its laws and regulations, which lawyers may help to unravel, also in a sense embody the results of their previous work. This means they are uniquely qualified to hedge the supply of their services with market imperfections which both define the market for their skills and buttress their social position.

What can be said, however, is that by virtue of the close connection between their work and the past and present operations of capital, lawyers in capitalist societies are (though with some exceptions) historically and structurally members of the bourgeoisie.

Yet in much the same way the capital itself has been restructured in the process of accumulation, so too has law practice. One obvious change, to which Berle (1933) first called attention has been the tendency towards practice in large law firms (Smigel) and inside the large capitalist corporations and state enterprises themselves. Hence, at least a proportion of the legal profession might be regarded as a privileged kind of productive *labour*, of the kind from which capitalists normally appropriate surplus value (Marx, 1963).

However this has varied greatly from one legal task to the next. In the USA, for example, there is almost endless segmentation between the different branches of legal work: the corporation lawyers, the lawyers working for Wall Street law firms, the middle-sized provincial firms handling the transactions of the smaller corporations, individual "general practitioners", Washington lawyer-lobbyists, welfare lawyers and those working in the large Federal and State bureaucracies. Yet at the same time the dominance of monopoly capital in the economy is reflected in the disproportionate influence within the profession of the lawyers working in the large law firms (Berle, Carlin 1966, Auerbach).

There are also important differences between the major capitalist countries. The legal tasks carried out in the USA by a partner in a large Wall Street law firm may also be performed by a small partnership in Australia, by a lawyer working as an employee in a West German industrial concern, or by an individual English barrister or even by a partner in a firm of City accountants. (For a systematic analysis of the factors producing variations in the structure of law practice in two major capitalist countries, the USA and West Germany, despite similar economic structures see Rueschemeyer, 1973.)

This degree of structural indeterminacy, the fact that there is no *necessary* relation between the organisational form of capital and that of law practice considerably complicates the task of comparative analysis. In Chapter 11, Green goes so far as to argue that it is of relatively little interest how and by whom lawyers' work is controlled, since this often does not make much difference to the final output.

However one reason for this is that the ideology of lawyers, their functions in capitalist production and their ability to defend their collective interests make it easier for them to assure control over their work even *within* the corporations and bureaucracies of the modern capitalist order as well as in independent practice outside them.

2. Agrarian Structures and Legal Intermediaries

Almost all Third World countries entered the world economy as primary producers, with the majority of their populations working in the agricultural or mineral-extracting sectors of the economy. The development and activities of legal intermediaries have therefore been greatly influenced by the way rents have been extracted and primary products produced and traded. In the case study of Ghana presented in Chapter 4, I argued that there was a direct link between the production of cocoa for the world market and the development of a lawyer class. To be sure this is only one example and may be a result of special historical and economic circumstances. Further comparative analysis would be required to ascertain whether the legal profession has developed in similar ways in other countries whose economies have also depended on peasant production of cash crops for the world market.

In Table 2 an attempt is made to set forth some of the more obvious variations in agrarian structure which might influence lawyers' functions. The categorisations are gross and open to criticism. However they are merely intended to illustrate the possible implications of differing agrarian structures for the development of a legal profession. In most countries the actual situation is more complex, as different modes of production emerging at different historical periods have been juxtaposed, sometimes being associated with different crops (like the slow displacement of sugar by coffee in Brazil) but sometimes with the same (as in smallholder and estate production of rubber in Malaysia).

What are the implications of these variations for the development and role of the legal profession? Table 2 is based on the following hypotheses. First that law has often been used to reconstruct precapitalist relations of production (categories 1-4 of Table 2). Second that commodity production has generally increased disputes over the control and ownership of productive resources, including land. And third, that it has generated surpluses which could be spent, among other things, on litigation and lawyers. However, the particular way in which productive resources have been controlled and surpluses extracted have led to the major differences in the use of courts and intermediaries described in the Table.

What impact has the growth of the legal profession had in its turn upon the expansion of the market and of capital in rural areas? There are two competing hypotheses that one might consider. The first is that legal activity has tended to institutionalise the relations of production that are required for the expansion of rural capital. Further, it has contributed to the accumulation of capital in that it is on the whole those who already have surpluses available for litigation who have best been able to take advantage of the legal system.

On the other hand, it may equally well be argued that not only have lawyers been unproductive, because they have not contributed directly to agricultural output themselves; but also that they have been parasitical in the sense that the litigation over rural property has actually *diminished* the surpluses available for other uses. For litigation may well have helped to protect outmoded relations of production and concentrate surpluses in the hands of those (like absentee landlords or lawyers themselves) who do not make productive use of them. Thus a correlation between the expansion of capitalism in the agricultural sector on the one hand, and an increase in litigation and the size of the lawyer class on the other, by no means implies that the latter is in any sense *required* for the former.

Analysis of the way lawyers reproduce agrarian structures would also enable one to draw some implications for agrarian reform. They are probably best at rationalising existing modes of production: for example bringing about improvements in security of tenure or facilitating credit and marketing arrangements. Programmes of large-scale redistribution of land and productive resources are much more problematic, both because such programmes are prone to legal loopholes and because those who would lose most by redistribution are best able to afford legal experts to make use of such loopholes. There is a large literature on the difficulty of implementing land reform (on Asia see the summary by Joshi and on Latin America see Lehmann) which illustrates many ways lawyers can thwart the overtly stated objective of legislation. To be sure, one cannot put all the blame on them, since all they do is to argue the case of economically dominant groups before the courts. Moreover those who legislate land reforms do not always intend them to succeed. For the object (Feder) may equally be to buy off agrarian discontent in time of crisis or to obtain foreign economic assistance when schemes such as the Alliance for Progress in Latin America make it contingent upon reform.

To be sure, one can conceive of circumstances in which lawyers could make a living by litigating on behalf of peasants and small rural capitalists, thus enabling them to benefit from land redistribution programmes (Lipton). But this assumes that peasants would in fact be able to organise themselves enough to litigate; and that they would not be swamped by the legal expertise and social pressures their landlords could muster. Large-scale socialisation of land could succeed only if the courts' powers to review legislation were limited and the deployment of legal expertise controlled by the State.

3. Legal Structures of Dependent Capitalism

Despite industrialisation and "development", law practice in Third World countries continues to be deeply influenced by their relationships with the world economy. In Table 3 there is a somewhat schematic typology, which summarises a number of hypotheses about possible relations between submodes of production, the kinds of integration with the world economy they represent, forms of adjudication and the organisation of legal work. These hypotheses can only be a starting point, however, as they use static categories to portray historical changes through which

Table 2. *Agrarian Commodity Production and the use of Legal Intermediaries*

Agrarian Sub-Mode of Production	Control of Means of Production and Organisation of work	Appropriation of Surplus and/or Rents	Nature of Disputes and Where Settled	Development and Role of Legal Intermediaries	Nature of Likely Agrarian Reforms and Potential Role of Lawyers in Them
1. Peasant, e.g., colonial Ghana and Tanzania (Chapters 4 and 7 above).	Land owned by family or community, with use controlled by former. Production on small scale, primarily through family's appropriation of own labour power. However hired labour used in the more commercialised peasant economies.	Surpluses generated by sale of commodities in world market provide profits for foreign trading monopolies and taxes for State. Remainder of surpluses retained for luxury consumption of wealthier peasants and rural bourgeoisie; or reinvested in land, labour and litigation.	Litigation about boundaries, control and use of land in both customary institutions and formal courts. Tendency (partly compensated by equalising mechanisms of peasant society) for litigation in courts to consolidate property rights of emerging rural bourgeoisie, e.g., richer peasants, chiefs, traders etc.	Growing use of paid intermediaries — including both "bush" and "bamboo" lawyers and trained professional advocates (except where expressly excluded by State as, e.g., in Tanzania). Some investment of surpluses in legal education for sons of entrepreneurs and rural bourgeoisie.	Either (i) measures facilitating accumulation and large-scale production: individual tenure, consolidation of holdings, improvement of credit mechanisms, etc. Or (ii) collectivisation through, e.g., cooperatives, "ujamaa" villages, etc. Lawyers likely to be involved in (i) but to be made less relevant by (ii).
2. Tax-rent, e.g., eighteenth and nineteenth century India (Cohn; Whitcomb) or Egypt (Ziadah).	Tax-farmers have rights to collect taxes with many of the incidents of ownership e.g., ability to dispose of tax-collecting rights, power to eject for non-payment, etc. However use of land controlled by peasants. Symbiosis between taxfarming/landlord class and State, which relies on it to extract resources.	Surpluses in cash or kind extracted directly by tax-farmers; partly for own consumption and debt payments; and partly passed on to State to finance administration or to remit to colonial metropolis.	Disputes arising about tax-farmer — tenant relations, rural indebtedness and ownership and boundaries of land. Settled primarily by recourse to courts. Tendency of litigation to consolidate rights and resources of tax-farming and money lending classes.	As above, with concentration of wealth providing stronger incentives for lawyer class to articulate rural propertied interests.	Either (i) marginal adjustments, e.g., measures giving greater security of tenure to taxpayer/tenant, or to reduce rural indebtedness, Or (ii) Tax reform, separating tax system from extraction of rents by tax-farming class (though often in effect converting the latter into landlord class instead). Lawyers play role both in implementing and resisting reform, depending on their clientele.

<p>3. Landlord-Tenant, e.g., late nineteenth and early twentieth century India (Januzzi) and Sudan (Chapter 8 above).</p>	<p>Land owned by landlords, production usually on a small scale by peasant farmers.</p>	<p>Rents extracted by landlords in different forms, e.g., under sharecropping arrangements, through payment of cash rents, etc. Used for luxury consumption, payment of debts, taxation, etc.</p>	<p>Disputes arising between members of landlord class concerning boundaries, ownership and succession to landed property; between landlords and foreclosing moneylenders; and to some extent between landlords and tenants. Tendency of courts to consolidate rights of landlords and creditors vis à vis tenants.</p>	<p>As above.</p>	<p>Reforms vary in scope: (i) marginal improvements like security of tenure for tenants, access to credit on favourable terms, reduction of indebtedness (ii) land redistribution or (iii) restructuring of rural property relations through, e.g., cooperatives or collective ownership. Lawyers able to facilitate (i) to use courts to prevent or lessen effects of (ii) and may be made irrelevant by (iii).</p>
<p>4. Latifundist, e.g., seventeenth to nineteenth century Colombia or Venezuela (Chapters 2 and 3 above).</p>	<p>Land owned by latifundists who farm the major part themselves, using compulsory or semi-compulsory peasant labour (ranging from outright <i>corvée</i> to paid labour under conditions amounting to compulsion). Remaining land leased or given to the peasants for their own use.</p>	<p>Latifundists acquire surplus by direct appropriation of labour power of peasants and use them for their own consumption, debts, taxation, litigation, etc.</p>	<p>Latifundists regulate disputes both directly by their local power and patronage and indirectly through their control of the State machinery. Some (limited) scope for court adjudication of disputes about ownership of and succession to latifundist property.</p>	<p>Economic incentives for development of legal intermediaries relatively weak. Tendency of lawyers (or rather jurists: see Chapter 2 above) to emerge in first instance as servants of bureaucratic State; and insofar as they do become private practitioners to be dependent on powerful patrons within the latifundist class.</p>	<p>Either (i) measures encouraging transformation of latifundia into full scale capitalist enterprises based on wage labour released from feudal restrictions or (ii) measures of land redistribution, restructuring of rural property relations. Lawyers likely to be employed to implement (i) but to resist (ii).</p>

Agrarian Sub-Mode of Production	Control of Means of Production and Organisation of work	Appropriation of Surplus and/or Rents	Nature of Disputes and Where Settled	Development and Role of Legal Intermediaries	Nature of Likely Agrarian reforms and Potential Role of Lawyers in Them
5. Capitalist Agriculture, e.g., Kenya and Malaysia (Chapters 6 and 9 above).	Land owned and production organised by employment of agricultural wage labour hired in the market. State often plays active role in creating wage labour force.	Surpluses appropriated from capitalist production exploiting the labour power of a rural proletariat and used for reinvestment, remission of profits to metropolis and taxation.	Disputes about control over and transactions entered into by agrarian enterprises settled through negotiation or by the courts. Disputes between capital and labour settled through collective bargaining, strikes, lock-outs, etc., sometimes mediated by direct state intervention.	Development of small but organised legal profession, largely serving interests of capitalist concerns. However it sometimes contains small deviant groups, e.g., of labour lawyers, criminal lawyers, etc.	Possible reform measures range from (i) increase in local participation in ownership of foreign plantations and estate to (ii) nationalisation of these by the State, through to (iii) direct control of production by the labour force itself.

Table 3. *Economic Base of Legal Roles*

(1) <i>Mode or Sub-Mode of Production</i>	(2) <i>Integration with World Economy</i>	(3) <i>Functions of State</i>	(4) <i>Legal Tasks and Functions</i>	(5) <i>Forms of Adjudication etc.</i>	(6) <i>Organisation of Law Practice</i>
<i>Pre-capitalist</i>	Little except luxuries and political goods (e.g., arms) necessary for reproduction of traditional political and economic structures.	Political organisation and functions in precapitalist formations varies greatly from "stateless" societies to relatively centralised states.	Social control within framework of custom or traditional law.	Great variety of ways of dealing with disputes, ranging from loose forms of mediation or arbitration through to formal procedures for adjudication.	Varying. Usually "legal" roles not distinct from other social roles. But in more complex societies legal specialists with some training; though not a differentiated class of lawyers offering their services on the market.
<i>Colonial</i>	Through circulation of goods (export-import trade) and appropriation of rent by metropolis. Variety of ways of organising production though all require the restructuring of precapitalist relations for commodity production for world market.	(i) Establishment of hegemony of modernizing or colonial ruling classes (Table 1, boxes 6, 8, & 8). (ii) Incorporation of precapitalist social formations within framework of State. (iii) Direct and indirect assistance to exploitation/accumulation (e.g., forced labour; encouragement of cash crop production).	Land law and other work connected with reconstruction of rural property relations, making use both of "customary" or precapitalist law and imposed law. Some work connected with circulation (contract, debt, insurance, etc.) and urban growth (criminal law, etc.)	Traditional methods of adjudication and settlement of disputes incorporated within imposed framework of differentiated, hierarchical modern courts.	Proliferation of legal intermediaries: vakils, letter-writers, "bush" or "bamboo" lawyers, etc. Beginnings of a class of professional lawyers with formal training making services available on the market and specialising in rural property and commercial transactions. Small scale "craft" organisation of practice reflecting production structure.

(1) Mode or Sub-Mode of Production	(2) Integration with World Economy	(3) Functions of State	(4) Legal Tasks and Functions	(5) Forms of Adjudication etc	(6) Organisation of Law Practice
<i>Capitalist</i>	Through circulation of goods (export-import trade), inflow of investment, outflow of profits. Increasing proportion of goods exported and of those traded in domestic market produced by wage labour. Capitalist production increased both through domestic accumulation and through foreign investment.	(i) Basic law and order. (ii) Nightwatchman state with sufficient intervention to ensure operation of market and inflow of capital.	Law work associated with circulation and capitalist production (contract, debt, insurance, company law, labour law) increases relative to rural property law which remains, however, important. Increase in legal problems associated with social change and urban growth (e.g., family law, urban law, criminal law, etc.).	Hierarchy of differentiated modern courts which increasingly displace traditional methods of adjudication even at lower levels. The latter only survive outside the formal court system.	Independent legal practitioners and small firms offering services on market, specialising in commercial, corporate and property transactions. Other legal intermediaries remain, but pushed further to the periphery of the legal system by the process of "professionalisation".
<i>Monopoly capitalist</i>	Through inflow of foreign investment and technology and outflow of profits; trade and circulation increasingly shaped by requirements of monopoly capital. Domestic accumulation is blocked and economy becomes increasingly dependent on capitalist centres for capital, technology, information, etc.	(i) Basic law and order; repression of increasing discontent against dominant classes. (ii) Intervention to ensure profitability of investment, e.g., by holding down wages or rural incomes. (iii) "Management" of increasingly complex economy.	Company and commercial law; legal problems of transnational economic relations. Problems of large scale industrial/urban growth (urban planning law, labour and industrial law, white collar crime, etc.) and of increasing political and social conflict (problems of squatter settlements, increased urban crime, use of law as instrument of political repression).	Hierarchy of differentiated modern courts. Often bypassed, however, by bureaucratic relations, negotiations out of court, personal contacts, corruption, exercise of economic and political power, international pressures, etc.	Increasing number of lawyers working in larger scale law firms or directly for MNCs and state bureaucracies. Tendency for stratification to arise between them and lawyers in the traditional areas of law practice which retain small scale craft organisation and become more peripheral in terms of earning power, status and political influence.

State capitalist

Investment and trade in theory controlled by state but in practice still dependent on inflows of foreign capital, technology, information and trade. Symbiosis of State and monopoly capital, the latter having shifted the locus of its profit taking from direct ownership to supplying goods, technology, management services, etc.	<p>(i) Basic law and order, securing and increasing power of state.</p> <p>(ii) Intervention to assure "national" control of economy and redefine relations with monopoly capital.</p> <p>(iii) Planning and management of economy.</p>	Legal problems of control and management of state enterprises; and of transnational economic relations. Problems associated with industrial/urban growth and political/social conflict similar to those generated under monopoly capitalism.	Hierarchy of differentiated modern courts. Bureaucratic relations, personal contacts, political processes still more important than under monopoly capital.	Lawyers increasingly concentrated in government bureaucracies carrying out specialised administrative as well as purely legal functions. Private practitioners remain, but for the most part in economically more marginal kinds of work, e.g., criminal, family, personal injury and minor commercial transactions.
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Socialist

Transformation of relations of production which goes beyond formal transfer from private to public ownership. Flows of external technology, trade, etc. brought under more effective control by State, which attempts to assure self-generating accumulation and technical progress.	<p>(i) Smashing and restructuring of state apparatus.</p> <p>(ii) Transformation of relations of economic production.</p>	Legal problems of control and management of state enterprises. Emphasis on dealing with remaining social contradictions by social control, education and mobilisation rather than law alone.	Relatively less reliance on courts. Use of a variety of other mechanisms of dispute-resolution, e.g., administrative intervention, discussion within party units, creation of "people's" courts.	Some de-professionalisation of legal roles, with legal technocrats still, however, involved in economic transactions and disputes. Rather than a single profession, a variety of specialisms dealing with particular types of law work.
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different societies have passed. Most Third World societies are structurally heterogenous (Sunkel and Fuenzalida) comprising different modes and sub-modes of production established in different sectors of the economy at varying periods of their history – and it is the *relationships* between these modes of production that are critical both as regards economic change and as regards legal specialisation.

No country in the Third World has experienced the same kind of transition from precapitalist to capitalist modes of production as the core capitalist countries of the West. Typically the commencement of production for the world market was directly imposed or encouraged by the colonial or modernizing State. Although in Table 3 I characterize this in terms of a “colonial” mode or submode of production, I do not wish to become involved in the debate about whether there ever was or was not such a mode of production (see Alavi). The reason I use the term here is to emphasize the structural consequences of insertion in the world economy in the colonial situation: a particular kind of transition rather than a fully articulated mode of production. This transition took a number of different forms, summarised earlier in Table 2. Seldom did it lead to the establishment of capitalism in the pristine form it assumed in early capitalist development; though Third World societies vary considerably in the extent to which the different sectors in their economies are organised on capitalist principles.

Capital accumulation – whether brought about by the penetration of foreign monopoly capital or the expansion of State capital – has tended (lines 4 and 5 of Table 3) to marginalise earlier forms of production and the social groups associated with them. This has usually affected the legal profession, particularly in societies where it has been historically associated with the local entrepreneurial or rural property-holding groups which were formed during the earlier phases of agricultural commodity production for the world market. The various factors associated with the decline of these groups – for example the tendency of the international and internal terms of trade for primary produce to fall and the extraction of surplus from the agricultural sector by the State – have often transformed the economic base of private law practice. In several countries the profession has suffered a decline in its income and influence and in some indeed the crisis has threatened the profession's very ability to survive in its traditional form, especially where, as in Sri Lanka, Tanzania or India (at least under Mrs. Ghandi), it has been affected by government hostility as well as unfavourable economic conditions (for analysis of this decline in Sri Lanka see Bar Council of Ceylon; in India, Kidder, n.d.; Galanter, 1969; and in Colombia, Ghana and Tanzania Chapters 2, 4 and 8 above).

The decline in the traditional economic base of law practice in the peripheralised sectors of the economy is not always matched by a corresponding movement of members of the profession into new kinds of legal work servicing the requirements of multi-national corporations or the government. The problem may partly be one of changing the professional orientation of lawyers from litigation towards counseling, business planning, international transactions and the like (International Legal Centre, 1975). But it has roots in the organisation of international capital itself.

Foreign firms operating in the Third World have many problems with a "legal" dimension, yet it cannot be assumed (a) that from the firms' point-of-view they are better handled by legal transactions than by diplomatic, political and bureaucratic contacts or by bribery and economic pressures, (b) that they are better looked after by lawyers than by other specialists such as accountants, surveyors, or corporate managers, or (c) that if legal experts were employed it should be that of local counsel, rather than legal advisers at the firms' head offices in the metropolis. In other words, the "demand" created by foreign monopoly capital for the services of a class of indigenous legal practitioners is often very limited, reinforcing the profession's decline in influence.

The role of the State in the economy also affects the organisation of legal roles. In most Third World countries the relationship of the State to foreign monopoly capital is highly contradictory. At first sight it seems that State control of the economy is ever on the increase, typically including controls over the location, scale and organisational framework of foreign investment, elaborate fiscal regimes and controls over the remittances of profits. The State itself, furthermore, often accounts for an increasing proportion of domestic capital formation, both by investing its own surpluses and by the expropriation and nationalisation of foreign enterprises.

One might expect this to increase the number of legal technocrats and the functions they perform. But the evidence is inconclusive. In some countries like Ghana or Kenya (see Chapters 4 and 7) where private practice is strongly preferred over State employment, it is difficult to create a cadre of experienced legal technocrats. Even in those like Colombia (Chapter 2) where a more substantial cadre exists it is difficult to isolate their careers and professional perspectives from the private sector. To be sure, nationalisation of key sectors of the economy, as in Tanzania, deprives practitioners of their previous economic base and makes it possible to restructure legal training and career lines to serve the needs of social transformation. Yet even in that country, as Rwelamira points out (Chapter 8), private practice has not only survived the loss of many areas of business, but is still attracting numbers of experienced lawyers after they have passed their period of indenture in the public sector.

There are other features of State regulation of the economy which may encourage symbiosis rather than antagonism between State and private foreign capital. Not only are there many kinds of State intervention the very purpose of which is to encourage the inflow of foreign capital (e.g., joint ventures between State and multinational corporations, tax concessions, infant industry schemes and the like), but also, as Ghai (1977) points out, the actual results of measures designed to limit foreign control of the economy may be precisely the opposite of their manifest objectives, e.g., discretionary licensing of economic activities, the real purpose of which is to discriminate in favour of politically dominant groups; import controls that multinational firms can get around more easily than smaller local enterprises; State majority shareholdings in foreign enterprises which give the latter political security without increasing the government's effective control; nationalisations which still allow foreign corporations to control actual operations under

management contracts and to take out large surpluses under licensing and patent agreements.

State regulation may actually encourage certain types of private legal practice. Lawyers may build an entire livelihood around the evasion of State regulations: as intermediaries between business concerns and bureaucrats and politicians by creating loopholes in complex regulatory provisions like India's land reform legislation; or by defending persons charged with economic offences as in Tanzania (Chapter 8).

4. Variations in the Economic Base of Law Practice

In Chapter 11 Green categorises the various kinds of expertise lawyers may bring to bear in economic transactions. Not only should one ask, however, what use a government and its planners, philosopher kings and political economists *might* make of such skills for development purposes. But also how *in fact* are these skills harnessed and by whom? This depends partly on the structure of the economy as analysed in a broad outline above in Table 3 and partly on how the production of and the markets for legal services are themselves organised. The following is an inventory of some of the main variables that would have to be considered:

(i) Variations in the structure of the economy:

(a) The proportion of foreign investment to total investment; how far it is new investment or reinvestment of profits; whether foreign capital makes its profits through direct investment, loans or the supply of technology and services; the nature and size of profit outflows; the national and international scale of operation of the firms operating in the national economy; the extent to which their production is integrated vertically; the extent of intra-firm transactions and ease with which the locus of profit-taking can be shifted to operations in other countries.

(b) The specific structural characteristics of capital and enterprises in each sector of the economy: whether production is largely organised, for example, by individual entrepreneurs; by small partnerships and firms; by large private corporations; by mixed enterprises; by public corporations; by State enterprises which lack corporate autonomy.

(c) The organisation of labour in different sectors of the economy and its legal regulation; whether or not there are unions; how powerful they are; their legal positions; the extent to which they are incorporated by or antagonistic to management; their relation to the State; their and the management's techniques of collective bargaining (strikes, lockouts, etc.); the way these are regulated (or not) by law.

(d) The nature and extent of State intervention in the economy: the proportion of economic activity in each sector and in the economy as a whole controlled by the State; the extent to which the State operates through market signals (e.g., monetary policy, interest rates), legal and administrative controls (e.g., licensing, exchange controls etc.), direct participation in economic activity or outright expropriation of key sectors of the economy; the extent to which state controls

are mainly directed to assisting the operation of private capital or are intended to replace the latter.

(ii) The manner in which "demands" for legal services arise – whether as services bought in the market; as bureaucratic directives; as requests for welfare services by citizens in need. And how they are allocated – by payment of the going price in the market, by prior contract or by previous arrangement with the supplier such as law firms which work on a retainer basis, or by queuing for bureaucratically allocated services.

(iii) The manner in which the labour markets for those with legal skills are organised – as a free market or subject to manpower planning? As an international market (thus influenced by the price and demand for professional services internationally) or a national or local one? As a regulated or a free market?

(iv) The degree of monopoly power exercised by the organised legal profession (Monopolies Commission) through control over the numbers entering the profession; its definition of a lawyer's skills; its power to exclude non-lawyers from performance of tasks (like conveyancing for profit); its ability to prevent "unfair competition" between its own members; and the extent to which these monopolistic practices are the result of powers expressly delegated by the State.

(v) The extent to which lawyers' *clients* also have any market power or ability to determine the terms and conditions under which services are provided to them. Compare, for example, the position of the individual *vis à vis* his lawyer, with that of a large business corporation *vis à vis* a law firm.

(vi) The degree and nature of State intervention in these markets, including: regulation of professional entry, qualifications; regulation of the price and terms on which professional services are provided; allocation of government legal work to private practitioners; exclusion of lawyers from certain kinds of work (for instance from cases involving "natives" under colonial regimes); or outright socialisation of major sectors of the economy and law practice.

(vii) The degree to which the "professional" model of colleague control of lawyers' work (Chapter 7; and Johnson, 1973) is or is not institutionalised; the extent to which other kinds of control prevail in the legal profession or particular segments of it (for example, oligarchic patronage in a society in which landlords or latifundists make up the ruling class, bureaucratic patronage in a colonial or post-colonial state, corporate patronage where the economy and market for legal services is dominated by large multinational or state corporations).

(viii) The extent to which there is conflict *between* such models of control, for example where "professional" criteria of colleague control operates within bureaucratic settings, as in Wall Street law firms (Smigel) or in the colonial situation (Johnson, 1973).

(ix) The division of labour within the legal profession. The extent to which the profession is, on the one hand, homogeneous in the sense that all its members carry out the same kind of work; or, on the other hand, segmented with different practitioners providing services for different kinds of client (the government, large firms, small businessmen, individual litigants, criminal defendants, etc.).

(x) The division of labour between lawyers and other legal specialists: notaries, court clerks, lawyers clerks (Flood; Morrison), letter writers, "bush" or "bamboo" lawyers (Lev) and touts.

(xi) The division of labour between lawyers and members of other professional groups who may compete in the same markets, like accountants, architects, surveyors, business analysts or planners.

(xii) The extent to which this division of labour is established by competition in the market, by monopolistic regulation of different occupational turfs (such as preventing non-lawyers from conveyancing for profit, or forbidding partnerships between lawyers and members of other professions) or through bureaucratic regulation (like the relationship between lawyers and, say, architects and urban planners within an urban planning agency).

This list is not just a reminder of the complexity of comparative analysis, but also of the fact that the organisation of legal work cannot be "read off" in a simple manner from the mode or submodes of production prevailing in one society or another, in the way that too literal a reading of Tables 2 and 3 might suggest.

IV Access to Justice and Class Inequality

By virtue of the functions they perform for capital and their connections with the State, lawyers are deeply committed to the class structures of capitalist societies. Yet a deep-rooted theme of legal ideology is equality before the law. The demand for equal justice arises out of an unequal class structure. The illusion of equal justice helps to legitimate it. And the two are counterposed in constant dialectical tension.

Lawyers are at the heart of concern with class inequality because they are gatekeepers, mediating both access to and exit from the authoritative decisions of the courts and other branches of the state apparatus. There are, however, several different levels at which this can be analysed. Consider:

1. The Content and Form of Law Itself

(i) How is law made, through codification, piecemeal legislation, decisions of courts, delegation to administrative agencies? To what extent do lawyers participate in its making, with what effect on its form, content and who makes use of it? Is the law complex, requiring the services of specialists; or simple, such that ordinary citizens can invoke it without much difficulty? How much emphasis is there on the separation of legal processes from other processes of social ordering?

(ii) How far do laws embody the prejudices, interests and institutions of socially dominant classes, with what effects on who appears before the courts in what kind of cases and with what likely outcomes? (For particularly clear examples see the studies by Hay (1975) and Thompson (1975) of British Criminal legislation in the seventeenth and eighteenth centuries; or indeed the sections of Marx's *Capital* on primitive accumulation during the transition to capitalism in Britain.) How readily have they responded to the requirements of newly emerging social classes?

2. The Processes of Decision-making in Courts and Other Dispute-settling Bodies

(i) Are they organised around models of adjudication, arbitration or negotiation? How does this affect the role of third parties and of intermediaries, including lawyers? With what effects on how disputes are processed, by whom, on behalf of who with what likely outcomes? To what extent are legal norms invoked, by whom and with what effect on the processing of disputes? How is the way that disputes are handled influenced by and how does it influence economic transactions, the exercise of political power or the process of class formation? (The literature on dispute-settlement – of which there is a useful critical survey in Abel – deals much more adequately with the internal dynamics of dispute-settlement processes than with their socio-economic context.)

(ii) How is dispute settlement affected by the composition and social backgrounds of those participating in it? The decisions of the Courts, for example, by the social position, political ties and class backgrounds of judges, lawyers and jurors? The role and functions of lawyers by their backgrounds and class allegiances? The chances of success of litigants by their power, wealth or status? To what extent is the effect of such differences increased by the way dispute settlement or litigation operates: by the fact that those who have greater resources at their disposal can better afford the risks of litigation; or that those who are frequently involved in litigation ("repeat-performers") are better able to manipulate the process and calculate its risks? (For a suggestive analysis of the manner in which litigation can be affected by disparities in organisation and resources, see Galanter, 1974.)

(iii) What is the *interrelation* between dispute-settlement in the various Courts and dispute-settlement institutions operating at other levels or sectors of a society? What alternative remedy agents are there (e.g., "traditional" dispute settlement, mediation in the framework of patron client relations, administrative procedures, or popular tribunals)?

To what extent has incorporation within the framework of the modern nation-state integrated previously unrelated processes of dispute-settlement within a single hierarchical framework? To what extent, on the other hand, have antagonisms ("law against law" as Santos puts it) developed between formal and popular justice? What role do lawyers and other intermediaries (touts, letter-writers, petty functionaries, etc.) play in mediating this gap (Lev)?

3. Bureaucratic Organisation of Access

(i) How far does the potential "demand" for the processing of disputes in the Courts exceed the capacity of the courts to handle them? How are such problems of access routinely handled? By queuing? Increasing the number of bureaucratic hurdles to be overcome by potential litigants before reaching the courts? By corruption? By pricing (e.g., high court or lawyers' fees)?

(ii) How do courts and other dispute-resolving bodies make decisions about the allocation of the limited time, personnel and resources at their disposal? Under what

circumstances does this alter the manner in which cases are disposed of, e.g., by tending to turn lower criminal courts into agencies for bureaucratic processing rather than trial of criminal cases (Blumberg; Baldwin and McConville)? To what extent do judges, lawyers and other intermediaries themselves contribute to bureaucratic processing?

(iii) To what extent, more generally speaking, may courts and other dispute-resolving agencies be analysed as part of the bureaucratic apparatus of the State? In which kinds of cases are such tendencies most pronounced and why? How far, for example, do Courts deal with cases involving threat to public order differently from the other cases before them (see for example Balbus' illuminating comparison of the way the American courts have disposed of cases involving American urban rioters with the way they have dealt with the same criminal charges in non-crisis situations)?

4. Role of Lawyers and other Intermediaries

(i) What services do intermediaries provide? How is their work organised and controlled? What is the cost of legal representation, expressed, for example, in terms of the hours, days or weeks a labourer or a peasant farmer would have to work to purchase the services of a lawyer for an hour (see Lynch)? Does the market put legal services completely beyond the reach of the poor and underprivileged? Or mean that they can afford only inferior services? Which *kinds* of services are least available to the poor?

(ii) In what ways do lawyers organise access to courts and bureaucracies? By initiating (or defending in) legal proceedings, acting as intermediaries in routine transactions with bureaucracies, by using personal contacts in informal negotiations or by acting as brokers in market transactions?

(iii) And how is access to lawyers and legal intermediaries themselves organised? To what extent through the market? To what extent by queuing (e.g., for legal aid, or for the services of lawyers in public bureaucracies)? To what extent through informal contacts and networks with local communities, powerful individuals, former clients, touts and other intermediaries? How far do such contacts modify the operation of market forces? How far, on the other hand, do they serve to reproduce or widen lawyers' markets (as I have argued in relation to private practitioners in Ghana: see Luckham, 1976b)? To what extent do informal contacts between lawyers and their socially more privileged clientele serve both to enhance the position of lawyers and reproduce the class structure to which they are linked? What are the techniques lawyers use to establish social distance between themselves and their clients? (For a fascinating case study of the use of such techniques by Indian lawyers see Kidder, 1974.)

(iv) How is access affected by the composition and structure of the legal profession as a whole? By the number of lawyers and their geographical concentration? By the profession's control of legal work? By the internal stratification of the profession by specialisation, wealth and status? By the division of labour between lawyers and other intermediaries? How far does the collective position and social mobility of the

legal profession within the class structure affect the price availability and allocation of legal services?

5. Ways of Broadening Access*

(i) By increasing the supply of lawyers (see Bing; and the critical assessment of large scale legal education in the International Legal Center's 1975 Report on Legal Education). By dismantling the legal profession's monopoly over the provision of its services (Monopolies Commission)? By providing market incentives such as contingency fees for particular kinds of legal service (Paliwala and Weisbrod)?

(ii) By special provision of legal aid and assistance to the less privileged (International Legal Center, 1974; Magavern et al.)? Through voluntary provision of such services by individual lawyers or by the organised legal profession? (Seldom, however, can this be relied on to secure more than marginal improvements: see Berney and Pierce; Luckham 1976a; and Lynch). Through state subsidies for such services? Through direct state provision of legal assistance to the poor, as by the Tanzania Legal Corporation or by the Public Solicitor's office in Papua New Guinea? To what extent and under what conditions can such measures equalise access to the legal system in the face of the pressures created by the accumulation of wealth, power and status in a capitalist economy?

(iii) Through the collective organisation of the poor and underprivileged in order to increase their market or bargaining power in encounters with the legal system? By the provision of counsel to their members by trades unions or agricultural cooperatives? Through class actions (the potentialities of which in developing countries are discussed in Paliwala and Weisbrod)? By coordinating litigation to secure the effective implementation of legislative measures such as rent control or land reform legislation? Through organisational pressure to achieve legislative or administrative reform? Under what conditions can such activities be combined with measures to make legal services more widely available (as in the law centre movement in the UK and USA)? Under what circumstances are they likely to be seen by those who control the State apparatus as a threat; and to lead to the cutting back of legal service programmes (as in some countries of South-East Asia: See Magavern et al.)?

(iv) By deprofessionalisation? For example by allowing unqualified or less qualified intermediaries to compete with lawyers in certain courts or categories of disputes (see for example the discussion by Lev of the reasons for and consequences of allowing "bamboo lawyers" to compete with qualified legal practitioners in the Indonesian courts)? By excluding lawyers from certain courts or categories of disputes, as in colonial Ghana, Kenya and Tanzania (Chapters 4, 7 and 8)? By abolishing private legal practice altogether? By simplifying legal procedures and replacing formal courts with alternative remedy agents, such as ombudsmen,

* for a useful summary and indication of future directions for research see Dias.

administrators, party cells or people's courts (see DuBow's discussion of such alternatives in Tanzania)?

Under what conditions are such measures feasible? What degree of popular participation in decision making do they presuppose? What are the dangers of attempting to deprofessionalise the legal system from above, in the absence of real participation from below (e.g., replacement of procedural protections offered by the law with the administrative discretion of the State)?

(v) By exit? That is by looking for remedies which completely bypass the formal procedures of the legal system and State administration – such as strikes, boycotts, riots, political agitation, guerrilla fighting, – or indeed are specifically designed to smash the existing legal and State apparatuses through revolution.

These various aspects of access to the legal process cannot be considered in isolation from each other. Changes in the content of the law all too often have no effect because the machinery for the processing of disputes is insufficient (for a particularly graphic example, of the failure to implement the Ethiopian civil code, see Beckstrom) or because the target groups (such as the theoretical beneficiaries of rent control or land reform) cannot afford to invoke the procedures of the law. Efforts on the other hand to make the services of lawyers more widely available are often frustrated by bureaucratic processing and the assumptions and procedures of the law itself, and these in turn are deeply rooted in the class structure.

V The Place of Lawyers in the Class Structure

The manner lawyers and other intermediaries mediate access to justice is shaped by the major features of the class structure; by their recruitment into positions in that structure through their professional education and careers; and by the organised legal profession's defence of the collective interests and status of its members as an occupational group or class fraction.

1. The Major Outlines of the Class Structure

(i) What are the main features of the process of capital accumulation and the organisation of State power (Sections III and IV above)? Is the class structure internally created and reproduced, or does it arise from an international division of labour and foreign political domination? Are the main class divisions stable, still in the process of formation or disintegrating (Sunkel and Fuenzalida)?

(ii) What are the main contradictions present in the society (e.g., between capital and labour; latifundist and peasant; international monopoly capital and "national" capital)? What are the main social classes and fractions of classes? How do they establish their claims on available surpluses: for instance through their role in production (e.g., investors, managers of corporations, etc.); their control of State power (e.g., politicians, bureaucrats, soldiers, etc.) or by virtue of their specialised skills (e.g., lawyers, accountants and other technocrats and professionals)?

(iii) What are the main processes of social mobility? How much are the upper levels of the class structure open to mobility by individuals; and to collective mobility by groups able, like lawyers, to control the way their skills are appropriated?

2. The Recruitment, Socialisation and Careers of Lawyers

(i) Recruitment and mobility

(a) How many lawyers are being recruited and is the profession expanding in size? How open is the profession to recruitment from lower as opposed to upper and middle class groups? From rural as opposed to urban backgrounds? From members of all religious, ethnic or social categories? To women as well as men (see Chapter 5)? To what extent does the fact that a profession includes a high proportion of persons from lower class backgrounds indicate that recruitment is genuinely open, or merely that the class structure is still in the process of formation, so that there is only a small number of candidates available from elite backgrounds for recruitment to professional roles (see the discussion of the recruitment of the Ghanaian, Tanzanian and Malaysian professions in Chapters 4, 5, 8 and 9 above)? What are the chances of a peasant's or a labourer's son gaining entry into the profession compared with a businessman's son or a doctor's son? How does this compare with their chances of gaining entry into other upper or middle class positions?

(b) What are the main mechanisms of mobility? Ability to afford the costs of education? Use of social contacts to secure places in good secondary schools, elite law schools or good lawyers' chambers? Or the general effect of having educated, high status parents on educational achievement? Is education and professional training subsidised by the State, and with what effect on recruitment into the profession?

(c) Is recruitment into the profession linked to subsequent success within it? Do lawyers with upper or middle class backgrounds do better than those from lower class backgrounds? Does success depend on the social contacts developed as a result of going to particular elite law schools, as in Colombia (see Chapter 2)? Or once recruited into the profession, are the chances of success mainly determined by such professional considerations as choice of specialisation, skill and organisation; and if so, can one nevertheless discover relations between these and class backgrounds?

(d) How far is recruitment into the legal profession a path of mobility into other roles, like management of business concerns, administrative careers or politics?

(ii) Legal education and professional training (see International Legal Center, 1975, *passim*).

(a) How much control does the organised legal profession have over the numbers entering law schools? How large are these numbers and with what implications for recruitment, content of legal education, ability of law teachers to inculcate legal ideology and the cohesion of the profession?

(b) To what extent is legal education segmented on the basis of specialisations

(e.g., barrister and solicitor)? To what extent stratified on the basis of quality, status and expense (e.g., between regular and night schools, between particular elite law schools and other less favoured schools)?

(c) How far is legal education viewed mainly as a means of providing professional skills? As a general preparation for a variety of careers as in the law schools of continental Europe and Latin America (though decreasingly; see Rueschemeyer; Steiner; Lowenstein; and Chapters 2 and 3)? As a means of inculcating the social outlook and class practices of socially dominant classes?

(d) What is the content of legal education and how (if at all) is it related to the functions lawyers carry out when they have qualified? What is the balance between academic and practical training? Between the inculcation of received knowledge or critical thinking?

(e) Are law schools centres of research as well as teaching? Is this research oriented towards the exegesis and perfection of legal doctrine or toward understanding the law in action? To what extent are the findings of research embodied in teaching? Do they have any effect on legal policy?

(f) Is law teaching a full-time occupation or a part-time hobby of established practitioners (as until recently in Latin America)? Is a career as a law teacher highly valued? How much do law teachers shape the content and practice of law itself, like the great legal scholars in the Civil Law tradition (Merriman; David and Brierly).

(g) Is legal education organised and controlled in universities, by separately organised professional schools, like the Inns of Court or the Kenya School of Law (see Chapter 7) or by apprenticeship to established practitioners? Is effective control over its content in the hands of law teachers, the organised legal profession, or the government? With what effect on how it is used as a mechanism of social selection?

(iii) The career lines of lawyers and the extent to which they reflect the profession's economic and political functions.

(a) What is the division of labour inside the profession? What are the relative numbers in private practice, in large law firms, in small partnerships or individual practice; in the judiciary; working for legal agencies of the government, for other government departments, for public enterprises or corporations; in business or in other non-legal careers? What are the proportions in each field of specialisation (corporate, commercial, criminal, personal injury, land, family, etc.)? How is this related to the economic base of legal roles analysed earlier (section III)?

(b) How much stratification is there of legal roles and on what criteria: earnings, status or political power? Are private practitioners stratified by the courts they practice in and their specialisation? How far is there a ranking between different branches of the profession (e.g., judge, government lawyer, private practitioner in common law systems; judge, public prosecutor, government lawyer, advocate or notary in civil law systems)? Is this ranking established by criteria intrinsic to

the performance of professional roles (e.g., the status of the judiciary in common law countries)? Or as a result of other economic and social factors like the difficulty of attracting experienced lawyers to the public sector within a capitalist economy noted in the case studies of Colombia and Ghana (Chapters 2 and 4)?

(c) To what extent are lawyers' careers individual in the sense that success in one position (e.g., accumulation of cases and wealth as a private practitioner) or movement from one position to another depends on personal choice and effort; or corporate in the sense that they are sponsored and controlled and controlled by the decisions of large organisations (e.g., government bureaucracies, corporations or large law firms employing lawyers)?

(d) Are careers on the whole compartmentalised *within* particular branches of the legal profession (as in most European civil law jurisdictions)? Or are there patterns of mobility *between* such branches (like the progress in many common law jurisdictions from successful private practice or a political career into the judiciary)? Under what conditions does compartmentalisation of careers break down (e.g., the tendency of young judges or prosecutors to move out into private practice in Colombia despite a civil law career structure: see Chapter 2)?

(e) How much disparity is there between *ideal* career lines and those which most lawyers *actually* follow? Is the stratification of legal roles modified by career lines which allow a substantial amount of mobility from lower status and less well rewarded roles to the more prestigious and better remunerated positions? Or is there a stratification of career paths themselves, meaning that lawyers starting from particular social origins, law schools and initial career positions (e.g., in prestigious chambers of large corporate law firms) will have a significantly better chance of success in practice or of moving into influential positions such as government Minister or Supreme Court Judge?

(f) To what extent do career lines reinforce the cohesion and ideology of a single legal profession? How similar are they to the career patterns of other professional occupations? How far are the criteria of success inside the profession those accepted in the society as a whole? How far does the division of labour inside the profession reflect the functions lawyers perform vis-à-vis the economy and the State?

(g) To what extent have legal careers typically been kept distinct from other careers? To what extent on the other hand have lawyers ventured out into positions in business, politics or administration? How large a proportion of those with legal qualifications work in other positions? How large a proportion of business managers, politicians or higher civil servants have legal qualifications? Are these regarded as *separate* careers that a law-trained person can follow? Or do they remain linked to legal careers, so that a lawyer-businessman or lawyer-politician can easily move back and forth into regular law practice?

(h) To what extent have alterations in the structure of dependent capitalist economies summarised earlier in Table 3 resulted in differences in professional careers: for example the erosion of established barriers between professional jobs; and the shift from individual practice to corporately sponsored careers in

bureaucracies, multinational corporations or law firms? How far have such trends matched, anticipated or fallen behind changes in the structure of the economy?

3. Professionalisation and the Collective Mobility or Decline of the Legal Profession

The legal profession's ability to mediate class interaction also depends on its collectively defended position in the class structure. On the one hand on the process of professionalisation through which lawyers have sought to appropriate their own labour power, control the terms and conditions under which their services are made available, extend their political influence and maintain their social status. And on the other hand on the factors which either deprofessionalise them by depriving them of functions, power and status; or reprofessionalise them by forcing them to redefine their skills and place in the occupational structure in ways that do not fit existing models of professional control.

All too often professionalisation has been seen in terms of the transfer or strengthening of modern (i.e., Western) professional roles, as one aspect of the "modernization" of law in developing countries (see especially Galanter 1966; Gower; Steiner; and indeed even the International Legal Center's otherwise relatively sophisticated survey of legal education). Yet as shown in section II above, the historical circumstances under which professional roles were created were drastically different from those of the central Western capitalist countries:

(i) What are the main variations in the historical conditions under which legal professions were created (Table 1)? What groups sponsored the process of professionalisation: Latin American caudillos (Perdomo); modernizing rulers or ruling classes, as in Japan or Turkey; colonial governments; or a newly emerging local bourgeoisie? Under what conditions did colonial or other ruling classes attempt to prevent or limit the emergence of a legal profession, by for example making legal education impossible to acquire or preventing lawyers from appearing in the courts? Under what conditions did lawyers on the other hand acquire a relatively independent economic or political base (as in Ghana or India) from which they could begin to promote their own professional interests? To what extent could they increase their influence by exploring contradictions in the State or colonial framework? How close a connection was there between lawyers and nationalist politics? And how did this affect their subsequent influence and ability to promote their own professional interests?

(ii) How far is there any structural basis for the consolidation of "a" single organised legal profession? To what extent do lawyers approximate the model of "independent" professionals, able to organise collectively among themselves to control their work and determine the conditions under which their services are offered? How far, to the contrary, is their work controlled within the framework of large organisations like law firms, multinational corporations or government

bureaucracies? How far does this modify their ability to organise as a body of colleagues?

(iii) How extensive are the legal profession's powers of self-regulation and how are they exercised?

(a) What particular professional matters are within the organised profession's control? Does it control entry, the terms under which services are supplied to clients and professional discipline? How much control has it over the division of labour between lawyers and other legal specialists such as lawyers' clerks or bamboo lawyers and between them and other professions, such as accountants?

(b) How much do these powers depend on the organised profession's ability to mobilise its own members? How well attended, funded and managed are its professional associations? Do they have support from the entire profession. How capable are they of extracting concessions from clients, corporate employers or the government?

(c) How far does the profession's control derive from State delegation of powers to certify, discipline and control members? Why were these powers delegated to it. To what extent can and does the State intervene to influence the manner in which delegated powers are exercised? Does the State retain any direct powers of control or discipline and if so how does it use them?

(d) How far is control within the profession exercised on a collegial or on a hierarchical basis? Do members with greater wealth, power and status tend to have a disproportionate influence on professional ideology and decisions affecting the collective interests of lawyers? Is control in the hands of corporate lawyers (Berle; and Auerbach)? With what effect on the strength and independence of the organised legal profession?

(iv) Is there a well articulated professional ideology? Does it reflect the classic Western capitalist themes (i.e., autonomy, self regulation by colleagues, service to the public and so forth) or are there major differences in emphasis? Is its main function to guide the behaviour of lawyers (e.g., their dealings with clients) or to mystify and divert attention away from what they *actually* do? How much is it adhered to by all groups within the profession? How does it reflect the distribution of wealth and power inside as well as outside the profession.

(v) How is the organisation and consciousness of the profession related to its position in the class structure? How critical are its functions to those who control capital and/or the State? What is the effect of its own ability to organise its members as a pressure group; to promote its own collective mobility within the class structure? How is this mobility affected by its connections with capitalist enterprise, with the State and with other fractions of the bourgeoisie?

4. Comparative Analysis of Structural Change

What broad conclusions can be drawn for structural change in different types of Third World legal system? In postcolonial societies (Table 1, box 8)

professionalisation has on the whole contributed to the *formation* of new occupational structures and social classes. The newly emerging bourgeoisie has been too small to provide enough recruits for its own expansion. Hence the legal profession like other fractions of this bourgeoisie has appeared to be open to upward mobility, when viewed from above in terms of the proportion of lawyers recruited from humble parental origins (Foster; Clignet and Foster). Yet viewed from below the chances of the son of a labourer or peasant becoming a lawyer have remained very small compared with those of the son of a shopkeeper, manager, bureaucrat or professional. And the more the dominant classes are consolidated the smaller the proportion of lawyers who are recruited from lower class origins.

On the other hand, in countries with already established class structures, the processes of class formation and professionalisation have in certain senses been reversed. For the penetration of foreign monopoly capital, the decline of previous sources of production and employment and the rising importance of the State have tended to result in existing class structures being disintegrated and restructured (Cardoso and Falleto; Sunkel and Fuenzalida). This has also transformed the legal profession, both by reducing recruitment from the previously dominant agrarian social classes; and by undermining the previously privileged position the profession often had in such societies as the recruitment ground for the political and business elite (Steiner; Lowenstein; and Chapters 2 and 3 above). Or so it may be argued, for the historical evidence is patchy and mainly relates to the societies created by European settlement in Latin America (Table 1, box 7).

These differences are further complicated by the particular strategies of collective social mobility embarked on by the organised legal profession in different societies. On the one hand professionalisation through *involution* as in Britain and some of her ex-colonies: that is by ensuring that the profession remains small and homogeneous through strict control over entry; by providing elite rather than large-scale legal education; by defining the expertise of lawyers in terms of high technical competence (e.g., in advocacy or drafting) rather than broad social skills (e.g., negotiation, counselling, political brokerage); and by strict monopolistic regulation of the market for legal services.

Secondly, professionalisation through a process of *diversification* as in the USA, the Philippines and possibly Venezuela (Chapter 3 above): with relatively loose control over entry; large-scale legal education (e.g., in night schools) at least for less well favoured recruits to the profession; acceptance of considerable stratification within the profession in terms of organisation of practice, wealth and status; wide definition of the expertise of lawyers, allowing them to take on a broad range of business and political as well as legal functions; and relative weakness of monopolistic regulation and tolerance of deviations from ethical standards, at least by the less prestigious members of the profession.

And thirdly, the *marginalisation* or proletarianisation of the legal profession or of certain sectors of it, as in India or some Latin American countries (including Colombia: see Chapter 2) where the legal profession has failed to secure tight monopolistic regulation over entry and the markets for its services; and yet at the

same time has not diversified its skills and markets sufficiently to guarantee work and prestige for its increasing numbers.

Despite such variations, all Third World legal professions have been affected by the major structural changes which have been associated with capitalist development since World War II. These developments, one can argue, have tended to reinforce their structural similarities, whether by creating new class divisions or by reconstituting old ones. Such similarities include:

(i) An increase in recruitment of lawyers, like other professionals, from within the professional, managerial, technocratic bourgeoisies, whether (as in post-colonial Africa) to the increasing exclusion of the lower classes, or (as in Latin America) at the expense of previously dominant classes, or (as in a number of Middle Eastern or Asian countries) at the expense of both simultaneously.

(ii) A tendency for the previously established divisions of labour and career lines within the profession to break down and to be reorganised to reflect the greater concentration of capital and its connection with the activity of the State. Examples are the erosion of the division between private practice on the one hand and judicial and prosecutorial careers on the other, which has been noted in Latin American countries like Colombia or Venezuela (Chapters 2 and 3 above); the difficulty of creating effective public sector legal departments capable of holding their own in transactions with international firms, because of the tendency of experienced counsel to drift into private practice and the increasing remunerativeness and prestige of corporate practice in larger law firms or within the legal departments of business corporations.

(iii) An overall decline in legal education as an instrument of class socialisation and in legal careers as a channel of mobility, compared with recruitment to other managerial or technocratic occupations: meaning either the actual displacement of legal education and careers from a previously privileged role in class formation as in Latin America and some Asian and Middle Eastern countries; or alternatively their failure ever to gain such a role as in the newer post-colonial States of Africa. The dominant trend, in sum, is for Third World legal professions to become (in terms of the distinctions made above) increasingly marginalised: because of their failure to secure tight monopolistic control over their services; and of their inability to develop skills and functions that correspond to the new functions of capital in a changing international economy.

VI The State and Lawyers in Politics

The relationship between the legal system, lawyers and the State is contradictory. The law is an emanation of State power. Both laws passed by legislatures and decisions of courts are enforced through the coercive apparatus of the State. And legal forms have frequently been used to restrict the rights of citizens and to increase the powers of those who control the State machinery. Pertinent recent examples are the State of General War legislated by the military junta in Chile, the Martial Law

Administration imposed by a theoretically civilian regime in the Philippines or the State of Emergency declared by Mrs. Gandhi in India. (However the use of law to repress and control has by no means been confined to the developing countries: viz. Kirchheimer; Unger, pp. 192–223.)

Yet the law is also seen as containing and regulating State power. In Western Europe, historical circumstances favoured such a view of “the rule of law”. For the factors which led to the differentiation of specialised systems of adjudication were to some extent distinct from those supporting the development and rationalisation of the power of the State. In England as Weber points out, it was the *lack* of rationalisation of the legal system and the guild-like organisations of the legal profession which indeed made it easier for lawyers and judges to protect the economic activities of capitalist entrepreneurs from regulation by the monarch. The close association thus established between early capitalism and legal activity encouraged the differentiation of the legal system from the remainder of the State apparatus. In continental Europe, on the other hand, the mechanisms were different, but the results in some respects are the same. Legal historians have argued (David and Brierley) that it was scholarship in the great medieval universities and the expansion of international commerce which contributed to the diffusion throughout Europe of Roman law and the rationalisation of national systems of law, also relatively independent of the increase in the power of the State.

Among bourgeois jurists, discussion of the rule of law is very largely concerned with the autonomy of the legal system from the remainder of the State apparatus. The discussion among social theorists influenced by Marx (see particularly Poulantzas; and Unger) centres around the extent to which the legal system, as part of the State apparatus is or is not relatively autonomous either from immediate control by members of the economically dominant class or from automatic determination by the prevailing relations of production and economic power.

The two issues – the autonomy of the legal system from the remainder of the State apparatus, and that of the latter (including the legal system) from its economic and class foundations – are closely related. For it may be argued that capitalist societies have provided the conditions under which the cultural and methodological autonomy of the law as a system of norms and ideological practices could be most adequately institutionalised in the form of differentiated and self-regulating roles and institutions.

Yet the history of the later developing capitalist societies such as Germany, Japan, Spain and Brazil reminds us that authoritarian rule is liberalism's janus face, often being equally compatible with, perhaps required by, certain types of capitalist development. Still less can one argue that capitalist development in the Third World will inevitably result in an autonomous legal system and independent legal profession.

Some of the main factors which affect the role that lawyers play in the political framework are set forth in Table 4, which (in a similar fashion to Table 3) is based on the assertion that the dominant modes or sub-modes of production in a social formation, the political form of the State and the political role of lawyers are

mutually related. Their relationship, however, is far from mechanistic and the State is far from being *merely* the executive committee of the economically dominant class, for several other factors intervene:

1. The Level and Nature of Class and Social Contradictions

In general the sharper the class and other contradictions present in a social formation, the greater the need for a powerful well-organised State apparatus to hold it together (Engels; Lenin).

In most Third World societies, class struggles are supplemented (or "overdetermined") by contradictions arising at a number of other social levels: those arising from the inclusion within the boundaries of "new" nation-states of precapitalist formations (religion, caste, tribe, language and region, etc.); those created by uneven development and the marginalisation of sectors of the economy and of groups like the peasantry, lumpen proletariat or petty bourgeoisie; and those that arise from international dependence in respect of the global economy and relations with the major metropolitan powers. The critical problems for analysis are as follows:

(i) What are the major contradictions that arise in each social formation? How far are they systematically related to changes in its mode(s) of production (as suggested in Table 4)? How is the situation affected by the coexistence within one society of different modes of production and different sources of social contradiction; and how do the latter interact and "overdetermine" or modify each other?

(ii) Under what conditions are such contradictions either managed or intensified through the legal system? The legal system tends to have a distinctive role in the articulation of such contradictions because it provides an arena in which conflicts can be fought in an institutionally and normatively controlled manner. Thus, if it is true that state superstructures tend to reflect a society's contradictions in a condensed form (Poulantzas, Part One), the battles for the control of property, rights and power in the courts are one place where this will be clearly observed. Lawyers work in the heart of society's contradictions; and this, as we shall see later, is a major feature of their political role. Yet in periods of sharp social conflict, those who control the state machinery often prefer more direct and repressive techniques of rule, precisely because the law may provide opportunities to challenge the power of the government and the interests of those who control it.

(iii) How is the role that lawyers play in the management of contradictions affected by their own class location? By their social connections with dominant (or in some cases marginal) social classes established by recruitment into the profession? By the nature of their markets, the functions they perform and the nature of their clientele? To what extent does this class location provide any structural base from which it is *possible* for lawyers to articulate contradictions (e.g., as independent professionals with a secure economic base in private litigation, as

in Ghana; or as labour lawyers working on behalf of powerful labour unions as in some more developed capitalist societies?)

2. Regimes and Ruling Classes

The functions of law and the role of lawyers cannot be considered separately from the regimes and ruling classes which control the State apparatus (column 2 of Table 3). The "rule of law" in its fullest sense presupposes both liberal democracy and the particular *kind* of capitalist development which produced it in Western bourgeois democracies. Yet even in the latter it is a precarious creation. And relatively few of the developing countries have had more than fleeting experience with the forms let alone the practice of bourgeois representative democracy. The contradictions of their development have been too sharp and their institutions too fragile. The great majority are ruled under authoritarian military, bureaucratic or one party-regimes. Nor do their ruling classes – based for the most part in the major corporate military and State bureaucracies – always have much interest in accepting serious legal limitations upon the exercise of State power, in the absence of strong pressures either from a strong national bourgeoisie or a powerful working class to compel them to do otherwise. This being said, there are many variations to be taken into account.

(i) What are the main characteristics of the regime in power? A military one party or competitive multiparty regime? Is it stable or subject to continuous change, and what are the mechanisms of change (elections, coups or revolutions)? What are the dominant classes (international bourgeoisie, national bourgeoisie, bureaucratic bourgeoisie, commercial or rural petty bourgeoisie, landlords, peasants, urban proletariat, etc.)? To what extent do they rule in their own name, or through their alliances with a different ruling class (e.g., the links between foreign firms and military or bureaucratic regimes)? What are the regime's ideological characteristics and how do these affect the development strategies it adopts (e.g., dependent capitalism, based on an alliance with monopoly capital; state capitalism; or attempted socialist transformation)? To what extent, above all, does it rely on force as opposed to law or consent (subsection 3 below)?

(ii) To what extent and how is State power rationalised and bureaucratised? To what extent does this increase the State's "relative autonomy" vis-à-vis the class struggle? How does it affect the implementation of its development strategies and the stability of the regime in power?

(iii) To what extent is there any basis for the legal regulation of State activity; and how does the concentration of State power increase the contradictions between bureaucratic and legal methods of control?

(iv) Under what conditions can democratisation and debureaucratisation occur? In particular, what types of transition to socialism may bring this about (as, to some extent, in Mao's China) and what types *increase* the concentration of State power (as in the Soviet Union and many other "socialist" social formations)? To what extent would any attempt to democratise the State apparatus also require its de-legalisation?

Table 4. *Determinants of the Political Functions of Law and Lawyers*

Mode or Sub-Mode of Production	(1) Source and Nature of Contradictions	(2) Regimes and Ruling Classes	(3) Techniques of Rule (Networks, Norms, Consensus, Force)	(4) Autonomy of Methods of Adjudication	(5) Political Roles of Lawyers
1. <i>Precapitalist</i>	Varying, depending on particular characteristics of mode of production.	Varying, from "stateless" societies, to centralised States with distinct ruling classes.	Varying, usually emphasising particularised statuses or patron-client networks in creating political relationships.	Adjudication seldom differentiated from other methods of social and political control.	Sometimes legal specialists, but no differentiated lawyer class.
2. <i>Colonial</i>	Situations of class conflict based on agrarian relations (e.g., peasants <i>vs.</i> landlords; and the latter <i>vs.</i> commercial or professional classes); but submerged by problems of integrating precapitalist formations within the State (tribalism, caste, regionalism, etc.) and by nationalist struggle <i>vs.</i> metropolitan bourgeoisie.	Bureaucratic regimes, whether with social base in colonial metropolis (Table 1, box 8) in local "modernizing" ruling class (Table 1, box 6), or in settler aristocracy (Table 1, box 7).	(i) Force: military subjugation. (ii) Norms: imposition of "modern" or colonial law. (iii) Networks: manipulation of precapitalist social relations (e.g., under colonial indirect rule). (iv) Consensus: varying from passive acceptance to active mobilisation <i>against</i> State (e.g., by nationalist movements).	Fusion of bureaucratic and adjudicative roles during initial imposition of State framework. Subsequent establishment of a degree of judicial autonomy.	Class of lawyers created. They begin to be active as: (i) Brokers between organised groups and State (especially colonial State). (ii) Adversaries, articulating contradictions in legal framework of State. (iii) Ideologists of nationalist movement. (iv) Members of nationalist political elite. (v) Bureaucrats (except where excluded from colonial bureaucracies).

3. <i>Capitalist</i>	Class conflict based increasingly on industrial (wage labour <i>vs</i> capital) as well as agrarian relations. Problems of integrating precapitalist relationships kept alive by uneven development. Confrontation national/metropolitan bourgeoisie formally ended by independence, but kept alive by continuing role of foreign capital in economy.	Rule through the forms of bourgeois democracy (the nation state, rule of law, individual rights, representative government, etc.) based on shifting coalitions between emerging national bourgeoisie and agrarian classes.	(i) Norms: laws, rules of the political game, rules of social mobility, rules governing access to govt. bureaucracies. (ii) Consensus but also dissent mobilised by political associations and parties, etc. (iii) Networks: manipulation of personal, clientelistic relations as basis of political organisation. (iv) Force: only where other techniques fail.	Adjudication free from direct state control, through retaining its latent class functions.	Lawyers central to the political class, with multiple roles, being: (i) Ideologists, (ii) Constitutional architects of the liberal capitalist state, (iii) a large fraction of the political elite, (iv) Adversaries articulating contradictions. They also remain: (v) brokers and are (vi) present in the bureaucracy, although having much less prestige there than in private practice.
4. <i>Monopoly Capitalist</i>	Sharpening class struggles, though lines of conflict confused by divisions between wage labour and capital in the monopoly sectors on the one hand and marginalised groups (peasantry, lumpenproletariat, petty bourgeoisie) outside these sectors on the other. Hence sharpening centre-periphery contradictions. And both integration and conflict between national and metropolitan bourgeoisies.	Consolidation of bureaucratic-authoritarian State, whether formally under military control, one party rule or some form of "guided" democracy. State mediates between international capital and locally dominant classes.	(i) Force: outright repression of class conflict. (ii) Networks linking members of military, state and corporate bureaucracies. (iii) Norms: obligations as vehicle of control, rather than rights as vehicle of choice. (iv) Consensus: fragile despite management of opinion through media and propaganda.	In principle autonomous adjudication. In practice undermined by (i) political and economic pressures (ii) repressive legislation, including removal of political issues and crimes from purview of regular courts (iii) other methods of dispute settlement (e.g., administrative tribunals) because of growth in regulatory functions of state.	Lawyers remain: (i) as brokers, especially between business interests and government, and (ii) as bureaucrats, both in corporations and in government. (iii) They decline in influence as ideologists, constitutional architects and political elites. (iv) Some members of the profession remain adversaries defending rights of marginal and opposition groups.

5. *State Capitalist*

Continued class conflict and polarisation of marginal sectors, despite nominal state ownership. Both symbiosis and conflict between State and monopoly capital, this conflict being also connected to rivalries between socialist and capitalist blocs.	Further consolidation of bureaucratic-authoritarian State, based on coalitions between the various classes and groups which appropriate surplus through the state apparatus (military, police, civil and party bureaucrats and the elements in the petty bourgeoisie that depend on their patronage.)	<p>(i) Force: outright repression of class conflict.</p> <p>(ii) Norms: legal framework used as</p> <p>(a) framework for management of economy</p> <p>(b) as framework of political control</p> <p>(iii) Networks: linking party or military, state and managerial bureaucrats.</p> <p>(iv) Consensus: absent or "managed" through party and media.</p>	<p>(i) Judicial autonomy still further undermined by increase in power of state bureaucracy & removal of political issues from courts.</p> <p>(ii) Courts seen as only one among a number of methods of resolving disputes, securing enforcement of obligations to state and regulating the operation of the state bureaucracies.</p> <p>(iii) There is relatively little scope for them as ideologists or as adversaries able to challenge the government through the courts.</p>	Decline of lawyers accentuated by nationalisations of sectors of economy on which livelihood based. Nevertheless they sometimes remain important as:
				<p>(i) Legal bureaucrats and brokers within the state bureaucracy.</p> <p>(ii) As legal architects for the proliferating state apparatus and thus to a limited degree as members of the political elite, but</p> <p>(iii) there is relatively little scope for them as ideologists or as adversaries able to challenge the government through the courts.</p>

6. *Socialist*

Class and centre-periphery contradictions in theory overcome by rule of workers and peasants, though to some extent kept alive by the "new class" of party and state bureaucrats; and by the presence of international class enemies which legitimises the retention of a powerful, centralised state apparatus.	Subordination of the state apparatus to the mass party controlled by the new class of party and state bureaucrats in the name of and with varying participation by the workers and peasants.	<p>(i) Consensus: mobilised through mass party.</p> <p>(ii) Force: political surveillance and repression of counter-revolutionaries.</p> <p>(iii) Networks: within framework of party mobilisation (through party cells, etc.).</p> <p>(iv) Norms: legal framework relied on less than other techniques of rule.</p>	<p>(i) Delegalisation: legal processes not seen as autonomous from economic, social and political.</p> <p>(ii) Courts seen as but one among a number of methods of resolving disputes.</p> <p>(iii) Emphasis on popular participation in administration of justice (people's courts, etc.), to the extent that it is compatible with overall party control.</p>	Though legal specialists still operate they have no political role as such, no independent economic base from which to enter politics, no capacity to offer fundamental challenge to powers of government in courts. Insofar as the state still relies on legal regulation (and this varies between socialist countries), lawyers continue to play a largely technocratic role as bureaucrats, brokers within the bureaucracy and as legal architects of state legislation.
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3. Techniques of rule

The fact that law is not "supreme" in the same way as in bourgeois democracies, does not mean legal norms are absent. Even authoritarian regimes rely in some measure on a framework of legal rights and obligations (Toharia). But legal norms are normally only part of a much broader and more diffuse collection of norms, conventions and practices establishing the framework of the State and hegemony of ruling classes. Further, norms are only one way of creating political relations and of establishing hegemony. Depending on the circumstances, other methods may be preferred, for example, the creation of networks of patronage linking those who control sources of political and economic power and those whose cooperation or compliance they seek to secure; the creation and manipulation of consensus through the mass media or political parties, encouraging citizens to identify their own interest with that of the ruling class; or the use of coercion, be this by bargaining from a position of economic monopoly, by means of threats, or by the outright use of force and terror to secure compliance. The balance between *norms*, *networks*, *consensus* and *force* as represented by the order they are ranked in each society (see column 3 of Table 4) both reflects the way State power and the hegemony of the ruling classes is organised and influences the forms this hegemony takes.

Not only, therefore, should one analyse the circumstances in which different kinds of legality are manipulated to create an ideological rationale for groups challenging and controlling the State apparatus, but also the variations in the extent to which legality is used at all, compared with other possible ideological rationales for authority and challenges to it. Changes in the nature of contemporary capitalism have, for instance, affected whether law is used, how and by whom. Those who control the great aggregations of capital and State power created under conditions of monopoly and state capitalism are less in need of the ideological blessing of legality, because they have other ways of securing compliance. Support for legality comes more and more from those groups which are peripheralised or radicalised by the expansion of capital. In many countries (not only in the Third World) it seems, paradoxically, to be both the most conservative groups and the most radical which seek to mobilise the legal system against the government, a split which is neatly reflected in the political allegiances of members of the legal profession. The defenders of the privileges of the Bar and of the autonomy of the Courts sometimes include lawyers associated with both the most reactionary propertied interests and the most left-wing critics of government policy (see particularly Bar Council of Ceylon).

4. Autonomy of Methods of Adjudication

The differentiation of legal ideology in modern capitalist societies has been closely associated with the development of courts and their relative autonomy from the direct political control of the State. Yet even in the liberal democracies the courts are not the only institutions through which legal norms are enforced, and they have always had but a qualified autonomy. The extent to which actions of the

government can be questioned in the courts varies considerably from one country to another, being permitted to a far greater extent in the USA, for example, than in Britain, where the courts have always been shackled by the (partly self-imposed) doctrines of parliamentary sovereignty and executive responsibility.

And the identity of interest between the judiciary and the ruling class has sometimes made direct control of the courts unnecessary. As Douglas Hay (1975) has pointed out, in eighteenth century England the judiciary played a critical role in maintaining political order because judges and magistrates were socially and economically tied to the ruling class. Nevertheless, they could impose criminal sanctions upon those who expressed social discontent with an appearance of impartiality, supported by the full majesty of the law.

Similarly, Balbus (1976) has discussed some of the ways in which the machinery of justice has responded to the challenges to political order created by black urban riots in the present-day USA, avoiding the need for a centrally organised process of repression.

Nor do courts flourish only in liberal societies. As Toharia (1975) has argued in his analysis of the judiciary in Franco's Spain, there are two different ways an authoritarian regime can protect itself from challenge in the courts. Either by incorporating the latter (and the legal profession) directly into its framework of political control, by appointing, promoting and dismissing judges in accordance with their political loyalty and preparedness to give judgements in the regime's favour. Or by redefining the functions of the courts so as to confine them to non-political or technical questions, handing over cases of a political character (as in Spain) to alternative tribunals, but preserving the practical and ideological advantages of "independent" adjudication of routine criminal and commercial matters.

If the courts of the major capitalist societies can be manipulated for the purpose of repression, it is hardly a matter of surprise that the same happens in the Third World, where their independence is seldom protected by the other institutions of liberal society, such as a free press and parliamentary democracy; and they are even more vulnerable to the powerful forces set in motion by the concentration of monopoly capital and centralisation of State power.

Nevertheless judges and lawyers in the Third World have not always acquiesced as can be seen by the resistance put up by the courts and organised legal profession in India during the Emergency under Mrs. Ghandi (Kidder, n.d.) in Sri Lanka under Mrs. Bandanaraiké (Bar Council of Ceylon) or in Ghana during the political crises described in Chapter 4 above.

What, then, are the social conditions which make judicial autonomy possible? And what are the practical consequences of this autonomy? Are we only talking about the methodological autonomy of judges – to develop law as a form and system of ideas – which could in principle be achieved even in a relatively repressive social order? Is there a real institutional autonomy of the courts and judges vis-à-vis the remainder of the State apparatus – the scope of their powers to review the powers of the executive and legislature, their ability to take and enforce their decisions

without interference, their protection from arbitrary dismissal, and so forth? Or does it go still further to include their relative autonomy vis-à-vis the economic interests of the dominant classes; and their ability to "stand above" and mediate the major contradictions present in the social formation? And what is the balance of class forces that does or does not permit them to acquire such an autonomy?

5. Political Roles of Lawyers

Lawyers themselves may play a direct role in political processes, in a number of different ways:

(i) As ideologists. Their influence on political ideas is direct, through the elaboration of doctrines which justify the exercise or limitation of State power and the hegemony of ruling classes; and indirect through the incorporation of legal ideas (like the social contract or individual rights) into the language of political argument.

(ii) As constitutional architects. Their influence on ideology is but part of the role lawyers play in establishing the constitutive framework of rules for the political system. Harold Lasswell once termed lawyers the plumbers of politics. This metaphor is not completely appropriate, however, for not only do they repair the leaks and holes, but they also help design and construct the building itself. This is so both in the most obvious sense in which lawyers and judges draft and interpret constitutions; and in a variety of more subtle ways, such as the definition and servicing of the property relations around which the politically dominant classes in any society are organised.

(iii) As adversaries. Lawyers can often sharpen the contradictions present in a society by bringing them into the courts. This is to some extent inherent in the way they represent opposed interests (capital/labour, creditor/debtor, landlord/tenant, prosecutor/criminal) in legal disputes. The implications for politics are also two-sided. In the sense that lawyers treat disputes over political rights and obligations as technical matters determinable by legal arguments put forward in court, they may actually *diminish* the political process itself and enhance the overarching authority of the State. But to the extent that they can bring into court challenges to the ruling class that cannot easily be brought to light in the political arena (for example under a colonial or an authoritarian regime) they may on the other hand help to turn latent conflicts into open political issues.

Thus the scope different legal systems offer for the expression of conflict varies considerably. In general, one would expect it to be greater where a number of the following conditions are present, though none of these, except perhaps the last, is an absolutely necessary pre-requisite for the articulation of contradictions by those in legal roles: (a) where the rules of legal procedure emphasise adversary rather than non-adversary ways of resolving disputes; (b) under autonomous rather than politically controlled methods of adjudication; (c) where lawyers have a source of livelihood that is relatively independent of the dominant class(es) or political interests they oppose; (d) where the concentration of capital and the centralisation of State power is still relatively incomplete; (e) and where there is a broad social base for the mobilisation of extra-legal as well as legal support around the contradictions

lawyers bring before the courts, such as peasant movements to supply the political momentum for litigation against members of the landlord class under land reform legislation, trades unions which can both go on strike and pay lawyers to argue their cases in court, or indeed a wealthy and well organised bourgeoisie, members of which wish to use the courts in order to disrupt the programme of a reforming government.

(iv) As members of the political class. In almost all capitalist societies, lawyers are an important section of the political class itself. In several Western countries (like the USA, Britain, West Germany) and in many countries of the Third World too (such as the Philippines, India, Sri Lanka or many Latin American countries) they indeed remain the largest single occupational category in that class despite important differences in the way lawyers are recruited into public life.

There seem to be two main reasons for the predominance of lawyers in bourgeois politics. The first is the central place of the legal system in reproducing the political framework and property relations of capitalist societies, although there is controversy (Eulau and Sprague) over which particular *aspects* of lawyers' roles – the nature of their skills, their role as intermediaries, their class linkages etc. – are most important in bringing them into political prominence. The second is that, like other professions, they have a relatively independent livelihood and control their own conditions of work (at least ideal-typically: see section III above).

Yet throughout the Third World lawyers have been losing ground within the ranks of the ruling class. In Latin America, this is particularly visible because of the sharp decline in legal education relative to other disciplines and the rise in the numbers and influence of the new class of technocrats (Chapters 2 and 3). But the same tendencies have been noted throughout the Third World, as the case studies in this volume testify. How far is this because of the economic and class marginalisation of lawyers in dependent capitalist and state capitalist economies, described earlier above (see Table 3)? And how far because of the increasing concentration of power under authoritarian regimes and the decline in legal regulation compared with other techniques of rule?

(v) As brokers. Lawyers are often highly active as intermediaries between individuals, groups or even whole classes and the government; between colonised peoples and a colonial government, between business corporations and state agencies, between local and multinational capitalists and so forth. The emphasis here is on their reconciliation of opposed interests in a way that lends itself more to the politics of control and consensus than to that of conflict. Brokerage, however, tends to reduce lawyers' scope for independent political action, since in mediating between powerful corporate or government groups they tend to become dependent upon the favours the latter have to offer. One might therefore analyse to what extent changes in lawyers' functions and skills, such as a shift in emphasis from advocacy to negotiation, are associated with corresponding alterations in their political role; and to what extent *both* are the consequence of the broader trends towards the aggregation of capital and State power we have already noted.

(vi) As bureaucrats. Lastly, lawyers are often servants of power in the most direct

sense, as actors in institutional or governmental roles. They are an important element within the bureaucracy in most Third World countries. The most fundamental differences are those created by variations in State control of the economy. For where the economy is largely socialised as in Tanzania (Chapter 8), there is seldom a social and economic base from which lawyers may move into politics as independent political actors, meaning either a diminution of their political importance or a shift from political to purely bureaucratic functions and activities.

To conclude, the political functions of lawyers are not universal, but rather their importance and whether they are the ideologists of the political system, its architects, the catalysts for conflict, its politicians, its brokers or its bureaucrats varies with the economic structure, the State apparatus and the nature of the contradictions which lawyers either promote or help to overcome. Comparative analysis of these has hardly begun.

Note: All the bibliographic references in this chapter relate to the general Bibliography at the end of this book.

Observations on Lawyers in Development and Underdevelopment

One objective of this volume is to examine the impact of lawyers and legal professions on development. We have described (in Chapter I) changing assumptions which have influenced discourse on this subject. Whereas once scholars asked whether and how lawyers contribute to the “modernization” of economic and political structures, more recently they have asked whether and how legal professions have helped to create or maintain political economies which produce increasing international dependency, skewed distribution of wealth and power, and persistent, often growing, social inequality. Concern about these trends prompts the central questions explored in the concluding parts of this book.

Accordingly, in this Chapter, we examine the surveys collected in this volume, and many other materials as well, in order to explore relationships between legal professions and victims of these social gaps, notably those in rural areas. The general conclusion suggested is that existing patterns of professionalization help to maintain – if not create – social structures which contribute to the continuing impoverishment of vast numbers of rural people; the bulk of Third World populations. Professionalization inevitably creates conditions of differential access to courts and other official institutions, hence differential capacity to use law in these arenas, notably in conflicts over control or equitable distribution of land, water, credit, prices, health care and other essential goods and services. As a result these conflicts are often muted; the poor are relatively powerless to contest terms imposed by landlords, employers or creditors or to demand social accountability from officials who control essential resources. Moreover, by virtue of their demographic distribution, social and intellectual orientation, sources of employment and economic incentives directing their energies – by virtue of these kinds of influences – most lawyers are not well geared to help the poor deal with these problems. The implications of these findings, notably the importance of increasing the collective capacity of the poor to use law in group struggles for essential resources are discussed in the concluding chapter.

I. The Focus of Our Observations

Concepts such as “development,” “Third World” and “legal professions” are extraordinarily elastic: the lawyers, legal systems and conditions of development in

Colombia are, in many ways, very different from Tanzania, and the fact that both countries may be placed within the "Third World" hardly obviates these differences. As Robin Luckham's essay shows, meaningful comparison between these countries calls for careful identification of those historical factors which have shaped political economies in ways which in turn have shaped the development of legal systems. Comparison of other influences – for example, variations in received political and legal cultures – may also help to explain why concepts of professional organization and the methods and roles of law-trained people differ between countries in the same region, for example, differences between the Ivory Coast and its anglophonic neighbors.¹ Even among countries adhering to the common law, there are important differences in the historical age, size, homogeneity and cohesiveness of professions, and thus variations in the extent to which lawyers have been able to develop the "received" legal system, and in the extent to which they have penetrated and affected different sectors of the economy and public administration, and in their interaction with different groups and communities within the polity.

But the purpose here is not to examine differences. Rather it is to portray widely-shared problems: how the modernization and professionalization of legal structures create differential capacities among people to use law in struggles over allocation of basic resources. Our essay focuses on experience in anglophonic polities, particularly Commonwealth countries in Asia and Africa – though we have attempted to use illustrations from Francophonic and Hispanic countries to support generalizations. Many of the questions which we identify as important may just as well be directed to first (or second) world professions, and, in fact, they have increasingly become the focus of a new literature about lawyers in Europe, North America and Australia.² But among the factors which distinguish "third" world societies are the legacies of colonialism or autocracy, dependency and legal systems which have been imposed "top-down," and the scale of poverty, and the magnitude of social gaps and the social distance between ordinary people and the institutions which others have created to govern them. Reliance on professional models patterned after Western (or, for that matter, Eastern) legal systems, to develop and to staff legal institutions and to provide legal services and access to courts or administrative or law-making bodies, may exacerbate these conditions of inequality and underdevelopment. Neglect of this hypothesis may be a serious omission for those who view impoverishment, political exclusion and social inequality as central problems of development.

There are many perspectives to examine relationships between lawyers and these social gaps. Study of historical factors affecting development of a profession may help to explain continuities between the colonial and post-colonial political economies and the roles of lawyers in maintaining them.³ Studies of the economic bases of both private and government legal work – and of the demographic distribution, employment and work tasks for which lawyers are commonly engaged – may suggest reasons why they have less identity with the needs of the poor and historically disadvantaged for legal assistance.⁴ Studies of modes of recruitment, education and acculturation of lawyers may help to explain how – and why – they

tend to reproduce, uncritically, the institutions, processes and inherited doctrines of foreign-inspired law in Third World settings – and why lawyers may lack orientation towards relationships between legal development and poverty.⁵ Studies of the controls exercised by lawyers over various kinds of legal work and over diffusion of legal information – may also show how professionalization restricts distribution of *legal resources* – i.e., the knowledge and skills people, themselves, need to use law to protect or pursue interests vital to their wellbeing.⁶ Study of a profession's public concerns about law reform, legal aid and so forth, may also reflect inherent biases in professional relationships to the poor, or in professional perceptions of their problems and needs.⁷ All of these perspectives, in turn, show why profession-managed systems of "delivering legal services" to the poor may be an inadequate response to their needs for that kind of legal knowledge and assistance which can most help them to redress power relationships and gain more influence over resource allocation.

II. The Historical and Social Environments of Professional Development

Legal professions – of the kind which interests us here (because they have provided models for replication all over the world) – developed in western Europe, notably France and England, over many centuries. Indeed their roots go back to Roman times, and to the 11th century revival of ideas about "legal science" within the Church. In medieval times lawyers played important roles in the service of monarchs struggling to extend their authority over a feudal nobility, the church and other enclaves of rival political power, in developing concepts of national law and courts and modes of administration which helped to convert feudal polities into national states; in developing new structures to facilitate commerce.⁸ In the 17th and 18th centuries they played important roles in developing the political ideas and conflicts which shaped the social revolutions of that era in western Europe, and then in developing political and legal structures which broadened political participation and brought power to constantly growing middle classes. In the 19th century lawyers helped to transform law to respond to demands of the age of capitalism and industrialization, and, in more recent times, to the demands of the welfare state.⁹ The role of law and the use of law as a vehicle for social change have been central themes in this history even if the legal system has never been neutral or equally accessible, even when legal professions have lagged behind demands for reform. The idealized model of an independent legal profession – as a learned group, as trustees of an autonomous legal system – has been derived from this historical experience.¹⁰

The creation, in the Third World, of professions patterned after these Western models has taken place in a quite different historical social context. A marked feature of most Third World countries – those which have legal professions – is the

fact that their official, state legal systems have been both imported and imposed from above, and in many ways they are still alien and inaccessible to the great mass of people and unresponsive to many of their needs for accessible structures to resolve conflicts over essential resources.¹¹ In colonial states, European law was imposed, without the least semblance of popular mandate as part of the structure of colonial governance.¹² In post-colonial Latin America the introduction of European-inspired codes was the product of efforts by elites within small ruling groups of highly stratified societies to modernize and rationalize existing political and economic systems rather than a popular response to widespread demands derived from shared perceptions of need, to use law to change the political economy.¹³ The processes of "modernization of law" were even more abrupt and ahistorical in ancient, traditional polities like Iran, Thailand or Ethiopia; European legal codes and institutions were sometimes introduced almost overnight by the fiat of modernizing rulers with little or no consideration of popular concerns or possibilities of using endogenous structures rather than replacing them.¹⁴ Legal professions followed these developments – as responses to, rather than initiators of, the legal changes. Rarely were lawyers identified as popular protagonists in broad-based social struggles for changes in the political or economic order.

The evolution of legal professions in colonial states varies, but the story produces a similar outcome. In some regions (e.g., in South Asia and West Africa), indigenous lawyers emerged at an early stage, and today the profession tends to be comparatively large, institutionalized and firmly rooted in the social structure.¹⁵ In other colonies (e.g., in East and Southern Africa), the development of an indigenous profession came late, sometimes only after independence; and indigenous lawyers are only now beginning to assert their particular identity within the social system. These variations reflect important differences in the kinds of social policies and political economy established within colonial states. Where settlement was sponsored (e.g., Kenya), or where the units of production and distribution in the modern economy were controlled by Europeans and other settlers (as in Zambia or Tanzania), the small legal professions which developed were almost totally non-indigenous. In these and other colonies, the immigration of peoples from the Indian sub-continent (as in East Africa) or China (as in Malaysia) was encouraged or tolerated as a source of skilled workers and capital and manpower for small-scale businesses. Some immigrant groups enjoyed opportunity to study law in England or India and gained entry to the bar, and many of these lawyers prospered as local needs grew for professional assistance to cope with – or use – the colonial legal system.¹⁶ In these colonies the provision of economic and educational opportunity for native people was generally neglected, frequently restricted as a matter of policy. Thus, in Eastern and Central Africa, when the "winds of change" blew strong in the early 1960's, there were small, well-established legal professions, but hardly any African lawyers in them.¹⁷ In those states the immediate goal of post-colonial governments was to "Africanize," rather than de-mobilize, the inherited structures of colonial governance; continuity rather than discontinuity was the policy followed in law and administration. Accordingly, just as efforts were pressed, through new

universities (staffed heavily by expatriates) to educate persons for high-level positions in the public service, so law faculties were founded to teach English law in order that African lawyers could assume positions of power. These policies looked to preservation of the inherited legal system and encouraged continuing formation of a profession to foster it.¹⁸

In many of the colonial states of Africa and Asia, the settler populations were insignificant, and colonial policy encouraged indeed, sometimes pressured, indigenous peoples into the production of cash crops and other raw materials needed for international markets. Where – and to the extent – indigenous people participated in the development of the modern economy, there arose transactions which created needs for legal services, and indigenous local lawyers emerged on the scene. Initially, they were trained abroad (e.g., at the Inns of Court) later (sometimes much later, as in most of Africa) at local institutions; but, in any event, they were thoroughly acculturated to the legal system of the “mother country.”¹⁹ As lawyers became more numerous in different colonies, so they sought – and received – the kind of benign state regulation necessary to foster formation of a self-regulating profession modeled on that of the metropole. In turn, the development of an indigenous profession produced a local interest group with incentives and the means to reproduce the essential features of the colonial legal system after independence. The larger and older the indigenous profession, the more firmly the “received,” foreign law of colonial days became entrenched as the official law of a new nation with little significant change.²⁰

In economic terms, legal professions throughout the Third World have developed in societies characterized by relatively small, “modern,” social “enclaves” built around commercial agriculture, extractive industries, export-import businesses and the infrastructure to serve them.²¹ The most powerful businesses in these economies were often foreign dominated, and as independence came, some indigenous lawyers began to play significant local roles in representing their interests.²² But most lawyers found clients among local businessmen or commercial farmers who entered the economic system as cocoa, coffee or cotton growers; as owners of plantations or ranchers; as landlords or money lenders; as traders or employers of labor. While these enclaves of modern economic activity were narrowly based, they generated local affluence and the kinds of family, business, land and credit transactions and disputes, which (along with government employment) created markets – often lucrative – for professional legal services.²³

The mass of people who lived on the periphery of the modern economic sector (e.g., as subsistence or marginal cash crop farmers, as tenants or depressed laborers) may have felt increasing needs for legal assistance – e.g., to deal with land exploiters, landlords, employers, creditors, tax collectors or other officials – but they usually lacked the means to hire professional intermediaries in a private unregulated market for legal services. Indeed, as legal professions established their identity and consciously reproduced the received legal system, so (invoking familiar arguments) they attempted to monopolize rights of appearance and other legal work, and regulate, limit or coopt the numerous non professionals – “bush” or “bamboo”

lawyers, "scribes" and others – who purported to provide legal assistance to the poor.²⁴ In the same fashion they pressed for rights of appearance in customary courts, and even where this privilege was denied they were often able to participate in – and manipulate – transactions governed by customary law. Thus, in West Africa, lawyers played an active, historic role in helping to create new kinds of customary land tenures which provided more security to commercial farmers.²⁵

In social terms, colonial societies were often characterized by marked dichotomies between a small, urban centered, western acculturated population and the mass of unschooled people.²⁶ Lawyers were recruited from educational systems which replicated that of the colonial power. Their status derived in part from their unique familiarity with the language, culture and institutions which had been imposed by that power and retained after independence. In earlier times the calling attracted many of the most talented of those privileged to enjoy access to education, and successful lawyers quickly became prominent people with ability to influence "significant centers of decision-making."²⁷ In part, this tendency may have been fostered by educational systems which were peculiarly oriented towards law – rather than, e.g., science, business or engineering, let alone the provision of health, agricultural or educational services to rural people. In part, lawyers achieved status because, as lawyers, they were assumed to be persons of universally recognized, intellectual attainment, members of a broader, international, intellectual community. (Indeed, within the Commonwealth, many lawyers continue to take pride in their membership in an Inn of Court and the British Bar.)²⁸ In part, law was attractive because it was one of the most lucrative private occupations.²⁹

Most colonial states were characterized not only by a high degree of stratification between the urban, educated wealthy and the mass of others, but also by segmentation of people into different, ethnolinguistic, religious or other kinds of groups or castes – historically insulated from, and sometimes hostile towards, each other. In those settings where colonial policy fostered – or tolerated – the immigration of alien populations to meet needs for commercial traders, small-scale businesses and skilled labor, these populations usually enjoyed superior wealth and educational opportunity and hence easier access to professional training and to markets for legal services produced by their group. Of course, where colonial policy had fostered European settlement, a European bar often continued to cater to European clients and dominate the profession after independence (as in Kenya). Thus ethnic and other divisions in society were reproduced within the profession and were reflected in the clienteles and interests served by lawyers, and these divisions affected the social orientation and cohesiveness of the bar, and its social links to the mass of people.³⁰

In political terms these societies have long been characterized by authoritarian government. In colonial times government lawyers and judges were civil servants in the colonial service, and their careers were dependent on their reputation in that service, rather than the esteem of colonial peoples.³¹ As a distinct professional group these government lawyers often had little social contact with lawyers outside governments or with the populace governed. Indeed they seldom regarded

themselves, or were regarded, as members of the local profession, and this tendency to dichotomize between public and private lawyers probably persists today. Lawyers serving colonial governments regularly borrowed legislation from other colonies, including laws which legitimated sweeping powers for ministers, police, parastatals and government bureaucracies. Colonial judges served at the pleasure of colonial governors in regimes which were hardly committed to bills of rights and robust judicial protection of the rule of law; the judges, too, were part of the colonial superstructure; their courts were often used as part of the system to enforce colonial regulations on taxes, obligations of workers, breaches of the peace and so forth, but seldom to protect ordinary people from abuses of officials who administered these laws.³²

Late in the colonial period more liberal constitutions were introduced, modeled, of course, on mother country institutions. Where strong indigenous legal professions existed – as in South Asia or West Africa – lawyers, schooled in the theory of these constitutions, often played prominent roles in politics, agitating for further constitutional reform and autonomy, and in courts, defending persons charged with political offenses.³³ In more recent periods they have played influential roles – in the making or remaking of constitutions. In West African countries, and in India and Sri Lanka – countries with older, long-established professions – leading lawyers have often been articulate spokesmen for political systems founded on principles of constitutionalism, competitive politics, a neutral civil service, the rule of a rational, modern legal order – and the replication of institutions with which they were intellectually familiar (such as courts, parliament, public service commissions).³⁴

In spite of these activities, it is doubtful whether one can say that lawyers (*qua* lawyers) have played the kinds of roles in the establishment of endogenous political institutions which their historic counterparts did in the revolutions which produced the modern political institutions of western Europe and North America. Rather, they tended to play brokerage roles – helping to produce an orderly transfer of power, from colonial officials to new national leaders, over political institutions which had been developed by essentially authoritarian and devolutionary political processes. The concepts of rule of law and constitutionalism which were grafted onto the inherited political systems of post-colonial states are yet to be linked by lawyers to popular understanding; the legal system is yet to be seen as a means for people to advance claims against government, and lawyers and judges are yet to be widely identified as defenders of human rights against government.

Indeed, colonial traditions – and the titles, symbols and roles ascribed to important law positions – tend to live on in post-colonial legal systems. So do many of the authoritarian laws of the colonial state (such as those permitting preventive detention, open-ended sedition charges, rigid control of public records and information and political censorship). So do the legal frameworks establishing institutions and concepts of administration which seem to preserve the broad realms of discretionary power and superior social status which higher officials in bureaucracies enjoyed in colonial times. While of course politicians of the day have

made the decisions to preserve (or at least use) these authoritarian legacies, lawyers have often been key actors in maintaining structures created by colonial governments to govern – such as police and public service establishments and parastatal institutions which seem to be insulated from legal accountability. Styles of writing laws and of administration within ministries and adjudication in higher government courts manifest these colonial heritages – the historic separation of administration and official law from indigenous political cultures and from popular understanding, access and control.³⁵

III. Development, Employment and Work Tasks of Lawyers

Entry to the legal profession is gained, in most countries, by successful progress through educational systems which still replicate European structures and are still (in many ways) geared to elitist, western and urban-centered values and to employment markets which put great emphases on formal academic attainments as eligibility criteria for higher level occupations.³⁶ Law students also learn that there are many kinds of legal practice, that income and status will depend on the kind of clientele served. Least remunerative and least esteemed are clienteles made up of the poor, particularly the rural poor. Indeed, the educational system often adds to a systemic bias against the rural poor by emphasizing urban practice as well as urban values and life styles.³⁷

While the volume of demands for lawyers may be widening in many countries, opportunities available to law school graduates for particular kinds of positions (e.g., in government or the judiciary) may be conditioned by ethnicity (as in Malaysia)³⁸ or by the university attended (as in the Sudan and Latin American countries)³⁹ and by other social connections.⁴⁰ It may often be difficult for lawyers from one group to build a strong clientele within another, and difficult for novice practitioners to move to communities where they are strangers to the language and customs of the local peoples. Often a rural practice requires a good deal of travel, and it may depend on establishing effective relationships with local, non-professional intermediaries – agents such as “touts” – who garner clients and handle a small local office for the itinerant lawyer.⁴¹ But for obvious reasons most graduates of law schools seek an urban practice if they can find one. The most successful and influential members of the profession often tend to be linked through social connection with those groups, political circles, institutions and interests which are beneficiaries of the existing political economy.⁴² Thus, the various clienteles of different sub-groups within the profession continue to reflect both pluralist divisions as well as patterns of stratification within society.

Private Lawyers. As the work of practitioners becomes organized around the specific needs of particular clienteles, so the orientation and organization of law

offices, and the kinds of skills and tasks used, and the volume of clients engaged, may vary.⁴³ One may find combinations of urban lawyers as partnerships or companies – perhaps with some degree of specialization – to deal with the problems posed by larger-scale business clients. Lawyers serving these interests often see themselves more as advisors, drafters and facilitators than as litigators, though some kinds of clienteles (e.g., large-scale employers; insurers) may use the courts frequently. When there is a relationship with a client which creates continuing contact with recurring problems of that client, the lawyer can afford – if the client provides the resources – to become more “expert” and innovative in finding ways to use law for the advantage of his client, a better counsellor to and pleader for his client. Thus, affluent clients with continuing relationships are often in a better position to demand and get more “expert” services tailored to their ongoing needs.⁴⁴

At the other end of the spectrum one finds individual practitioners who serve less affluent clients on high volume, low overhead, low fee and limited contact bases.⁴⁵ These lawyers can seldom afford to invest large amounts of time and effort to explore and deal with the more basic problems of the client; the range of services provided is usually more limited; they often see themselves primarily as litigators. A former Solicitor General of Uganda offered a familiar critique: “We do have a large body of lawyers who appear to be captivated by the wig and gown and engage in great quantities of court work for which they often make little preparation.”⁴⁶ He went on to observe that when the poor come as clients, moved by the traditional urge to force resolution of their disputes in a community forum, they find advocates who are only too willing – if payment can be arranged – to press claims in court rather than mediate settlements or serve as a general counsellor trying to help the client in more basic ways to become more self-reliant in a legal sense. It is commonly alleged that many of those lawyers who cater to the less affluent will accept claims which may be dubious (when judged by standards of official law) or of an economic value far below the cost and risks of courtroom contestation. Indeed, the fees charged by lawyers for litigation call for great sacrifice by a poor client, and there may be endless appeals – and many more fees and calamitous indebtedness – before the issue gets settled, if it ever does. Thus it often appears (in studies of rural communities) that lawyers “serving” the poor help to escalate conflicts between poor people beyond the traditional forms and forums of dispute settlement and into the costly, official legal system.⁴⁷

Because contacts of high volume litigators with clients are limited, their practice usually provides “reactive,” rather than “proactive” services, to individuals. They may lack the time, capacity, orientation or economic incentives to use the legal system aggressively (in the way lawyers with continuing relationships with institutional clients can) to help poor people in rural communities to organize and address shared problems through collective efforts. Thus, the most serious concerns of the rural poor in a particular area may have to do with access to land, credit and markets, or with relationships to state bureaucracies established to provide agricultural services or provide loans or regulate prices. Ignorant of the law and unorganized, the poor lack effective, individual access to these institutions and also

means to mobilize and articulate group claims and exert collective efforts to influence the way officials exercise discretion. On the other hand, court-centered, private lawyers may lack the motivation or means to help the poor understand how, through organization, they may be able to deal more effectively with powerful governmental or private bodies by asserting group claims. The poor as an interest group are seldom his client, and counselling on disputes which cannot be easily be converted into traditional categories of litigation are seldom part of his professional business.⁴⁸

Public Lawyers. "Law and development" writers of the early 1960's placed heavy emphasis on the potential roles of public lawyers – as potential writers of laws who would be expert in "planning" and in structure; as counsellors who would represent broad-based public concerns in official circles; as defenders of rule of law who would help significantly to restrain abuses of power and unprescribed activities within bureaucracies; as leaders within their profession.⁴⁹

Few surveys of lawyers have focused very closely on those who work in government, particularly in ways which test these aspirations. The bias towards private lawyers, towards treating lawyers as purely private actors, is often evident. Perhaps it is a reflection of disinterest, among many professionals, in claiming the public roles ascribed to them. In any event, the materials here as well as studies of bureaucracies and public administration, suggest that the work lawyers (*qua* lawyers) perform in government seldom matches the earlier expectations of "law and development" theorists.⁵⁰

Many government lawyers are litigators – notably in the criminal justice system. Most others tend to be technocrats performing rather routine work within departments and parastatals.⁵¹ Instead of influencing the character of public administration they tend to be influenced by it, blending into the bureaucracies they serve, becoming a part of them rather than an autonomous counsellor to them. A number of factors may explain this phenomenon: inherited colonial legacies, professional socialization, economic attractions and social rewards.

Colonial lawyers were usually a kind of "house counsel" rather than independent professional; their accountability lay to higher-level colonial officials; they performed limited roles in governments which enjoyed limited social accountability; they were employed to be legal agents of those governments rather than recruited from an autonomous profession with professional accountability to the local society.⁵² Nor, until late in the day (and often with reluctance), did colonial governments seek to employ indigenous lawyers in responsible counseling positions even when local professions were well developed.⁵³ Rather, strong dichotomies existed between public and private lawyers, and, upon independence, the public service establishment offered few legal positions of importance in policy-making terms.⁵⁴

For example, colonial lawyers who served as law writers were regarded more as skilled technicians, than as counsellors and participants in the processes of policy-making underlying legislation. In Commonwealth countries drafting is said

to be an "art" which can only be learned from others in the guild. Both the art and the notion of a guild (peculiarly insulated from the public and accountable to whatever government is enthroned) have often been handed down from colonial times; the parliamentary draftsmen of colonial days have continued to school their successors, and this phenomenon has often produced an uncritical replication of concepts and modes of legal expression which characterized colonial laws. Examination of many statutes will show how draftsmen write them as if they were talking to specialists – incorporating, even where inapposite, terms and concepts drawn from the "mother country's" law. Because they do not participate in earlier stages of the law-making process but rather take orders from ministries or cabinets, draftsmen may lack understanding in depth of important aspects of the problems to be addressed by the legislation they write (e.g., perceptions of the needs and interests of the intended beneficiaries of a land reform). They rarely participate in the organization of hearings geared to provide consultation with the people and interests affected by legislation. (Indeed such procedures are themselves rare; they are not part of the received tradition.) Consciously or not, they often write laws which may convey little information and few rights to groups affected by the laws; they write laws which establish and reinforce realms of hierarchical, discretionary public administration, by delegating wide powers and implicitly incorporating colonial vintage public law doctrines, which insulate public power-wielders from review in courts or other forums of accountability.⁵⁵ The whole process of law-writing is often seen as a technical one of simply reducing a decision already made to a legal form, to say it in legal words rather than a process used by the lawyer to expose issues for consultation and debate, a process of anticipating conflict and problems of administration and forcing careful review of assumptions underlying a given approach to a problem.

Among lawyers with talent or connection, government employment is usually less preferred as a career though often it is sought as an entry point into a legal career,⁵⁶ and in some African countries a period of public service has been required.⁵⁷ Except in the top ranks (and even here the turnover is usually notable) governments do not often compete with the better paying private markets or parastatals for talented or experienced lawyer. When civil service job classifications are set legal talents are often valued less than other professional skills.⁵⁸ Perhaps this is because politicians as well as economic planners, managers and other elites in government service (and international "experts" who advise on these matters) put a low value on the importance of lawyer inputs in high level decision-making and development administration. Indeed, manpower plans seldom ever discuss public (or private) legal services as a category of human resource needs.⁵⁹

Since legal jobs tend to be routinized within bureaucracies, lawyers are less often engaged in creative, innovative work developing new modes of development administration, new models for public resource allocation which provide for more access and participation. Over and again, in one setting or another, one finds a familiar lament among government lawyers: they are consulted late, and for limited purposes, in the course of the shaping of transactions. The use – and non use – of

lawyers in transnational negotiations is often cited as a striking instance of this neglect of the value of legal resources by governments. Unless highly placed, with a political base or at least strong talents of persuasion, a government lawyer may lack the means to bring the concerns of the poor to bear in his counselling.⁶⁰

Judges. In most settings the courts are constituted as an independent branch of government, and judicial service is established, at least *de jure*, as a distinct public service, a career track.⁶¹ The higher ranks of the judiciary are supposed to reflect outstanding legal talent (drawn, in anglophonic countries, from the higher ranks of the bar). Enjoying prestige within the profession, and a high official, but non-political status, and tenure in office, judges can usually survive coups or political upheavals if they are not readily identifiable as political figures.⁶² The rhetoric of the higher judiciary – portrayed in numerous reports of international meetings – reflects a firm commitment to the maintenance of the rule of law through an autonomous judicial system.⁶³ Yet thoughtful judges have sometimes written about the paradoxes in their position. While judges may, in the courtroom, exhibit the majesty and style of a European magistracy, their base of political authority and popular support is notably weak. While the judiciary may be legally endowed with wide powers (often including powers of constitutional review) which could be used to broaden the civil and political rights of the poor (e.g., by expanding rights of due process and rights to counsel), conservatism and restraint have more frequently characterized the use of these powers.⁶⁴ Judges exhibit a “black letter” orientation in replicating received legal doctrines, and a “formal style,” in interpreting legislation and constitutions. The work of the courts has had little impact on the authoritarian characteristics of public administration and the accountability of bureaucracies to people. A Ghanaian judge⁶⁵ has recently observed:

It would seem that on the whole governments in the newly independent countries hanker after the simplicity of the colonial arrangement, with the primary aim of the courts being to uphold the power of the State, enforce its laws and provide stability. The courts’ function of protection of the individual from the abuse of power is relatively new and less well appreciated. . . . In any event, until the people develop values to guide their courts, other than that of upholding state power, the constitutional enactment of the separation of powers is bound to remain largely a declaration of intent.

If “the people” are to demand more protection by courts against abuse of power, presumably that movement must begin with the lower courts. The lower judiciary is more important from an access perspective though it has seldom been studied as a group.⁶⁶ In most countries the lower courts are staffed, more and more, by professionals. Usually these judges are younger lawyers who have no long-term ambitions for careers in judicial service where promotion – and more challenging work – may come slowly, if at all. When assigned to a rural area, the judge frequently lives as something of a stranger among the people he is assigned to serve, lacking knowledge of their language and customs. He identifies with other officials of the central government who are also assigned to the area, and, whether in a rural or urban setting, the judge may perform functions which become “routine” and

"bureaucratic" in character: cases tend to follow regular patterns. On the criminal side (often a large part of the business of lower courts) the bulk of the docket is increasingly concerned with theft or violations of regulatory laws, tax delinquencies and similar infractions. On the civil side it may be debt collection, land and family disputes. The volume of cases is high, the pressure on the judge is to dispatch them.⁶⁷ Thoughtful judges have noted the social gaps which seem to separate the courts from poorer elements in communities as a result of professionalization of the judiciary and legal process.⁶⁸ But advancement within the judicial service does not depend on establishing links between courts and the local poor. On the contrary, the model prescribed is that of the impartial professional judge who maintains social distance. The organization of the judicial service, like that of other bureaucracies, is hierarchical, and service in rural communities carries neither prestige within the judiciary nor other attractions to hold talented newcomers. Attrition of younger judges to more rewarding employment is often high; and adaptation of the judiciary and lower courts to the needs of the poor, notably the rural poor, remains a rather neglected area,⁶⁹ particularly when one comes to look at relationships between the legal system and rural poverty.

IV. Needs of the Rural Poor for Legal Resources

Few studies of lawyers have examined legal professions from the perspective of victims of the gaps, notably the vast numbers of people in rural areas living in conditions approximating "absolute poverty." Histories and surveys of lawyers may tell us about the principal markets for professional legal services, about economic activities which generate work for lawyers, about the clientele and interests served by different groupings within the profession; but they tell us little about the needs and interests of people who don't employ lawyers because poverty, ignorance and the demographic distribution and social distance of professionals makes it difficult or impossible to do so. Studies which focus on the activities of lawyers may show how professionalization affects the character of laws and legal and administrative institutions, how, among other things, it leads to "modernization" of these structures, but these studies tell us little about the effect of these changes on those who lack access to legal resources— who lack access to the functional knowledge and skills needed to use law as a means to protect or advance their economic and political interests.

Our purpose here is to examine the social impact on the rural poor of the professionalization of law, legal services and legal institutions. Since such studies are lacking, the approach and conclusions developed are suggestive, for, obviously, the problems of impoverished rural people vary considerably. But by looking at illustrative studies (coming from different countries) of rural communities where poverty is widespread, and at the needs of farmers, workers or mothers in those communities, it may be possible to identify various kinds of conflicts over resources

– conflicts which are sometimes real or, but more often inchoate and which illustrate needs of the poor for legal resources.⁷⁰ It may then be possible to offer a more meaningful assessment of the importance of the legal resource needs of the poor and an assessment of whether and how legal professions – developed along existing models – can respond to these needs.

In relatively homogeneous, autonomous, self-sufficient rural communities, needs for land and other resources may be limited and equitably satisfied by historic community structures. But these kinds of communities are the exception. A World Bank report⁷¹ describes the social situation in communities where “absolute poverty” is widespread.

In most cases, the poor, are found living alongside the prosperous. They sometimes suffer from limited access to natural resources. But more frequently they suffer because they have little access to technology and services. . . In many cases, vested interests operate to ensure not only that the benefits of productive activity are distributed inequitably, but that the poor are denied access to the inputs, services and organization which would allow them to increase their productivity. Thus the socioeconomic system operating in the rural areas is often hostile to the objectives of rural development, serving to reinforce rural poverty, and to frustrate the efforts of the poor to move up.

Peripheralization, stratification, impoverishment and political exclusion of groups of people has occurred, over time, as various social changes have been introduced. Political and economic – and hence legal – relationships of people are gradually altered by integration of the community into national (and international) economic systems. Production of cash crops and other agricultural changes call for the use of new technologies requiring more money and new skills. Private commercial farming, requiring investment and intensive – and sometimes extensive – land use, may produce manipulation of customary land tenure in the courts, a shift towards recognizing individualized ownership, and then the enlargement of some holdings and the diminution of others, an increase in landlording, landlessness and employment of farm labor. Population growth may exacerbate land shortages. The introduction of modern schooling, money and new consumption habits brings about the replacement of old norms favoring collective welfare with new ones favoring private gain. The growing presence of the central government operating through professional officials, in the regulation of more and more community affairs and in the provision of services which increasingly affect people’s welfare also contributes to the impotence and breakdown of local traditional structures for handling disputes and allocating resources.⁷²

Struggles in rural communities (e.g., over land, indebtedness or employment conditions or for access to goods and services to satisfy urgent needs) may produce several different kinds of needs for legal resources: those arising from encounters with more powerful private persons or institutions, those arising from encounters with public agencies and bureaucracies.

On the one hand, landlords, suppliers, creditors or employers may resort more and more to official law, police and the courts – to which they have superior access – to impose and enforce new economic relationships through contracts, leases and

other legal forms.⁷³ The threat of litigation to enforce these terms in official courts may be a very real weapon. Ordinary people cannot easily use the courts where they are handicapped by language barriers, ignorance of the rules, and other factors. They must usually go deep into debt to secure needed professional assistance, and even with lawyer assistance there are risks (perhaps increased by lawyers) of endless rounds of litigation dragging on for years. The certainty and formal equality promised by official law may seem illusory to those who view it from these perspectives, "it is common knowledge," writes a Nairobi law teacher, "that the majority of Kenya citizens want nothing to do with official law."⁷⁴ The observation is no doubt widely true in rural settings throughout the world.

Increasingly the rural poor may be affected by the actions of large agro-industries – oftentimes firms which are the "joint enterprises" of foreign multinational companies, corporations and domestic companies created and controlled (in theory, at least) by the government. Thus government may join with a foreign concern to create a commercial fishing enterprise, or a domestic rubber plantation, or a pulp industry. The new enterprise may profoundly affect both the social and physical environment of the locale where it is introduced: it may impact on individual peasant producers, driving them out of business; or, by expropriating large land areas, it may create a new landless group; or, by exploiting natural resources on a major scale it may destroy forests or pollute water or otherwise disturb ecological balances affecting agriculture and deprive local people of resources on which they have, historically been dependent.⁷⁵ Increasingly, perhaps inevitably, these kinds of cases occur, and the question arises whether those affected can invoke laws (concerned, e.g., with unfair competition, land use and the environment, price practices or other matters) to protect against the adverse effects of the enterprise.

While these kinds of disputes generate legal needs which may be more apparent to discerning lawyers concerned with the "legal needs" of the poor, other kinds of encounters of the poor with public administration create other needs for legal resources which are seldom analyzed closely in the literature of rural development but which may be even more significant to many people in impoverished communities. In most Third World countries – whether the regime avows some form of socialism or another ideology – the state exerts (or purports to exert) a pervasive control over resources essential to well-being, such as land, credit, technology, schooling, health care and prices. Different kinds of institutions (ministries, planning agencies, public corporations, regulatory bodies, cooperatives, courts and other tribunals) exercise a variety of powers (planning, rule-making, licensing and adjudication; provision of utilities or employment, transport, markets and prices for essential goods) affecting the availability and allocation of goods, services and other benefits which (in the World Bank's words) affect "efforts of the poor to move up." Different kinds of law – statutes, administrative regulations, company and commercial law – provide a structure of rules governing the exercise of these powers. Thus law creates an infrastructure, invisible to most people, which enables the state to control and allocate essential resources.⁷⁶

In theory, these government programs are often supposed to identify closely with the essential needs and concerns of the people for whose benefit the programs are especially designed. Thus credit schemes, or land reforms protecting tenants, are supposed to advance the welfare of particular groups and officials charged with implementation are supposed to work harmoniously and effectively with intended beneficiaries. Since the relationship desired between bureaucracies and intended beneficiaries is one of cooperation, not conflict, the legal "rights" and "duties" of the parties in this relationship are thought to be irrelevant to the problems to be addressed. If a program fails to allocate resources in accordance with the intentions of policy makers, the frequent assumption of official policy makers is that this is due to some failure in development administration. But studies of administration of these kinds of programs repeatedly show a variance between official theories and assumptions and actual practice. In fact, both the design and implementation of rural development programs are fraught with situations where conflicting interests – group and class conflicts or competing economic policies – must be resolved. Repeatedly these conflicts are resolved through processes and decisions which ignore the interests and needs of groups affected by these actions, because, by reason of poverty, ignorance and other disadvantage, these groups have no influence in decision-making processes.⁷⁷

Lack of access by the poor to distant, high-level, central government officials who design programs often means that policies and assumptions underlying a program (usually developed by experts working *ex parte* with little or no local consultation) may ignore local conditions or the actual needs of important groups of the poor to be served by the project. Thus, concentration and centralization of policy-making and rule-making powers in hierarchical ministries coupled with lack of access to decision-makers often means that:

... those without adequate political access to those with power, can be short-changed. For example, in Ethiopian land settlement projects of which the author has personal knowledge, it has been necessary to decide how to deal with local nomadic peoples, what new arrangements to make for land in the intensive development area, and what kinds of new institutional arrangements for decision making to develop. These decisions have by and large been made at central headquarters, with little input from some of the groups most directly affected. Yet these decisions [which have the force of law] about the allocation of resources and power are crucial to the future of these peoples, particularly to their chance to break out from poverty in future decades.⁷⁸

In the same way local day-to-day administration of state programs which control resources essential to the needs of the poor is frequently affected by the lack of access of those directly affected by the practices and decisions of officials charged with implementation. Studies of administration of these kinds of programs repeatedly show that resources are underallocated or inequitably allocated.⁷⁹ A variety of factors may explain the result: the class or social bias of administrators; organizational defects and weaknesses in the administrative system, lack of political will or leadership. But one important reason why the rural poor are so often neglected by public agencies which are supposed to serve them is because they lack

effective means to demand recognition of their interests.⁸⁰ In many instances the poor may have inchoate legal claims for resources; the claims are never asserted because of peoples' ignorance of law or their perceived inability to influence officials who have, in fact, the discretionary power to help those who urgently need the goods, services or other benefits controlled by the state. For example, a public agency may be entrusted by legislation with broad discretionary powers to provide credit to cultivators or to fix commodity prices, or to effectuate a land reform program, or to enforce rules which protect agricultural laborers from exploitation; or an agency may be established to provide health care programs – to supply potable water, sanitation or child care to communities. The agency may simply fail to exercise its powers, or it may exercise them in ways which are neither understood, nor effective; or in ways which create eligibility rules which favor some groups while discriminating against others historically disadvantaged. The agency may have failed to exercise discretion or to enforce laws in the manner intended by law; or it may have dealt with people corruptly, or have exercised unprescribed powers in oppressive ways.⁸¹ In any event, the problem, from the perspective of those adversely affected, is to understand that they have rights to protest the agency's neglect and to select appropriate forums and devise appropriate means to force the agency to recognize their entitlements. The legal system, in theory, provides rights or, at least, opportunities for people to voice grievances and dispute the legality of official decisions or practices which adversely affect their interests. Often, of course, these avenues may seem closed; courts may refuse for "jurisdictional" or other reasons to hear claims against abuse of discretion by government agencies; the agencies themselves may be unwilling to review their own actions, political channels may be unresponsive.⁸² But even if the courts or higher-level officials fail to respond to claims by victims of underallocation or misallocation, the problem remains: can the victims use law to force attention to their grievances, by publicizing the dispute, by exposing contradictions, by bringing community pressure to bear?

These problems focus attention on another important, unexplored category of needs for legal resources. The poor need legal resources to help them form their own, self-help organizations as a means of dealing with public and private centers of power. Perhaps these needs are of the highest priority.

There is now abundant evidence that participatory, community groups can affect relations between the poor and public agencies which are supposed to administer to their needs. The literature of development increasingly reflects themes built around concepts of "mobilization" and "organization" of the poor, "self-help and self-reliance," "popular participation" and "readjustments of power" over institutions which allocate resources essential to the poor, "deconcentration of bureaucratic power" and "decentralization of administration."⁸³ Summarizing a series of country studies of rural development efforts in Asia, APDAC (the UN's Asian and Pacific Development Administration Centre) reported⁸⁴ that:

rural organizations serve as the most crucial variable [affecting implementation of] rural development policies,

and that rural administration had failed most conspicuously to close gaps where there was lacking:

an effective vehicle through which the interests of the rural poor could be articulated.

Analyses of land reform experience in many parts of the world suggest that creation of rural organizations which enable people to participate more directly in administration of programs may be a crucial factor in producing outcomes which transfer resources to those historically disadvantaged. Analyses of problems of providing credit suggest similar conclusions. Umma Lele's survey of a number of local studies of experience in rural development in Africa noted that – echoing the Asian studies – the “ability of rural people to articulate demands for rural services” through their own organizations may determine whether they get the resources they seek.⁸⁵ A striking illustration of these findings is reflected in India's latest Five-Year Plan (1978–1983).⁸⁶ It proposes major shifts in priorities for government programs concerned with redistribution of land, and essential goods and services for the rural poor, and it sets out a detailed critique of earlier Indian experience in administering rural development:

Critical for the success of all redistributive laws, policies and programmes is that the poor be organised and made conscious of the benefits intended for them. Organised tenants have to see that the tenancy laws are implemented. Organisations of the landless have to see that surplus lands are identified and distributed to them in accordance with the law within five years. . . The general lesson of the experience so far is that because leakages in delivery systems and ineffective administration, rural programmes fail to improve the distribution of income. The Planning Commission is proposing a massive shift of resources in favour of rural areas with an in-built redistributive character in almost every programme. But whether the larger resources will have the desired equalising effect will depend on the extent to which the organised pressure of the beneficiaries counteracts the weaknesses of the administration and the opposition of vested interests.⁸⁷

The Indian Plan seems to recognize that organization for self-help and conflict are necessary features of effective implementation of redistributive legislation. But if groups of historically disadvantaged people are to “be organized” and “made conscious” of their entitlements; if they are to “see that tenancy laws are implemented” and exert “organized pressure” on administrators and overcome “opposition of vested interests” – if they are to achieve these results – then, again, they must have knowledge of relevant law and the skills to use it.

V. State and Professional Responses to the Needs of the Rural Poor

A combination of factors limits the response of legal professions to the needs of the poor.

In most countries where the numbers of lawyers is small, affluent clients and government employment tend to consume all available professional resources. As the number of lawyers increases, some begin to work in rural communities, but, as

we have seen, these practices are characterized by high volume and turnover, and the services offered to clients are usually limited to representation in court or counselling on transactions which typically involve lawyers. The problems of aggregates of people, of a community of poor as an interest group, are seldom the focus of a professional relationship – perhaps because there is no perceived economic base for this work or because the work and skills required to aid formation of groups and articulation of their grievances lie outside the professional calculus of most lawyers; or because the poor, themselves, see no advantage in hiring lawyers except when they are forced to deal with official law in the courts. Indeed, since the legal system is alien in many ways, and used, often pervasively, for authoritarian purposes, and since ignorance of law abounds, lawyers are seen, at best, as a resource of limited value. Often, it would appear, they are regarded with hostility or mistrust.

Legal education and (with noteworthy exceptions) legal scholarship have tended to neglect the problems of development viewed from perspectives of the impoverished.⁸⁸ Thought about adaptation of legal systems to the needs of the poor – notably to conflicts over resources essential to their needs – is often lacking or ill developed. English common law, or French-inspired civil codes, are still the primary focus of the training – on the plausible assumption that they are an important foundation of practice. Curricula follow a European model and changes in them over past decades have usually been marginal. The basic materials of study – whether home grown or imported – are often much the same as one would find in England or France, as are the examinations. It is an intellectual universe which tends to emphasize knowledge of foreign doctrine and foreign professional models as a source of local legal development, which often reflects a view of law as an autonomous, self-contained discipline. The literature produced has usually been expository, concerned with expounding doctrine rather than examining social problems empirically as the starting point of inquiry. With notable exceptions, there have been few systematic efforts to explore relationships between law and class phenomena; law and public administration of resource allocation; law and the social gaps; law and the basic needs of the poor. Even though public management of many essential resources is pervasive and even though the social accountability of these managers raises many serious problems, legal education focuses on law relevant to private affairs and on the kinds of problems which clients of means may bring to urban lawyers, and it tends to be centered on the law which is administered in courts as opposed to the law which is developed and applied by administrative organs or used in political arenas. Indeed, there is often an implicit dichotomy which distinguishes between “lawyer’s law” and law used by administrators (e.g., law governing health, educational or agricultural services) on the theory that since the latter lies outside the province of courts and ordinary legal practices, it lies outside the province of professional concerns. Although the powers of a Minister of Agriculture are rule-created and, in theory, rule-bounded and although exercise of these powers may affect who gets what services, the problems of control of ministerial discretion are treated as the concern of the Minister, not of the legal system.⁸⁹ This subtle dichotomization may affect the way legal systems and

professional legal cultures have responded to increasing the role of the state in resource allocation.

These observations are reflected in reports of numerous international and regional meetings over past decades, and in a mass of critical reports on the state of legal training and research in particular settings.⁹⁰ What may be surprising, in view of the volume of criticism, is the inertia which seems to afflict legal education. Diverse explanations have been forthcoming: some have focused on the professions' influence over law schools and the orthodoxies which it imposes over the content and hence the preoccupations of law teaching; some have focused on law teachers themselves – on the difficulties of recruiting or retaining imaginative, scholarly, reform-oriented teachers; some have focused on the lack of indigenous legal literature needed to stimulate new kinds of research and implement basic changes in curriculum which will force a look at the system from the perspective of the poor; some have focused on the economics of legal education – on the state's low investment in resources to encourage change.⁹¹ Other outside influences on legal education have received less attention – e.g., the influence of the marketplace for lawyers over student motivations and their perceptions of educational requirements for respectable jobs; the elitism of universities and their insulation from social accountability to the poor; the political economy of legal education.⁹²

While there has been a growing concern – in both local legal circles (in many countries) and in international bodies or gatherings of lawyers – over the inequities of access to the courts and increasing discussion about finding ways to provide legal services to the poor, most treatments of this subject have manifested a rather narrow, traditional approach to the “needs” of the poor for legal services. Once again, “needs” have usually been defined by reference to familiar categories of legal work; the lawyer is perceived primarily as a courtroom advocate representing individuals in familiar types of criminal and civil litigation.⁹³ Since legal professions in developing countries are often stratified and lack cohesion, economic incentives, and the necessary range of skills, it is unlikely that, acting on their own, they can develop responses, even to these needs. Indeed research suggests that these concerns rank low on professional agendas.

In any event, government intervention seems clearly necessary if an economic base for these services is to be created. In some settings, there have been calls for “socialization” of the profession. Some of these reforms – e.g., provision on a wide basis of free “legal services,” or socialization of the bar – seem unlikely as a matter of politics and economics. In many countries – perhaps all – there are not enough lawyers to serve the poor, at least the rural poor on an individualized basis; and in most cases the likelihood of increasing the numbers and deployment of lawyers to reach rural regions in substantial numbers seems unrealistic. As the Chief Justice of the Ivory Coast noted a few years ago, lawyers “are non-existent in the interior,” and so the state “is in no position to guarantee legal aid [on equal terms] to all.”⁹⁴ Advocates of legal service programs have also been unclear about how these proposals relate to other social policies – a confusion which sometimes reflects ambiguities in concepts of “development.”⁹⁵

A question often debated is whether provision of more free "legal services" will produce more "distributive justice," and whether the effort is worth the cost. But a profession-centered view of the concept of legal services tends to narrow this debate to such issues as whether lawyers for the poor will achieve much success using the courts to bring "test cases" and "class" actions aimed at private or public institutional practices which infringe the rights of an identifiable poorer clientele.⁹⁶ For a variety of reasons – procedural and jurisdictional barriers to initiation of such suits (such as "standing" requirements), alleged lack of appropriate remedies in the received law, the weakness of judicial fiats directed against hostile bureaucracies or governments, traditions of judicial formalism and conservatism in construing statutes and constitutions and reviewing claims against officials – the predictions for success have been pessimistic.

Other strategies have been proposed. Some call for simplification – or de-legalization – of the processes and institutions to process disputes in rural areas, e.g., the greater use of arbitration or traditional community structures.⁹⁷ While these measures may help alleviate some problems – such as the delays and heavier costs incident to use of courts in wasteful private disputing over small claims – the proposed remedies may do little to help the poor in their encounters with powerful private interests or public agencies.

Other proposals, addressed to problems arising from citizen dealings with bureaucracies, call for creation of an independent government agency, unencumbered by much legal formality, which can hear grievances generated by dealings of bureaucracies with citizens. Permanent commissions of enquiry, ombudsmen and other institutions, with varying kinds of jurisdiction have been created in a number of countries.⁹⁸ Reported experience of these institutions is difficult to evaluate from the perspectives offered here; but clearly there are limits to the capacity of ombudsmen bodies to deal with aggregate claims of the poor against bureaucracies, to compel or encourage changes in distributive policies which emphasize greater satisfaction of the needs of the poor. While ombudsmen can expose, through investigation of individual complaints, pathologies such as delay and inattention to claims, and (perhaps) corrupt dealings, they are less equipped (with political power and legal jurisdiction) to deal with more basic flaws in the design and administration of allocational programs by representing the distinct groups of the rural poor.⁹⁹

Another strategy calls for the creation of cadres of legal assistants (made up primarily of legal paraprofessionals) to assist intended beneficiaries of various kinds of agrarian programs. Thus, it is suggested, legal assistance programs should be established to aid implementation of resettlement and villagization schemes, or land reform and related agrarian measures. Again some countries have established publicly funded cadres of lawyers or paralaawyers to aid the intended beneficiaries of land reforms. Reported experience from the Philippines, and other places, indicates that these measures do help,¹⁰⁰ particularly when those providing legal assistance, are not cast in traditional lawyer roles where the professional dominates the relationship, but rather are perceived by the intended beneficiaries as their

advocates who can identify with their needs. However, the provision of this kind of legal assistance may be less effective if it fails to respond to another basic need of the poor: the need to help the poor to help themselves through mobilization, organization and collective self-reliant assertion of group demands.

All of this suggests that analyses of the legal needs of the poor – and responses to them – must be linked, though they seldom are, to broader concepts of and approaches to development. It seems worthwhile to examine more carefully “bottom-up” strategies of development, and lessons which teach the importance of endogenous groups as vehicles to change perceptions, civic behavior, institutions and social relationships in impoverished rural communities. It seems important to examine more fully, for example, the premises and implications of the proposition in India’s current Development Plan:

The rural and urban poor have to be organized. Their vigilance alone can ensure that the benefits of various law, policies and schemes designed to benefit them do produce their intended effect.

Notes

(See list of Selected Readings and References, p. 381)

1. For comparisons of “legal cultures” of legal professions, cf., e.g., Bozman (1970); Damaska (1975); Merryman (1969); Rueschemeyer (1973). Cf. Johnstone and Hopson (1967).
2. See, e.g., Abel (1979); Abel-Smith *et al* (1974); Auerbach (1976); Cappelletti and Gordley (1972); Cappelletti *et al* (1975); Galanter (1977) (1976); Tomasic and Bullard (1978); Zandu (1968); Zemans (ed.) (1979). See note 93, *infra*.
3. E.g., Luckham, Chapters 4 and 12, and Perdomo, Chapter 3. Cf. Johnson (1973) and (1972).
4. Luckham, Chapter 4 and Luckham (1976); Lynch, Chapter 2 and Lynch (1978); Perdomo (1978).
5. Machado and Said, Chapter 10; Lowenstein (1970); Samaraweera (1978); Steiner (1971). Cf. Schaffer (1978); Erlanger and Klegon (1978).
6. Odenyo, Chapter 7; Johnson (1972); Bastedo (1968); Gadbois (1969).
7. Cf. Salman, Chapter 9 and Odenyo, Chapter 7; Lynch (1978). Cf. Auerbach (1976).
8. Cf. Dawson (1968); Berman (1978); Berman (1977); Tigar and Levy (1977).
9. See, e.g., Berlanstein (1975); Brisaud (1915); cf. Greenberger (1979) and Bouwsma (1973) which discuss literature on this point.
10. Cf., e.g., Horowitz (1977); Friedman (1964); Ganalt (1969). Cf. Larson (1977); Reader (1966).
11. Cf. Bryde (1978); Cohn (1960). Material describing the origins of legal professions in various Third World countries is also collated in Note 4 to Chapter 1.
12. See, e.g., Bryde (1978) and (1978). Cf. Galanter (1968) (Displacement of Traditional Law in India).
13. See, e.g., Lynch (1979); Means (1973); Cuneo (1972).
14. See, e.g., David (1963); Sedler (1967); Stein and Stein (1970).
15. See, e.g., Adewoye (1968); Rudolph and Rudolph (1967); Braibanti (1966); Fernando (1970).
16. Rwelimira, Chapter 8; Machado and Said, Chapter 10. See also Ghai and McAuslan (1970), Chapters 4 and 11. Ross (1973).
17. Cf. Gower (1968); United Kingdom (1961); Ghai (1972); Littlewood (1962).
18. Cf. Bryde (1976); Ghai (1972).
19. On the history and post-colonial legacy of legal education in the colonial Commonwealth, see United Kingdom (1961). See also Ghai (1972); Gower (1968), especially at 104–117.
20. Cf. Adwoye (1968); Fernando (1970).

21. For some descriptions of political economies in colonial states, see, e.g., Alavi (1975) (India); A. Seidman (1972) (East Africa); Kay (1972) (Ghana); Salih (1977) (Malaysia); Siddiqui (1978) (Bangladesh); Crowder (1978) (West Africa).
22. Ziadeh (1968). Cf. Ghai and McAuslan (1970); Lynch (1980).
23. Cf. Luckham, Chapter 4; Rwelimirira, Chapter 8; Machado and Said, Chapter 10; Lynch, Chapter 11.
24. Adewoye (1968); Ghai and McAuslan (1970); Ziadeh (1968).
25. Cf. Lev (1973); Morrison (1972) and (1974); Kidder (1971); Murphy (1967). Compare the "legal profession" described in Geraghty (1969). Cf. Bing (1968); Nader and Todd (1978) (Introduction).
26. See, e.g., Asante (1968); Woodman (1976). Cf. Ziadeh (1968).
27. Lloyd (1968); Manghezi (1976); Nzongola (1970); Clignet and Foster (1966); Johnson and Caygill (1972).
28. The quote is from ILC (1975) p. 35. Cf., e.g., Rudolph and Rudolph (1965); Samaraweera (1978); Adewoye (1968); Johnson (1972); Abueva (1972); Schwartz (1968) for discussions of lawyers as part of the political elite.
29. On educational systems, see, e.g., Ashby (1964); Clignet and Foster (1966); Foster (1965); Goldthorpe (1955); Mercier (1956). On the status attached to membership in the Commonwealth bar, cf., Phillips (1978); Roberts-Wray (1960).
30. Cf. Adewoye (1968); Johnson (1973); Ghai and McAuslan (1970); Luckham, Chapter 4.
31. Rwelimirira, Chapter 8; Machado and Said, Chapter 10; Salman, Chapter 9; Ghai and McAuslan (1970); Rudolph and Rudolph (1965). Cf. Geertz (1963).
32. Amisah (1976). Cf. Nwabueze (1977) (Chapter 12); Roberts-Wray (1963); Cohn (1960).
33. Seidman (1978) (Chapters 12 and 13); Seidman (1978) (legislative drafting); Roberts-Wray (1963). Cf. Commonwealth Secretariat (1977).
34. See, e.g., Adewoye (1968); Fernando (1970); Mahajan (1962); Twumasi (1975); Vacha (1962).
35. See, e.g., Luckham (1976) (lawyers in Ghana's Constitutional Assembly of 1966). Cf. Aguda (1974); Awolowo (1966); Gajendragadkar (1969); Nwabueze (1977); Verhelst (1971). See also *East African Standard* of August 14, 1972 reprinted in Harvey (1975) containing description of the organizational meeting and goals of the African Bar Association: heavy emphasis on need for autonomous legal institutions to secure rule of law. See note 34 to Chapter 1.
36. Cf. for varying discussions of these propositions, Ghai (1972); Schaffer (1978); Seidman (1978) (Chapters 13 and 14). Cf. Gould (1976); Hyden (1970) (language and administration).
37. See ILC (1975). See note 28. Various essays on these propositions appear in Ward (ed.) (1974).
38. Ashby (1964); Bastedo (1968); Cottrell (1972); Lowenstein (1970); Lynch, Chapter 2; Odenyo, Chapter 7; Ross (1973); Rwelimirira (1977); Schwartz (1968). Cf. ILC (1975).
39. Machado and Said, Chapter 10.
40. Salman, Chapter 9; Lynch, Chapter 2.
41. Odenyo, Chapter 7. Cf. Rudolph and Rudolph (1965).
42. Salman, Chapter 9; Lynch, Chapter 2; Lowenstein (1970); Rudolph and Rudolph (1965); Schwartz (1968). See note 24.
43. See Luckham (1976); Lynch (1980); Rudolph and Rudolph (1965).
44. See, e.g., Cottrell (1972); Luckham (1976), Lynch, Chapter 2, Odenyo, Chapter 7.
45. See Lynch (1978). Cf. Galanter (1974).
46. See, e.g., for descriptions Lynch (1978); Morrison (1972); Kidder (1971).
47. Mugerwa / 1968).
48. *Ibid.* See note 45, *supra*. Rudolph and Rudolph (1967). Cf. Nader and Todd (1978) (introduction by editors deploying influence of lawyers on dispute resolution among the rural poor).
49. Cf. Lynch (1978).
50. See Chapter 1. Cf. Seidman (1978) (Chapter 1); Friedman (1963); Gower (1967); Franck (1972) and (1971).
51. See, e.g., Odenyo, Chapter 7, *supra*; Salman, Chapter 9, *supra*; Luckham (1976); Luckham, Chapter 4, *supra*; Lynch, Chapter 2, *supra*; Ross (1973); Cottrell (1972) and (1973). Even in post-Arusha, Tanzania, the work of public lawyers is compartmentalized, see Mkude (1976) and private practice has a strong pull. See Rwelimirira, *supra*, and the as yet unpublished (officially) report of the government commission

appointed to study the future of the judicial system in Tanzania.

51. For studies of bureaucracies which have something to say about lawyers and the character of legal roles in them, see, e.g., Taub (1969); Braibanti (1966).

52. See note 32, *supra*.

53. See, e.g., Fernando (1970).

54. See, e.g., Gower (1967) at p. 132 *et seq.* Ebb (1957).

55. See note 32, *supra*. Cf. Dickey and Tsikata (1972).

56. See note 50, *supra*.

57. Rwelimira, Chapter 8.

58. Lynch, Chapter 2.

59. See Paul (1972) (analyzing "high level" "manpower" needs in the development plans of five African countries). Cf. Paul and Twining (1971); Bentsi-Enchill (1969).

60. Cf. ICLD (1979).

61. Cf. Nwabueze (1977) (Chapter 12).

62. *Ibid.* See also Amissah (1976); Iyer (1974).

63. See note 34, Chapter 1.

64. There are few empirical studies of judges. Cf. Gadbois (1969). For general discussions, see Nwabueze (1977); Paul (1976); Fazal (1969). Cf. Sawyerr and Hiller (1971) and Newbold (1969). Cf. Roberts-Wray (1960) and (1963) arguing that judges in Africa should reproduce English common law in Africa because this is the "received" law.

65. Amissah (1976).

66. The importance of the "lowest" courts in the official hierarchy of courts is interestingly developed in many of the speeches and writings of P.T. Georges, former Chief Justice of Tanzania; these appear in James and Kassam (1973). See also Nyerere (1968); Spalding *et al* (1970). Cf. Geraghty (1969).

67. See, e.g., for varying depictions of basic level judges or courts, Lynch, *supra*; James and Kassam (1973); Severeid (1976); Abel (1969) and (1970); Ietswaart (1979); Mutungi (1973); Spalding *et al* (1970); Tafara (1970).

68. See note 66. See also, e.g., Iyer (1974).

69. See, e.g., Luckham, Chapter 4; Lynch, Chapter 2, *supra*; Salman Chapter 9, *supra*; Rwelimira, Chapter 8, *supra*. See note 66.

70. Cf. Dias (1975).

71. World Bank (1975).

72. Cf. Snyder (1979) describing the changing character – over a period of several years – of a rural Senegalese community. Cf. Rald (1975) (detailed description of society agriculture and conflicts within a rural community in Tanzania). See note 00, Chapter 14.

73. For depictions of these kinds of conflicts in rural communities, see, e.g., Baxi (1976); de Silva (1979); Gold (1975); Mbithi (1974); Mbithi and Barnes (1975); Nijar (1976); Rald (1975); Siddiqui (1978); Thome (1976) and (1979); Zolezzi (1976).

74. Mutungi (1973).

75. See Chapter 14, note 32, *infra* for illustrative case studies of conflicts between rural communities and local and multinational enterprises.

76. For more extensive discussion, see ICLD (1979) (Law, Administration and Resource Distribution) (reporting on discussions and on research and working papers presented at a series of international workshops in Asia, Africa and Latin America on the above subject).

77. See Schaffer (1969) and (1978) and Schaffer and Wen-hsien (1974) for observations on these phenomena. For some studies suggestive of legal problems arising from access relations between bureaucracies and intended beneficiaries see, e.g., Asian Centre for Development Administration (1976); Asian and Pacific Development Administration Centre (1978); Blair (1973); Fimbo (1977); Finacune (1974); Gillette and Uphoff (1973); Gold (1977); Gould (1976); Harvey (1974); Hollnsteiner (1977); Medina (1976); Menezes (1978); Nijar (1976); Ollawa (1978); Palmer (1974); Riveiro (1976); Thome (1976) and (1979); Tiruchelvam (1976); Wood (1977). See also note 79, *supra*.

78. Dunning (1975).

79. E.g., the studies developed by Professor Schaffer and his associates, see note 77, *supra*. See also

Schaffer (1978).

80. See note 76.

81. *Ibid.*

82. Cf. Trubek (1978).

83. Cf. World Bank (1975); Asian Centre for Development Administration (1976); Cohen and Uphoff (1977).

84. Asian Centre for Development Administration (1976).

85. Lele (1975). See also, e.g., Uphoff and Esman (1974); Gillette and Uphoff (1973); Asian and Pacific Development Administration Centre (1978).

86. The Plan is extensively discussed and quoted in *International Development Review*, Nos. 3/4 (1978).

87. *Ibid.*

88. See Chapter 1. See also ILC (1975); ILC (1974).

89. Cf. McAuslan (1976).

90. See sources cited in note 45, Chapter 1.

91. See ILC (1975).

92. *Ibid.*

93. For discussions of the problem of identifying "legal needs" in various Third World settings, see, e.g., Bacungan (1976); Baxi (1977); Falt (1976); India (1974) and (1973); Iyer (1974); Metzger (1974); Nijar (1976); Singvi (1971); Valdez (1975). Cf. Curran and Spalding (1974); Hazard (1969); Mayhew and Reiss (1969).

94. As quoted in Reyntjens (1979).

95. Cf. Metzger (1974).

96. Cf. Lynch (1978); Trubek (1978). Cf. Trubek (1977). See Cabral and Coomaraswamy (1977) advocating development of public interest law firms in Sri Lanka.

97. Cf. Dunning (1974); Cappelletti *et al* (1975).

98. See, e.g., Cappelletti (1975); ICJ (1976); Rukwaro (1973).

99. Cf. Martin (1977).

100. Medina (1976).

Lawyers, Legal Resources and Alternative Approaches to Development

During the period 1965–1975 many lawyers attempted to theorize about the “role” of “law” in “development.” Today, much of this writing (like analogous work from other disciplines – e.g., earlier literature on “education” and “development”) seems unsatisfactory, in part because earlier paradigms and models of development have become problematic, and because “development” has become a much more controversial concept. Perhaps, one must ask: Development of what? For whose benefit? How? – recognizing that the ends and means of development may be interdependent, that questions about how (and by whom) development should be defined, planned and administered may be central – especially if one views the processes of “development” from the perspective of the needs of the rural poor. In response to these concerns some scholars and experts in development circles have begun to articulate and advocate an “alternative” kind of development which emphasizes rather different ends and means.

In this chapter, we first describe some of the concepts, assumptions and approaches of “alternative,” “human-needs-centered” development, notably those which emphasize a radical shift from “top-down” to “bottom-up” efforts to change social and physical environments. Our purpose is to explore implications of these strategies to the legal system and to the professionals who exercise so much control over the creation and administration of law. In order to examine these relationships we report (in section two of this Chapter) on two recent case studies of the experiences of grass roots, endogenous “self-help” organizations of the rural poor – one in India and the other in the Philippines. These studies portray, in microcosm, various kinds of efforts by the rural poor which, presumably, epitomize the beginnings of – and the preconditions for – “alternative development.” We analyze the significance of “legal resources” – the capacity to use law – in the development of these groups and in their conflicts with public and private agencies. We then suggest (in section three) some general propositions about the significance of law and legal resources in the paradigms of alternative development. In essence, the conclusion is that law, lawyers and legal resources are, ultimately, very much implicated in alternative development strategies; and, in a concluding section, drawing upon materials developed elsewhere in this volume, we suggest some problems which must be confronted by proponents of alternative development and by lawyers who seek to find ways by which concerned professionals can help victims of the gaps help themselves.

I.

Alternative concepts of "development" and approaches to it have grown out of a series of analyses of world poverty and critiques of earlier paradigms and models, and out of various statements and policies promulgated by various international organizations which have asserted, with growing urgency, the basic needs of the poor for land, employment, nutrition, health care and other resources as the central concerns of development.¹ Resolutions of world congresses and other international bodies,² reaffirming "universal human rights" to these necessities, have also tended to force attention – if the "rights"³ are to be treated seriously as legitimate claims which the impoverished may lawfully demand of their polity – to new principles and structures governing allocation of things essential to life and human dignity. A new literature – prescribing another, alternative kind of development – has been one response.⁴

Some of these statements – those which draw from lessons of past experience in a systematic way to devise new comprehensive strategies to address the problem of social gaps – emphasize the satisfaction of several different kinds of *interdependent* "basic needs" as the primary purpose of development: the need for goods and services essential to physical well-being; the need for other kinds of less tangible resources (knowledge, rights, belief in one's equality and dignity) which help people to become more capable, self-reliant and active in political as well as economic terms; the need for social structures which enable people to share more influence in arenas of decision-making and resource allocation which affects their immediate welfare and environment. Thus, while one object of alternative development (as we use that concept here) is to provide more equitable distribution of essential goods and services to satisfy changing requirements for well-being, a second is to provide more participation and social accountability in official bodies which define basic needs, or which produce and allocate resources to meet them; and a third is to enable people to exert more power themselves to bring these changes about. These three concerns reflect *interdependent ends and means*⁵ of alternative development.

The concept of self-reliance emphasizes the need to reduce the dependency of the poor on the "expertise" and discretion of those who presently control these structures or who act as intermediaries to them. The concept of "participation" emphasizes the need for greater voice and power in these structures through one mode or another, such as direct participation or clearer representation in decision-making, or more effective channels of communication and access to decision-makers. The concept of social accountability suggests the need for institutions which can review the actions of other official bodies and hold them to new norms of people-centered development. Concepts of human rights, in this context, emphasize not only the government's obligation to do equity in resource allocation but also to recognize rights crucial to realization of self-reliance and participation, notably through endogenous organizations.⁶

Strategies to operationalize these ideas, and their legal implications, have hardly yet been explored. Over time exponents of this kind of alternative development

may need to address a formidable agenda of questions concerned with both theory and its practical application in a wide variety of settings. However, initiation of these approaches need hardly await the conception of a master design, let alone a benign government committed to its execution. On the contrary, the initiation of these approaches may depend in the first instance on the mobilization of the very people who are impoverished, politically excluded and socially disadvantaged by the existing political economy and modes of administering state-controlled resources. A major objective of alternative development is to reduce dependency and reliance on bureaucracies, and to recognize that both the ends and means of development entail struggle by people, and, often, conflicts with dominant groups and officials who wield discretionary power over allocation of resources essential to the satisfaction of basic needs. What is envisioned is the generation of "bottom-up" processes to "develop" new kinds of development through the mobilization of victims of the gaps. *They* must begin to organize and acquire knowledge; *they* must articulate and advance their own interests; *they* must set in motion grass-roots activities leading to broader social change. Without such steps, development would still remain a "top-down," officially-guided process.

These observations suggest important implications to those concerned with immediate efforts to help the poor to take steps to close the social gaps. Using the concepts of alternative development as a departure, one might attempt to explore the experience and potentialities of particular groups of the poor in a particular region as vehicles for alternative development. Lawyers might study the needs of these groups for legal resources. In the section which follows we do that by examining two recent studies of the importance of legal resources in the formation and activities of several endogenous, participatory organizations of the rural poor in India and the Philippines.

II.

There are many types of organizations of rural people in the Third World. In some regions they may be mobilized in open, forcible opposition to the state, or to a particular regime which claims its sovereignty, or to enforcement of a law of that regime. At the other end of the political spectrum are groups which are endogenous, perhaps rooted in culture or religion, but which play a very limited role in helping people confront conditions of impoverishment, oppression and political weakness. Widely prevalent, too, are organizations created under the aegis of the state (such as state-sponsored cooperatives or communal bodies) which are officially intended (ostensibly at least) as vehicles for "participation" in programs of "rural development." While these "parastatal" groups may be voluntary and democratic (in form at least), they are frequently managed or manipulated by public officials or by wealthier people or traditional patrons of the community, and for that reason the groups may rarely come into serious conflict with state agencies or dominant classes, or challenge the premises and methods of development administration.⁷

Needs for legal resources of rural groups vary depending on the underlying composition, motivations and shared perceptions of the group, on its methods of mobilization, organization and decision-making, on objectives and the means chosen to pursue them and on the kinds of conflict generated by a group's activities and its ways of handling conflict. A most important variable, for our purpose, is the stance of the group towards the state and its law.⁸ We report here, on groups which operated within law (even if sometimes only within the outer parameters of it) and generally tried to use state law as a basis for asserting claims and grievances. We are concerned with the way needs for legal resources developed as these groups began to pursue, autonomously, human-needs-centered means and ends, such as:

1. *civic education*: i.e., developing functional knowledge of their rights to claim resources essential to well-being (such as land credit, health care, schools, improved work conditions or security of employment or better prices for their produce);
2. *collective advocacy*: i.e., developing means of asserting shared claims by challenging public agencies, landlords, other powerful people or institutions through deputations and demands, demonstrations, claims in court or local councils or in other official institutions.
3. *self-help*: i.e., developing new, group-managed (often in lieu of state-managed) structures to provide resources (such as credit) or resolve problems shared within the group; and
4. *political participation*: i.e., developing new means of influencing governmental policy-making in more remote arenas of decision-making (such as legislatures, planning bodies and service-providing ministries).

The Bhoomi Sena ("land army") is an organization of historically depressed, landless, rural workers in Maharashtra. They became mobilized for organized action when they learned that the government was failing to enforce legislation which declared, in effect, that agricultural workers should enjoy various rights to minimum wages, security in their employment and in possession of land leased to them by their employers – rights tantamount to the very rights of these people to existence. With this knowledge and through modes of participatory decision-making, they agreed upon collective action and pursued a variety of tactics to force officials to interpret and apply the law, and to force landlords, money lenders and others to obey it – letters, deputations, demonstrations, public appeals, refusal to accept the legitimacy of traditional leases, loans and contracts of employment. Pursuit of these objectives led to other activities: the creation of a group-managed credit institution, child-care centers, schools and road building.⁹

The "Kagawasan"¹⁰ groups are peasants who had lived for many years in "Kagawasan" in the Philippines, technically as "squatters," on government lands designated as "forest reserves." They were threatened with eviction when government officials in Manila agreed to lease large portions of these lands to pulp and timber businesses. They became mobilized for collective action when they learned that, under the relevant law, the Minister in charge of forest preserves had *discretion* to decide whether to lease these lands (and to whom), and when they learned that there were procedures available to them to request ministry officials

to recognize their needs for possessions of the lands and exercise discretion to lease to them rather than the outside industries. They, too, used petitions, deputations and demonstrations and similar means to persuade officials with discretionary authority to recognize the superior justice of their claims. The need to establish each family's claim to specific lands led to development of a group-managed system to survey the area and record the names of responsible possessors. This effort led to development of group-managed structures to work out new concepts of land tenure and settle boundary disputes between families, and these efforts led to awareness of the superiority of these group structures over government courts for purposes of resolving other, intra-community conflicts. As they gained security in land tenure and as they began to pay taxes, the Kagawasan groups (often successfully) made other demands for health care facilities, paramedical training courses for local people sponsored by the group and schools for their children.¹¹

All of these groups operated through participatory processes which, of necessity, had to become more elaborate and hence more regularized as the groups became larger in number.¹² By developing new norms and processes for group decision-making, they were able to preserve participation in the identification of their needs and the choice of strategies to pursue them. Of the essence to many of these choices was the growing realization that (in the words of our Kagawasan informants) "the law [could] often be made the starting point" for mobilization and organization for a particular project – such as a demand that a particular official do what he was in fact legally empowered (if not obliged) to do, that even when the law delegated broad discretion to officials to enforce laws, that does not mean that any choice of action – or inaction – is "legal." Thus people, working collectively, found they were often able to use law to bolster claims concerned with how, and for whom, official powers should be used. Similarly, they learned how to use law to defend themselves against harassment by the police, landlords, local officials and others accustomed to exercising untrammelled power in the traditional social structure.¹³ Of course, knowledge of law and ways of invoking it were only tools, used in combination with other techniques in the totality of group efforts; but legal resources were often important in developing the capacity of groups to articulate demands and grievances and giving focus and a sense of legitimacy to their claims.

Group need for legal resources will obviously vary depending on the setting. Nor will they be readily apparent. Indeed, identifying these needs is an important task for persons seeking to aid collective action by the poor to promote alternative kinds of development.¹⁴ Nevertheless, the case histories examined here suggest several categories of need, and it may help to underscore them.

1. *Mobilization.* Crucial to the mobilization of the Bhoomi Sena in India and Kagawasan movements in the Philippines was popular appreciation of the fact that there were, indeed, laws which could be used to redress popular grievances – e.g., laws on employment relationships, laws on land distribution, laws creating other rights or entitlements. This knowledge not only helped the group decide on a course of action to address a shared problem, but it helped to overcome apathy grounded

in the belief that official law was always on the oppressors' side and fears of government reprisal. Moreover, as the studies show, people began to learn that a great many of the laws which affected allocation of basic resources (such as provision of health care or agricultural services) were laws that delegated discretion – and that it was possible to question officials about how and why they were failing to exercise discretion in ways which would better serve the interests of the group. Thus, a Kagawasan group was able to force officials of the Ministry of Community Development to release discretionary funds (allegedly hoarded by the Ministry) for designated local projects. Bhoomi Sena mobilized members to build roads (long promised by the government, long needed by the community) and then petitioned and pressured the relevant bureaucracy to pay for the labor and costs. In these ways people learned how to question authority, how to file complaints against officials who abused power or failed to use it effectively to meet the needs of people most in need, how to counteract bureaucratic inertia. As the Kagawasan reports says, “the effect of this process [of learning how to use law] was sometimes awe inspiring and not a little frightening.” And again, “Once people were aware of the moral or legal righteousness of a demand they would develop methods to obtain them. . . As [this] activity progressed. . . their understanding and use of law grew more and more sophisticated.”

2. *Institutionalization.* Legal resources also seem to be a factor in the institutionalization of groups: they enable people to develop their own organic rules and processes to manage their groups. An internal “constitution” seems necessary to govern intra-group relationships, give order to meetings and facilitate participatory decision-taking and delegation of power and leadership roles.¹⁵ As groups expand and become aggregated with other groups for particular purposes these needs become more extensive. The endogenous, internal legal structures of the organization must be capable of resolving disputes within the group in ways which emphasize the need for cohesiveness and, often, collective interests. An internal “constitution” may also serve as a check to prevent one group from exploiting or harassing another, to help people develop notions of law as a reflection of shared values and principles. Indeed, the characteristics of internal, group law may be of crucial importance affecting the vitality of the group over time, and its capacity to affect other people and groups.¹⁶

3. *Access to, and advocacy in, official forums.* Bhoomi Sena sought to enforce minimum wage and other laws protecting employee rights, as well as land reform measures; it sought to secure higher wages, schools and local health care services. The group used a variety of tactics: strikes, boycotts, deputations to authorities in the regional capital, letters to newspapers, demonstrations, self-defense against bullies hired by its adversaries. Pursuit of these tactics brought diverse encounters: in the courts (defenses to criminal charges; defamation, trespass and other tort claims for damages); in police headquarters (to prevent manipulation of policy by landlords and others in opposition who enjoyed political status); in ministerial offices (to

demand enforcement of the laws or issuance of specified instructions to local officials; to demand official investigations or rulings to interpret legislation). The experience of the Kagawasan groups generated similar needs for legal resources.¹⁷

4. *Creation of community self-help institutions.* As the activities of Bhoomi Sena and the Kagawasan organizations expanded, the groups increasingly developed their own measures to meet shared needs – such as health care centers, road building, credit institutions. Creation of a new social structure to solve one problem often led to recognition of other problems and the need for other new social structures. For example, the creation of a new, group-managed institution to provide credit led to efforts to change customs and behavior which led to a squandering of money (e.g., expensive weddings; dissipation of funds on litigation and lawyer fees) and efforts to create new “unofficial,” community structures of the settlement of disputes arising as a result of those changes. All of these self-help activities called for the creative use of legal resources.¹⁸

III.

The literature on alternative development has generally ignored the needs of the poor for legal resources, and the problems of finding ways to develop them. It may help to depict *two* different categories of legal resources in order to examine the problems of how to develop them.

1. *Legal resources within groups.* The studies summarized above suggest that the rural poor will not be able to organize and press claims of immediate, direct concern unless legal resources are developed within communities – unless people themselves gain of functional knowledge of law and administration and learn how to use shared concepts of justice, customs and shared norms as part of the process of catalyzing participatory, self-reliant, collective action.

2. *Legal resources for groups.* At various stages, as its concerns and activities expand, a group (or aggregates of groups) will need more specialized legal assistance, sometimes of the kind which only professionals can provide, either to defend the group (e.g., from criminal prosecution) or to aid representation of its interests in forums (such as higher courts, or government commissions or planning bodies) where “professional” knowledge and skills may be important.

The development of legal resources within groups can often best be provided by knowledgeable organizers and others with relevant experience, and by group reflection and decision-making. The extent to which legal specialists may be needed, at some points, to provide knowledge and skills which would otherwise be unavailable is difficult to determine without a careful review with a group of its perceptions and choices at various stages of its activities. But the histories we have reviewed show quite clearly that legal specialists, properly oriented, did provide

information which significantly increased the capacity of people to identify issues, articulate positions and determine strategy and tactics to assert them. The problem is not whether legal specialists can be valuable to groups but how to generate the right kinds of specialists and define their tasks. If lawyers are to help human-needs-centered groups they must not only develop new concepts and skills, but new roles.

These tasks may include: education – perhaps teaching (or writing simple pamphlets and notices) which helps to provide functional knowledge (e.g., on such matters as how to register land, deal with tax officials, or simple explanations of the effects of new laws which directly affect the people with whom he is working); organization – helping people to work together collectively and institutionalize group activities; counseling – for example, on how to have a grievance heard in the right office by the right official. The educational function may be peculiarly important as well as broad ranging. For example, the lawyer who worked with the Kagawasan groups “lectured” on matters as diverse as “natural justice” (important in helping the group work out its internal group rules) and “due process” (important in asserting claims for rights of access to officials) to the conditions justifying a citizen’s arrest (knowledge which was then used by members of the group to deal with an abusive policeman).¹⁹

Traditional legal aid programs (like traditional lawyer-client relationships) are based on a narrower perception of legal roles and skills (e.g., preparation of conventional legal documents, counseling on property exchanges, courtroom appearances). They frequently reflect the dependency of the client, ignorant of law, on the advice of the learned professional.²⁰ But the lawyer – or “paralawyer” – working with human-needs-centered groups should not be seen primarily as a professional serving a client, nor as a litigator or an office-bound solicitor dispensing opinions and professional documents. These concepts of role may be too limited, indeed sometimes hostile to basic human needs objectives. If he is to help the group develop collective capacities, he should probably be a part of its cadres, a resource for helping people to form particular projects themselves. He must understand the collective needs and outlooks of the group. He must help it make participatory, collective decisions and help it develop its own legal resources.

Legal professions, we have suggested, lack the orientation, social relationships and economic incentives to develop and encourage these roles.²¹ If alternative development is to be pursued new ways must be found, working outside of orthodox professional circles and traditional legal aid programs to enlist essentially sympathetic lawyers in this work and train them for it. As yet virtually no attention has been given to these problems in discussions about legal assistance to the poor in Third World countries, or in discussions about popular legal education or communication of law and similar topics.

The development of legal resources for groups presents a more complex problem. It seems clear that, for some purposes, groups must either produce their own legal specialists or secure the help of lawyers who are prepared to work for them in ways which do not undermine self-reliance and participatory decision-making.

Perhaps one of the most significant problems to be encountered, by groups (and by those who seek to create a climate wherein groups can emerge) is the problem of repression. Critics of alternative development have argued that, in many settings, the poor are immobilized, not simply by their ignorance and lack of resources, but by the overwhelming power of states controlled by unsympathetic ruling coalitions. Dominant private interests, bureaucracies and others with political influence have superior access to police, prosecutors, courts and the media and sources of official force the power to immobilize those who attempt to disturb, too much, the existing social system. Appeals to law to legitimize group activities will be met by invocations of law to suppress them.²²

Rights to organize human-needs-centered groups and undertake collective activities are implicit in the Universal Declaration on Human Rights and in numerous international covenants (e.g., that which establishes the ILO).²³ These rights are frequently guaranteed more explicitly in national constitutions and various legislation. But in some countries, to varying degrees, these guarantees are negated by the terms of other laws or by the way officials interpret them. Thus laws which establish preventive detention or which define sedition in expansive catchall terms (so that group activities which embarrass officials may be claimed to "undermine the integrity of government") or which call for censorship of all publications, or which prohibit demonstrations or which impose repressive burdens on voluntary associations (such as extensive registration and licensing requirements) – these and other measures – can be used to intimidate autonomous groups or to co-opt or destroy them after formation.²⁴ The more expansive the powers of the state to regulate or punish collective activities, the greater the likelihood that over-zealous local officials or police may be prompted to invoke these laws to suppress group activities. Thus, for example, attempts by groups to dramatize their problems through mass demonstrations have been countered by threats of criminal prosecution for "conspiring to commit breach of the public peace."²⁵

As the Kagawasan experience suggests, it may be possible to form and maintain aggressive groups in spite of the existence of a vast panoply of repressive laws.²⁶ The development of legal resources within a community may affect the way adversaries of the group can invoke and interpret these laws, as well as the means which groups take to deal with their existence. Even in repressive situations it may still be possible for people to use law (e.g., as anti-colonialists did) to expose fundamental contradictions in the official legal order; to dramatize concrete issues. Of particular interest in these situations, is the role of lawyers committed to human needs values. Where groups, or group spokesmen are prosecuted, it may be important to defend them with robust assertions of group rights. Lawyers can help to define the parameters of these rights and help to establish credible claims for their recognition, including claims which link the rights to the very process of development. Over time, if alternative development is to proceed, it seems that legal systems must adjust and accommodate to the existence of groups, and that process may begin by recognizing their legitimacy.

If the assistance of lawyers seems important to deal with the problem of repression, it seems even more important when we come to examine other problems, and assumptions, of alternative development. As groups develop, so (experience suggests) will their awareness of the less visible economic and political arrangements which tend to shape their local social environment, and so their agendas for action will change. Illustrative is the Tiahuanacu Manifesto of a group of Bolivian peasants.²⁷ As this group first began to learn and think about their economic environment they came to decide that the root problem was "exploitation" by the urban firms which acquired the fruits of their labor. Henceforth, the peasants announced in their "manifesto" our "struggle" will be centered on finding ways of marketing our produce which will achieve a "new balance between the [price of the] products we sell in the countryside and those we must buy from the city." Or another example: the tenant fruit growers of Castle Bruce Valley in Dominica engaged in a series of inconclusive conflicts over employment terms with the company which leased the land in which they worked and set prices for their labor and its product. Finally the landless growers determined that the only solution was to persuade the government to expropriate the company estates and lease them back to some kind of cooperative which the growers determined they would organize themselves.²⁸ In each of these cases the groups began to think of more sophisticated complex solutions to their predicament. In each case the proposed lines of action came from within the group; but each case suggests that sophisticated legal resources must be generated *for* as well as within the group to press group claims for remedial action.

The export sector of agriculture in nearly all developing countries is closely tied to transnational agribusiness corporations through a variety of legal (notably contractual) arrangements: direct investment or production agreements, management and marketing agreements, technical assistance agreements. Whether the local partner in such contractual arrangements is a public sector or a private sector enterprise in either case, the impacts of these agreements upon local rural communities are rarely reviewed and addressed because the specific interests and needs of rural people are rarely represented.²⁹

Specific attempts by rural producers to change these economic relations may take many forms; e.g., renegotiating "terms of trade," diversification of rural economic activities, and restructuring income-producing activities related to rural produce so that an increasing share of such income accrues to the producer community through, for example, the replacement of state marketing and urban or foreign-based processing units by local marketing and processing cooperatives. Moreover, many of the problems posed by the presence of transnationals, operating in rural areas may also be posed by the similar presence of national public or private enterprises. A national private enterprise entity operating an agribusiness may create, among affected rural communities, needs for "unpackaging" (e.g., capital, equipment, technology, management, etc.) of agribusiness projects similar to the needs which would arise if these groups were dealing with transnationals. Thus, rural communities may have, in their dealings with local enterprises as well as

transnationals, needs for legal resources of a highly-skilled and specialized character.

These examples are simply illustrative. The struggles of depressed people to change the conditions of life may begin over immediate, local claims – efforts to secure land, water, schools and so forth. But if these efforts are to continue their encounters with the state they may entail increasingly complex issues. If the paradigms of alternative development are to become a reality, then legal and administrative structures will eventually have to be changed in fundamental ways. The knowledge and skills of a new breed of lawyers committed to this kind of development may become indispensable to its realization.

IV

The capacity of people to mobilize and engage in collective action is critical to the assumptions, ends and means of alternative development. Groups are seen as vehicles for political education, demands and power and as sources of new social structures. The development of such groups seems to depend, in part, on the creation of legal resources for and within them. While these needs for legal resources may be important, there may be obstacles which impede their realization. Illustrative propositions describing these constraints are suggested by studies of rural groups, legal professions and profession-centered modes of delivering of legal services.

Ignorance and suspicion of law. Within rural communities there is often a general ignorance of the content and nature of official legal structures, and aversion to them. These barriers become all the more formidable where the government's laws and official proceedings are rendered in an alien language and in terms difficult to comprehend and in books difficult to find; where knowledgeable sources of legal information and providers of legal assistance are unavailable; where government bodies assume no obligation to provide that knowledge, and where the law imposes none.³⁰ As the Kagawasan report suggests, there was initial skepticism within those groups that appeals to the state's law – rather than appeal to official grace – could provide a means to persuade officials to recognize the "rights" of the Kagawasan "squatters." "Law" was associated with the power of those in authority to do virtually whatever they chose to do, at least so long as their superiors condoned the actions. Law was less understood as a source of limitations on authority – a possible source of rights and claims which officials might be obliged to recognize.³¹

Fear of reprisal. Even where people gain knowledge of law, they may still be afraid to invoke it to support valid claims when they believe the effort may lead to retaliation. In some regions these fears may be a major deterrent to mobilization and organization and all the more formidable where those most threatened lack access to legal knowledge and sympathetic lawyers. Of course lawyers cannot prevent this kind of repression, but they may help people to evaluate risks and gain more confidence in the legality of their position, in their potential ability to use courts and other forums to defend themselves and to use law to exploit the

contradictions of lawless repression of lawful activities, and this knowledge may help them realize the potential power of numbers and organization to counteract retaliation.³²

Institutional biases. Assuming ignorance and fear may be overcome, people may still be deterred from assertion of claims, valid in theory, by beliefs that the institutions, processes and officials administering the relevant law are heavily biased against the poor. These biases may take various forms. Pressing claims – whether in courts or in other institutions – can be a protracted, costly effort, especially where skilled intermediaries are lacking. The officials who make decisions often lack loyalties to the community they serve; rather they are part of a hierarchy of centralized government agencies and ministries; often they are linked in social and economic terms to the existing political economy and to those who benefit from it, and they may be reluctant to make changes in resource allocation or modes of administration which would shift power to the poor. Institutions to review the public administration of resource allocation – notably the higher courts – are often inaccessible except through intermediaries, and often ineffective. Inherited doctrines of administrative law create – or may often be interpreted to create – a whole series of obstacles to frustrate review of the lawfulness of administrative practices or decisions. Cumulatively, these biases may create a fear that “the system” is so weighted against the poor that efforts to improve their legal capacity to challenge bureaucracies are ultimately doomed.³³

Assistance of legal specialists. If the barriers suggested above, and others, are to be overcome, if groups are to develop effective legal resources to enhance their capacity to confront existing social orders, then means must be found to enable them to secure the effective assistance of legal specialists – probably both professional and paraprofessional. But that assistance must be geared to the ends and means of alternative development, i.e., it must be developed to help groups to:

1. develop their own legal resources (e.g., through formal and informal modes of education; by helping some within group cadres to develop more detailed knowledge and skills);
2. cope, on a day-to-day basis, with recurring problems (e.g., in respect to dealings with tax collectors, cooperatives, price regulators, agricultural extension agencies);
3. obtain the assistance of other legal specialists (e.g., lawyers in urban capitals) to represent group interests before a wide variety of governmental bodies – legislative, administrative and adjudicative – on terms which permit the group to determine its basic positions;
4. aggregate their demands with other groups, similarly situated, so as to present broader-based claims for changes in laws, official policies and structures;
5. dramatize the failures and inadequacies of state law in relation to the needs of the poor (e.g., by helping groups to obtain access to the mass media and to publicize issues at stake when demonstrations are held or when “test” cases are brought into the courts);
6. educate and sensitize state officials to the concerns of the rural poor;

7. formulate reforms in – and principles of reform for – legal and administrative structures which emphasize the needs of the poor, access, participation and social accountability as overriding principles to govern distribution of essential resources;
8. develop non-state structures to meet those needs which groups can meet themselves; and
9. investigate and research problems of concern to particular groups (e.g., how to secure more effective public health controls and services within a community) and aggregates of communities (e.g., reforms in the conceptualization, organic laws and administration of health care programs).

The research reported in this volume, and elsewhere, suggests many obstacles to the generation of these kinds of legal roles.

In many countries the demographic distribution of lawyers puts them at great distance – both geographic and social – from impoverished, excluded rural people. Even where lawyers are physically accessible, the costs of legal services impose a significant constraint. Moreover, the way in which legal services are provided by those lawyers who do cater to poorer people, may also create barriers to the development of legal resources for and within groups. These lawyers usually offer a limited range of skills to their clients. Their talents are usually expended on litigation, or counselling individual clients on problems of a typical legal sort (such as the preparation of contracts, wills, leases or similar documents). Since these clients pay only modest fees, the lawyer seeks to develop a high volume practice entailing use of these familiar skills. Clients with difficult problems, requiring significant investments of time but offering meager rewards, are less desired, if desired at all. Indeed, many of the problems of rural groups probably may be quite novel to most lawyers, and they may call for innovative thinking in order to develop a persuasive theory about the proper interpretation and application of unfamiliar statutes and rules which will fit the particular needs of a group clientele – for example: how to force a Ministry of Agriculture to provide more adequate extension services and credit to poorer, marginal farmers. If he is alien to the group the lawyer may be all the more reluctant to become involved with problems which are remote to his experience and routine. Further, a rural group may be a less attractive “client” if the lawyer is called upon to work within the group as part of its cadres. By immersing himself in the concerns of the group and embracing its claims, he risks alienating other, wealthier clients, or jeopardizing desired social connections and his status within the community.³⁴

The work tasks envisioned in “alternative lawyering” for alternative development are alien to perceived professional roles. As we have seen, these roles have been modelled along lines developed by European professions. The training of lawyers is usually heavily oriented towards provision of the kind of knowledge and skills which, traditionally in Europe, have been the particular province of solicitors and advocates, towards transactions and disputes which customarily occupy lawyers serving businessmen and middle class clients. Many of the problems of the poor do not fit neatly into these traditional categories of professional knowledge and cannot

readily be converted into "legal problems."³⁵

Moreover the concepts which characterize the traditional professional-client relationship may be incongruent with the concepts of alternative development. The usual lawyer-client relationship envisions a knowledgeable expert advising an unschooled client. The professional lawyer – like other professionals – preserves his position within society by retaining control of his special knowledge and by monopolizing particular intermediary functions. The client is supposed to be dependent on his expertise – just as the patients are typically dependent upon the skills of doctors. But this relationship, as emphasized elsewhere, can be antithetical to the goals of developing autonomy, legal self-reliance and participatory decision-making among groups. If legal resources are to be generated within and for groups, then legal specialists pursuing these ends must develop new concepts of their relationship to the peoples with whom they work.³⁶

V

As noted elsewhere, there has been a renewal of interest throughout the world in the "legal needs" of the poor and in developing ways to provide more equality of access to official, adjudicative institutions. Law reformers in a number of Third World countries have proposed various remedial measures. One is subsidized legal aid. Another is to require a measure of compulsory legal service to the poor on the part of each professional. Another (proposed, for example, by a government commission in Tanzania) is socialization of legal services, for example, by requiring all lawyers to work for a state-created legal services' office (e.g., a public corporation) which would offer services equitably to all and set fees on the basis of ability to pay. Another proposal is to establish subsidized, non-governmental bodies similar to American "public interest" law firms, which would represent the aggregated interests of particular kinds of historically unrepresented groups in society.³⁷

While these measures may be important, proponents of alternative, human-needs-centered strategies of development must analyze them critically. Thus, the problem with many of these proposals is that they look to the legal profession, and to lawyers acting in traditional professional roles, to administer to the needs of the rural poor. Once again the solution envisions top-down, professionally-controlled structures to allocate resources. A critical need is to devise new institutions and methods which are geared to the ends and means of alternative development. An illustrative approach was suggested recently by some concerned lawyers in Sri Lanka³⁸ who have proposed experiments with the development of urban and rural "legal assistance clinics," i.e., "organizations designed to provide multi-purpose programs aimed at developing legal resources within communities." The "elements of this model" include:

- (a) "emphasis on *collective demands* and group interests;
- (b) establishment of clinics which are *proactive* in that they actively seek out the grievance of poverty groups and ways to advocate their interests;

- (c) the *expansion of the arenas of group advocacy* to include administrative, legislative and other institutions of policy articulation and implementation;
- (d) the *multiplication of the types of legal assistance provided* to include counselling on the structuring of transactions and the formation of new associations;
- (e) the organizations of a 'delivery system' [of legal knowledge and skills] to include *participatory involvement of potential beneficiaries*. Such participation might take the form of a group-managed legal aid scheme, coupled with group efforts at dissemination of information about social welfare services and redistributive legislation and encouragement of self-help; and
- (f) the development of *research* concerned with community needs and experience."

Research aimed at developing this model would include:

- (a) "careful examination of the different legal needs of groups within different communities of the urban and rural poor, including plantation workers, displaced landless persons, small farmers, etc.;
- (b) the identification of informal social processes and persons in para-professional roles who are – or may be – responsive to these needs;
- (c) analysis of the operation of social welfare programs directed towards the satisfaction of the basic needs of these communities;
- (d) examination of the implementation of the more important distributive legislations such as the Agrarian Land Laws; and
- (e) appraisals of the existing market for the provision of legal services in relation to the above needs."

A second, suggested approach (which might be combined with the rural clinic project) would be to establish a "national center on law and rural poverty." The center would be managed by representatives of rural groups. It might (as suggested by the Sri Lanka group):

"coordinate the work of community clinics in order to develop advocacy of the aggregated interests of these communities at the national level. This advocacy could take the form of critiquing and, if necessary, filing legal challenges to proposed legislation and administrative actions which infringe the rights and interests of its constituency; the filing of complaints against maladministration before the Parliamentary Commissioner for Administration (Ombudsman); and the institution of class actions to defend the economic, political, environmental, consumer and human rights interests of its constituency."

A third, suggested approach which might also be associated with a clinic, or groups of clinics, might be to establish ad hoc "law reform commissions of and for the poor" as vehicles for asserting carefully studied, documented claims for changes in legislation and state or parastatal structures.⁴⁰ For example, such a "commission" might be created to address problems of rural credit and indebtedness or prices of particular commodities or problems of rural tenants. This "commission" would be a non-state, participatory body, representative of those groups whose concerns provided the reasons and impetus for the law reform effort. In terms of "operating style," the commission might do what conventional "law reformers" often fail to do – it would go to the problem: it would hear the grievances of the poor in places and

settings which encourage full and candid discussion. It would seek principles and proposals for reform from the people affected – and thus seek to impart new endogenous concepts into state law. It would seek to develop alternative structures for distribution of essential resources and new structures to enable the poor to participate more directly and effectively in the development and control of agro-industries, plantations and marketing of commodities. It would seek to publicize needs and lobby for reform.

Of course these proposals are only illustrative. But they emanate from groups of Third World lawyers who have begun to apply more systematic attention to the needs of the poor for legal resources – and to ways by which these resources can be used to advantage. Nor should they require massive amounts of government funding or massive numbers of lawyers. Whereas conventional legal aid programs deliver “services” on a “one-to-one” (lawyer-client) basis, group-managed clinics would deal only with important collective, group claims. The use of the talents of legal specialists would be allocated and controlled by the group itself. They can – perhaps should – rely heavily on finance generated from within the group itself supplemented by private aid supplied directly to the group. Nor do these approaches require reforms and changes within legal professions – a goal which may be desirable but which, research suggests, are formidable. Relatively few lawyers – who share new concepts of problems to be confronted and roles for legal specialists – may be able to do a lot. Of course that is only a hypothesis. But there is hope that it may soon be tested.

All of these approaches may depend, at the outset, on a recognition of the possible importance of legal knowledge and skills. Thus, an important first step may be the creation of effective dialogues between concerned lawyers and leaders and organizers of groups. By systematic review of group concerns and experiences it may then be possible for the participants to discern the possibilities of developing community legal education designed to help people cope with public and private centers of power, to articulate their rights and use law in other ways. The demand for legal resources – and the impulses to use them – must come from the communities affected. In a very real sense, the lawyer’s role – in this paradigm of development – is to help people begin the process of reconstructing the legal order to make it responsive and accountable to their needs as they perceive them.

* * * * *

The problems and approaches discussed in this chapter have taken us a long way from the study of legal professions as such. That is because research developed in this volume and elsewhere suggests that legal professions developed along existing models seem to have contributed to impoverishment and political exclusion of great numbers of people in Third World countries – and because efforts to work within professional structures change lawyers as a social group, to make their profession more responsive to the needs of the poor, seem unrealistic in view of lessons suggested by these studies.

If changes are to be made in official laws, institutions, decision-making processes (and in the behavior of actors who provide life to these), changes which facilitate the kind of human-needs-centered "development" described in this chapter, then those changes must emanate, to a major degree, from the beneficiaries of change, from outside the established legal order and from within communities most in need of another kind of law for another development. Paradoxically, if these changes are to preserve some of the basic values of rule of law – such as respect for the kinds of rights enunciated in the Universal Declaration, then lawyers must be found who will work with groups to help them use essential ideas and premises of law to chart the course of change and to carry the case for basic reform into existing citadels of power. In a sense, harkening back to themes of Chapter 1, one is led to a new, aspirational agenda for law and for lawyers in development. But it is an agenda which can only unfold by a very different process than that envisioned by the "modernization" and "professionalization" processes envisioned by the importation and imposition of Western (or alien socialist) structures. The law envisioned in another, alternative kind of development is law which grows out of popular struggles to regain control of resources and power, law which responds to human needs, tangible and intangible and law which grows out of new social structures. It cannot be produced or reproduced by professions which are divorced from these struggles. The form which these struggles may take will obviously vary. There is evidence, however, that in many parts of the world rural people are mobilizing, that groups are forming and that group activities are producing new kinds of social units and new demands – that the pressures for another law are building.⁴¹

Notes

(See list of Selected Readings and References, p. 381)

1. The diverse origins of "alternative," "Human Needs" strategies of development are traced in Green (1978) ("Accumulation, Distribution Efficiency, Equity and Basic Human Needs Strategies). See, e.g., Dag Hammarskjöld Foundation (1975); ILO (1976); ILO (1977); Hopkins and Norbye (1978); D.P. Ghai (1977); Grant (1977); Green (1978); Meehan (1978); Nerfin (1977) and (1978); OECD (1977); Rudra (1978); United Nations (1979). See also *Down to Basics: Reflections on the Basic Needs Debate*, IDJ Bulletin IX, No. 4, June 1978.

2. See, e.g., ILO (1976); *United Nations World Food Conference* (1974).

3. See, e.g., United Nations (1979); U.N. World Food Conference (1974). Cf. Convention 141 of the General Conference of the International Labour Organization of June 1975 (*The Rural Workers' Organisations Convention*).

4. See, e.g., issues of the Dag Hammarskjöld Foundation's *Development Dialogue* since 1975; *Dossier* published by the International Foundation for Development Alternatives (in Geneva); SAREC (1979) (reviewing much of the recent literature).

5. See, e.g., Nerfin (ed.) (1977) (Introduction); Green (1978); D.P. Ghai (1978).

6. The "Rural Workers' Organisations Convention, 1975" of the ILO proclaims (Art. 3(1) that "all rural workers [a category which emphasizes 'tenants, sharecroppers or small owner occupiers'] shall have the right to establish, and subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization." The preamble to the Convention states that it is "imperative for rural workers to be given every encouragement to develop free and viable organizations capable of protecting and following the interests of their members and ensuring their effective contribution to economic and social development." The United Nations Economic and Social Council,

Commission for Social Development in its Report of the Twenty-Fourth Session (1975)(E/CN5/525 par. 4) urged governments to "encourage the widest possible active participation of . . . non-governmental organizations in the development process. . ."

7. Cf., e.g., Widstrand (1970) and Hyden (1970); Kerr (1978); UNRISD (1975) (African cooperatives). On the effects of state manipulation or control of participatory rural groups see, also, e.g., Lele (1975); Baxi (1976); Blondie Po (1977); Hollnsteiner (1977) and (1979); IFDA (1979); Pearson (1972). Cf. Gish (1980); Salah (1977); Stavenhagen (1977).

8. Cf. Rahman (1978).

9. De Silva *et al* (1978) and (1979).

10. Institute of Philippine Culture (1978). See also Hollnsteiner (1979); ICLD (1979). "Kagawasan" is a fictitious name, used by the researchers to protect identities of informants.

11. *Ibid*.

12. *Ibid*. For some case studies of other endogenous rural organizations – or confederations of them – reflecting the need to develop *pragmatically*, an endogenous "constitution" to govern the group, see, e.g., Baxi (1976) and (1979); Chowdhury (1978); Ghai (1978); Ghee (1978); Haque *et al* (1977); Hollnsteiner (1979), especially pp. 413–414; Kern (1978); Khan (1979); Magavern (1975); Martin (1974); Mishra and Tripathi (1978). Cf. Gamer (1972).

13. See, e.g., Institute of Philippine Culture (1978) (describing how Kagawasan squatters, upon learning about the law of "citizen's arrest" (from a sympathetic, rural lawyer who was assisting the group) proceeded to arrest policemen who had been abusing members of the organization. Cf. Baxi (1976). On the ability of people with little formal education to learn how to use law, cf. Wexler (1971).

14. On problems of identifying the needs of rural organizations for legal information, skills and ability to use law, see Chapter 13, *supra*; Baxi (1979); Dias (1975); ICLD (1979).

15. Institute of Philippine Culture (1979).

16. Baxi (1976); Hunter (1972). Cf. Khan (1979).

17. De Silva (1979); Institute of Philippine Culture (1979), cf. Martin (1974).

18. *Ibid*. Cf. Baxi (1976); Hollnsteiner (1978).

19. Institute of Philippine Culture (1979). Further follow-up studies of Bhoomi Sena and Kagawasan indicate the continuing importance of legal resources to develop knowledge of land law, tax laws, availability of credit and knowledge of the functions and powers and duties of a variety of government offices.

20. See, e.g., Kidder (1974). Cf. Mayhew and Reiss (1969).

21. See Chapter 13, especially section 5.

22. See, e.g., Nasution (1976); Magavern (1975). Cf. Welch (1978).

23. See note 6, *supra*. Cf. Welch (1978).

24. Cf. Institute of Philippine Culture (1979) setting out terms of the martial law decrees in the Philippines. Cf. Ghai (1978) (possibilities of bureaucratic manipulation of rural groups through elaborate registration requirements).

25. See, e.g., Baxi (1976); Khan (1979); Mishra and Tripathi (1978).

26. See note 24, *supra*. By focusing on specific issues and invoking law to support particular claims, it was possible for the Kagawasan groups to gain numbers, confidence and strength.

27. See "The Tiahuanacu Manifesto" (1974). Filipino squatters in Tondo, using legal resources countered an official announcement of a government law establishing a "public" housing program (prospectively) with the publication of a "Peoples' Law" which set forth the terms on which the group thought land and other resources relating to habitat should be provided and administered.

28. Martin (1974).

29. See, e.g., ICLD (1979) "The Impact of Transnationalization of Rural Economies on Legal Resource Needs."

30. For a general discussion of these problems see, e.g., Green (1979); Espiritu (1978). For some case (micro) studies indicative of the variety of different kinds of interactions between different kinds of multinational, local and parastatal (joint enterprise) firms and rural people see, e.g., Ghee (1978); Martin (1974); Mishra and Tripathi (1978); Sawyerr (1977). Other illustrative materials can be found in Widstrand (1975).

31. IPC (1979).
32. See, "The Tiahuanacu Manifesto" (1974).
33. Cf. Tiruchelvam (1976).
34. See Chapter 13, *supra*.
35. Cf. Kidder (1974); Lynch (1978); Morrison (1974) and (1969).
36. On the professional relationships, see generally, Tomasic and Bullard (1978); Pledstein (1976); Blumberg (1971); Illich (1977); Moore (1970).
37. See discussion in Chapter 13, *supra* (and notes 93–99).
38. Cf. Y.P. Ghai (1978) and Narakobi (1978) describing aims, methods and aspirations of the Papua New Guinea Law Reform Commission.
39. See ICLD (1979) (Developing Legal Resources).
40. *Ibid*.
41. Growing international interest in studying endogenous, human-needs-centered groups – particularly by working *with* them – is reflected in a variety of recent international undertakings. Cf. Rahman (1978) (studies undertaken by the Rural Policy Section of ILO with various participatory groups in Asia, Africa and Latin America); World Council of Churches (1976); The International Council for Adult Education has begun an international "Participatory Research Project" to develop methods of "participatory research" – research through direct involvement – with participatory groups of the rural and urban poor in all parts of the world. The International Foundation for Development Alternatives (Geneva) has encouraged study; from a wide variety of persons and institutions in all parts of the world, of the role and social impact of participatory groups on development.

Appendix 1

Selected Readings and References Cited in Chapters 1, 12, 13 and 14

The items listed below are those cited in the overview chapters (1, 12, 13 and 14). The list does not purport to be a bibliography though it may be helpful for those interested in developing studies of lawyers, legal professions and their social impacts in Third World countries. Indeed, unless one uses a rather narrow approach to define the subject, we are skeptical of attempts to capture the literature relevant to the study of lawyers within any single bibliography. For example, if one is interested in examining the economic base, employment markets and work tasks of lawyers in a particular region or country, one may find material of value in studies of different sectors of the economy, or of particular businesses and their economic relationships and practices. If one is interested in the social significance of lawyers to different groups in rural areas, one may wish to consult studies of land reform, rural indebtedness or control of water resources. If one is interested in studying "needs" of the rural poor for legal assistance, one might wish to go beyond lawyer-authored works on "legal needs," legal aid schemes and the like, and examine studies of particular communities and conflicts – overt and inchoate – between the rural poor and various institutions, interests and individuals (e.g., money lenders, bureaucracies and officials who purport to allocate valued resources). If one wants to study the education and training of lawyers, it may be very important to go beyond law-teacher-authored material and examine general studies of the country's educational system from various social and economic perspectives, and, by means of such materials, examine constraints which inhibit the adaptation or reform of university education in law. If one is interested in the legal culture, professional ideology and rhetoric of leaders of the bar of a country, one will look at speeches, lectures and similar materials which frequently appear in reports of lawyer meetings or professional journals. On the other hand, descriptions of a typical day in a typical, basic-level rural or urban court – perhaps even written by a non lawyer – may reveal a different, albeit important picture of the law in action and the social gaps between lawyers and the poor. The works cited here include these kinds of materials, though the listing is only suggestive, illustrative of the kinds of literature to be explored.

We have consulted much of the massive literature on lawyers and legal professions in North America and Western Europe, but, in the preparation of these chapters, we have had only limited occasions to cite some of these works, interesting as they are to the student of comparative study of lawyers. On the other hand, we have made an effort, exhausting but by no means exhaustive, to track down English-language materials which explicitly purport to describe legal professions and professional training in many Third World countries.

Appendix 1

- Abe, H. "Education of the Legal Profession in Japan," in Von Mehren (1962).
- Abel, R.L. "Case Method Research in the Customary Laws of Wrongs in Kenya – Part II," 5 *East African Law Journal* 247 (1969) and 6 *Ibid.*, 20 (1970).
- Abel, R.L. "A Comparative Theory of Dispute Institutions in Society," 8 *Law and Society Review* 3, 1973.
- Abel, R.L. "Transformations in Research on the Legal System of Kenya: From Customary Rules to Dispute Institutions to Litigation in Society," in Luckham (ed.) 1979.
- Abel, R.L. "Socializing the Legal Profession: Can Redistributing Lawyer's Services Achieve Social Justice?" 1 *Law and Social Policy Quarterly* 5 (1979).
- Abel-Smith, B. and Stevens, R. *Lawyers and the Courts*, London (1967).
- Abel-Smith, B., Zander, M. and Brooks, R. *Legal Problems and the Citizen: A Study in Three London Boroughs* (1974) (The English Citizen's Advice Bureau).
- Abueva, O.V. "Bridging the Gap Between the Elite and the People in the Philippines," in Uphoff and Ilchman (1972).
- Adewoye, O. "Prelude to the Legal Profession in Lagos," 14 *Journal of African Law* 98 (1970).
- Adewoye, O. *The Legal Profession in Southern Nigeria 1863–1943*, (Ph.D. Thesis; Columbia University, 1968).
- AID (United States Agency for International Development). *Small Farmer Credit in Africa* (Vol. 6, A.I.D. Review of Small Farmer Credit, 1973).
- Agrawala, S.K. (ed.). *Legal Education in India: Problems and Perspectives* (1975).
- Aguda, T.K. "The Role of the Judge with Special Reference to Civil Liberties," 10 *East African Law Journal* 147 (1974).
- Alavi, H. "India and the Colonial Mode of Production," *Economic and Political Weekly* (New Delhi), Special Number, August 1975.
- Almond, G.A. and Coleman, J.S. *The Politics of the Developing Areas* (1960).
- Alvarez, R. and Heredia-Bonetti, L. "The Role of Law in Social Change: Legal Aid and Public Interest in the Dominican Republic," (American Society of International Law, Country Report, 1976).
- Amin, S. *Imperialism and Unequal Development* (1977).
- Amissah, A.N.E. "The Role of the Judiciary in the Governmental Process: Ghana's Experience," 13 *African Law Studies* 4 (1976).
- Anderson, J.N.D. (ed.). *Changing Law in Developing Countries* (1963).
- Anonymous, "Ghana's Subversion Trial," *West Africa* (1973) (*passim*).
- Ansari, M.I. "Horizons of Legal Education," 5 *Karachi Law Journal* 70 (1968).
- Apter, D.E. *The Politics of Modernization* (Chicago, 1965).
- Asante, S.K.B. "Interests in Land in the Customary Law of Ghana: A New Appraisal," 74 *Yale Law Journal* 848 (1965).
- Ashby, C.E. *African Universities and The Western Tradition* (1964).
- Asian Centre for Development Administration (ACDA). *The Role of Rural Organization in Rural Development: A Conceptual Framework* (1976) (3 volumes).
- Auerbach, J.S. *Unequal Justice* (1976).
- Aung, U.H. "Legal Education in Burma," 10 *Far Eastern Review* (Philippines) 458 (1963).
- Awolwo, O. *Thoughts on the Nigerian Constitution* (1966).
- Bacungan, F. "Access to Legal Services in the Philippines," ILC Working Paper (1976).
- Bainbridge, J. *The Study and Teaching of Law in Africa* (1972).
- Balandier, G. "The Colonial Situation Concept," Chapter 1 of *The Sociology of Black Africa* (1970).
- Balbus, I.S. *The Dialectics of Legal Repression: Black Rebels Before the American Court* (1976).
- Baldwin, J. and McConville, M. *Negotiated Justice* (1977).
- Bar Council of Ceylon. *Memorandum Submitted to the Constituent Assembly by the Bar Council of Ceylon on the Draft Basic Resolutions*, Colombo, Sri Lanka, 9 March 1971.
- Baraclough, S.L. "Agricultural Policy and Strategies of Land Reform," in Horowitz (1970).
- Barry, D.D. and Berman, H.J. "The Soviet Legal Profession," 82 *Harvard Law Review* (1969).
- Bastedo, T.G. "Law Colleges and Law Students in Gihar," 3 *Law and Society Review* 269 (1968).
- Bates, L. "Clinical Legal Education in Latin America: Some Reflections" (Catholic University of Chile, June 16, 1977).
- Bates, L. and Leitel, I. "Legal Services to the Poor in Chile," in *Legal Aid and World Poverty: A Survey of Asia*,

- Africa and Latin America* (Committee on Legal Services to the Poor in the Developing Countries, ed., New York: Praeger, 1974).
- Baxi, U. "Patterns of Advanced Legal Education and Legal Research," 4 *Jaiapur Law Journal* 164 (1964).
- Baxi, U. *Socio-legal Research in India: A Programschrift* (Indian Council on Social Science Research, 1975).
- Baxi, U. "Access Problems of the 'Rural' Population," ILC Working Paper (1976).
- Baxi, U. "From Takrar to Karar: The Lok Adalat at Rangpur, a Preliminary Study," 10 *Journal of Constitutional and Parliamentary Studies* 52 (1976).
- Baxi, U. "What Do Convicts of Rajamundry Prison Teach Us? Some Reflections on 'Socio-legal Research.'" (Address to 16th All-India Law Teachers' Conference, 1977).
- Baxi, U. "People's Law, Development, Justice" (paper prepared for Ninth World Congress of Sociology, 1978).
- Baxi, U. *Notes Toward Socially Relevant Legal Education* (India, University Grants Commission, 1979).
- Baxi, U. "Notes on the Relevance of Legal Recourse for Participatory Organization of the Rural Poor: the case of the Chipko Movement" (ICLD Working Paper, 1979).
- Beckstrom, J.H. "Handicaps of Legal-Social Engineering in a Developing Nation," 22 *American Journal of Comparative Law* 697 (1974).
- Beneviste, G. and Ilchman, W. (eds.). *Agents of Change: Professionals in Developing Countries* (1969).
- Bentsi-Enchill, K. "The Lawyer's Calling to Africa," (lecture delivered at University of Zambia, December 10, 1969).
- Berlanstein, L.R. *The Barristers of Toulouse in the Eighteenth Century (1740-1798)* (1975).
- Berle, A.A. "Modern Legal Profession," 9 *Enclopedia of the Social Sciences* 340 (1933).
- Berman, J. "The Cuban Popular Tribunals," 69 *Columbia Law Review* 1317 (1969).
- Berman, H.J. "The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe," 45 *University of Chicago Law Review* 553 (1978).
- Berman, H.J. "The Origins of Western Legal Science," 90 *Harvard Law Review* 894 (1978).
- Berney, A.L. and Pierce, H.A. "A Evaluative Framework of Legal Aid Models," 1975 *Washington University Law Quarterly* 5 (1975).
- Bhavnani, J.K. "Legal Education in India," 4 *Journal of the Indian Law Institute* 167 (1962).
- Bienefeld, M.A. "Planning People" in Rweyemamu, J.F. et al., (ed.), *Towards Socialist Planning in Tanzania* (1972).
- Bing, G. *Reap the Whirlwind: An Account of Kwame Nkrumah's Ghana from 1950-1966* (1968).
- Bitar, S. "Chile: Elements of a Strategy for Another Development," in M. Nerfin (ed.) (1977).
- Black, L.E. *The Dynamics of Modernization* (1966).
- Blair, H.W. "The Political Economy of Distributing Agricultural Credit and Benefits" (Cornell University, 1973).
- Bledstein, B.J. *The Culture of Professionalism* (1976).
- Bloomfield, M. "Lawyers and Public Criticism: Challenge and Response in Nineteenth Century America," 15 *American Journal of Legal History* 269 (1971).
- Blumberg, A.S. "The Practice of Law as a Confidence Game," in Aubert, Vilhelm (ed.), *Sociology of Law* (1971).
- Boni, A. (ed.). *Legal Aid for Individuals: Report of the Conference of African Jurists on Legal Process* (UN Doc. E/CN.14 HR/WP B, 1971).
- Bossuyt, Ma. "La Distinctions Juridique entre les droits Civils et Politiques et les Droits Economiques Sociaux, et Culturels," 8 *Human Rights Journal* (1975).
- Bouwisma, W.J. "Lawyers and Early Modern Culture," 58 *American Historical Review* 303 (1973).
- Bozeman, A.B. *The Future of Law in a Multicultural World* (1970).
- Braibanti, R. *Research on the Bureaucracy in Pakistan* (1966).
- Brett, E.A. *Colonialism and Underdevelopment in East Africa* (1974).
- Brickman, L. "Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism," 71 *Columbia Law Review* 1153 (1971).
- Brinton, J.Y. *The Mixed Courts of Egypt* (1930).
- Brisaud, H. *History of French Public Law* (1915).
- Brode, J. *The Process of Modernization: An Annotated Bibliography on Sociocultural Aspects of Development* (1969).

Appendix 1

- Bryde, B.O. *The Politics and Sociology of African Legal Development*, Hamburg 1976.
- Bryde, B.O. "The Reception of European Law and Autonomous Legal Development in Africa," 18 *Law and State* 21 (1978).
- Buitrago, F.L. "The Agrarian Economy and Access to Labor Law: A Point of Reference for a Study of the Colombian Situation," ILC Working Paper (1976).
- Burki, S.J. "Rural Development in Pakistan," in Asian Centre for Development Administration (ACDA), Vol. 3 (1975).
- Cabral, S. and Coomaraswamy, R. "Towards a Public Interest Law in Sri Lanka," *The Sunday Times* (Colombo), October 1, 1977.
- Cahn, E. "Law in the Consumer Perspective," 12 *University of Pennsylvania Law Review* (1963).
- Cappelletti, M. "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study," 73 *Michigan Law Review* 793 (1975).
- Cappelletti, M. and Gordley, J. "Legal Aid: Modern Themes and Variations," 24 *Stanford Law Review* 347 (1972).
- Cappelletti, M., Gordley, J. and Johnson, Jr., E. *Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975).
- Cardoso, F.H. and Faletto, E. *Dependency and Development in Latin America* (1979).
- Carlin, J. *Lawyer's Ethics* (1966).
- Carlin, J.E. *Lawyers on Their Own* (1962).
- Carlin, J. and Howard, J. "Legal Representation and Class Justice," 12 *U.C.L.A. Law Review* 381 (1965).
- Carr-Saunders, A.M. and Wilson, P.A. *The Professions* (1933).
- Chen-Tung, C. "Bureaucratic Organizations of Services and the Problem of Access," ILC Working Paper (1976).
- Chowdhury, Z. "The Paramedics of Savar: An Experiment in Community Health," *Development Dialogue* 41, 1978:1.
- Chroust, A.H. *The Rise of the Legal Profession in America*, 2 vols. (1965).
- Clignet, R. and Foster, P. *The Fortunate Few: A Study of Secondary Schools and Students in the Ivory Coast* (1966).
- Cohen, J. and Uphoff, N. *Rural Development Participation: Concepts and Measures for Project Design, Implementation and Evaluation*. Mimeographed. Rural Development Committee, Center for International Studies, Cornell University (1977).
- Cohn, B.S. "Some Notes on Law and Change in North India," 8 *Economic Development and Cultural Change* 79 (1959).
- Cohn, B.S. "Structural Change in Indian Rural Society," in Frykenberg, R.S. (ed.), *Land Control and Social Structure in Indian History* (1969).
- Cohn, J. "The Initial British Impact on India: a case study of Benares Region," 19 *Journal of Asian Studies* 418 (1960).
- Coleman, J. "Modernization: Political Aspects," 10 *International Encyclopedia of Social Sciences* 395 (1968).
- Coleman, J.E. "The Resurrection of Political Economy," in Uphoff and Ilchman (1972).
- Commonwealth Secretariat. *Seminar on the Scheme for the Training of Legislative Draftsmen Under the Commonwealth Fund for Technical Cooperation* (1974).
- Cortes, I.R. "The Law Teacher in Philippine Society," 3 *Jurnal Undang-Undang* (1976).
- Cottrell, J. "Law Practice in Nigeria" (1972).
- Cottrell, J. "The Role of the Legal Profession in Nigeria" (1973).
- Crowder, M. *Colonial West Africa* (1978).
- Cúneo, A. "Legal Education in Latin America," ILC Working Paper (1972).
- Cúneo, A. "Legal Education in Latin America - Bibliography," ILC Working Paper (1972).
- Curran, B.A. "Legal Services for Special Groups," in *Encyclopedia of Social Work* (1971).
- Curran, B.A. and Spalding, F.O. *The Legal Needs of the Public* (1974).
- Dag Hammarskjöld Foundation. *What Now? Another Development: The 1975 Dag Hammarskjöld Report on Development and International Cooperation in Development Dialogue* (1975).
- Damaska, M. "Structures of Authority and Comparative Criminal Procedure," 84 *Yale Law Journal* 480 (1975).
- Daniels, W.E., and Woodman, G. *Essays in Ghanaian Law*, Legon (1976).

- David, R. "Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries," 37 *Tulane Law Review* 187 (1963).
- David, R. and Brierley, J.E.C. *Major Legal Systems in the World Today (Second Edition Revised)* (London: Stevens, 1978).
- Dawson, J.P. *A History of Lay Judges* (1960).
- Dawson, J.P. *Oracles of the Law* (1968).
- Deak, F. and Rheinstein, M. "The Development of French and German Law," 24 *Georgetown Law Journal* 551 (1936).
- de Alcantara, C.H. "Mexico: A Commentary on the Satisfaction of Basic Needs," in M. Nerfin (1977) at pp. 152-207.
- de Silva, G.V.S., Mehta, N., Rahman, A. and Wignaraja, P. "Bhoomi Sena: A Struggle for People's Power" (n.d. 1978).
- Deutsch, K.W. "Social Mobilization and Political Development," *American Political Science Review* (1961).
- Diamond, A. *Primitive Law Past and Present* (1971).
- Diamond, S. "The Rule of Law versus the Order of Custom," in R.P. Wolff (ed.), *The Rule of Law* (p. 115) (1971).
- Dias, C. "Research on Legal Services and Poverty: Its Relevance to the Design of Legal Services Programs in Developing Countries," 1975 *Washington University Law Quarterly* 147 (1975).
- Dickey, W. and Tsikata, F. "A Look at Administrative Law in Ghana," 9 *University of Ghana Law Journal* 135 (1972).
- Djukanovic, V. and Mach, E.P. *Alternative Approaches to Meeting Health Needs in Developing Countries* (UNICEF/WHO 1975).
- Dodd, D.J. "The Role of Law in Social Change: Legal Aid in Guyana" (American Society of International Law. Country Report, January 19, 1977).
- DuBow, F.L. *Justice for the People: Law and Politics in the Lower Courts of Tanzania*, University of California, Berkeley, unpublished Ph.D. dissertation, 1973.
- Dunning, H. "Legal Services and Legal Systems in Africa" in ILC, *Legal Aid and World Poverty* (1974).
- East African Standard. "Formation of African Bar Association," 14/8/72 in *Harvey* 1975.
- Eisenstadt, S.N. *The Political System of Empires* (1963).
- Eisenstadt, S.N. *Modernization: Protest and Change* (1966).
- Elder, J.W. "Cultural and Social Factors in Agricultural Development," in Uphoff and Ilchman (1972).
- Elliott, P. *The Sociology of the Professions* (1962).
- Engels, F. *The Origin of the Family, Private Property and the State* (1972).
- Erlanger, H.S. and Klegon, W. "Socialization Effects of Professional Schools," 13 *Law and Society Review* 11 (1978).
- Espiritu, A.C. "A Filipino Looks at Multinational Corporations," in *Philippine Perspectives on Multinational Corporations* (1978).
- Eulau, H. and Sprague, J.D. *Lawyers in Politics: A Study in Professional Convergence* (Indianapolis: Bobbs Merrill, 1964).
- Faculty of Law, University of East Africa. *African Conference on Local Courts and Customary Law: Record of the Conference Held in Dar es Salaam, Tanganyika, September 8-18 (1963)*.
- Falt, J.L. "Access to Legal Services in Sri Lanka: A Preliminary Report on Fieldwork," ILC Working Paper (1976).
- Fazal, M.A. *Judicial Control of Administrative Action in India and Pakistan* (1969).
- Feder, E. "Counterreform," in Rodolfo Stavenhagen (ed.), *Agrarian Problems and Peasant Movements in Latin America* (1970).
- Ferkiss, V.L. "The Role of the Public Services in Nigeria and Ghana," in Heady and Stokes (1962).
- Fernando, P.T.M. *The Legal Profession of Ceylon in the Early Twentieth Century: Official Attitudes*, 19 *Comparative Ceylon History Journal* (1970).
- Fimbo, G.M. "The State and the Peasantry in Tanzania; a study of Agrarian Law and Administrative Institutions," ILC Working Paper (1977).
- Fimbo, G.M. "Land, Socialism and Law in Tanzania," in Ruhumbik, G., *Toward Ujamaa - 20 Years of TANU Leadership* (1974).

Appendix 1

- Finacune, J.R. *Rural Development and Bureaucracy in Tanzania* (1974).
- Finer, M. "The Legal Profession," in Zander (ed.) (1970).
- Fishman, J.A., Ferguson, C.A. and Das Gupta, J. *Language Problem of Developing Nations* (1968).
- Flood, J. "Barristers' Clerks," Warwick University Law Faculty Working Paper (1978).
- FAO (Food and Agricultural Organization of the United Nations). *Man's Right to Freedom From Hunger* (FAO:1963).
- Forsyth, W. *The History of Lawyers* (1875).
- Foster, P. *Education and Social Change in Ghana* (1965).
- Franck, T.M. "The New Development: Can American Law and Legal Institutions Help Developing Countries?" 1972 *Wisconsin Law Review* 767 (1972).
- Franck, T.M. "Can U.S. Lawyers and Legal Institutions Help Developing Countries?" (1971).
- Frank, A.G. *Capitalism and Underdevelopment in Latin America* (1969).
- Freedman, M.H. *Lawyers' Ethics in an Adversary System* (1975).
- Freire, P. *Pedagogy of the Oppressed* (1972).
- Friedman, L.M. "Legal Rules and the Process of Social Change," 19 *Stanford Law Review* 786 (1967).
- Friedman, W. "The Role of Law and the Function of the Lawyer in the Developing Countries," 17 *Vanderbilt Law Review* 181 (1963).
- Friedman, W. *Law in A Changing Society* (1964).
- Furnish, D. "The Hierarchy of Peruvian Laws: Context for Law and Development," 19 *American Journal of Comparative Law* 464 (1971).
- Furnivall, J.S. *Colonial Policy and Practice* (New York University Press, 1948).
- Furtado, C. "Development and Stagnation in Latin America," in Horowitz (ed.) (1970).
- Gadbois, G.H. "Indian Supreme Court Judges: A Portrait," *Law and Society Review* 317 (1969).
- Gadbois, G.H. "Selection, Background Characteristics and Voting Behavior of Indian Supreme Court Judges 1950-54," in Schubert and Danelski (ed.) *Comparative Judicial Behavior* (1969).
- Gajendragadkar, B.B. *The Constitution of India* (1969).
- Galanter, M. "Delivering Legality: Some Proposals for the Direction of Research" (1977).
- Galanter, M. "Duty Not to Deliver Legal Services," 40 *University of Miami Law Review* 929 (Summer 1976).
- Galanter, M. "An Incomplete Bibliography of the Indian Legal Profession," 3 *Law and Society Review* 445 (1968).
- Galanter, M. "The Modernization of Law," in M. Weiner (ed.), *Modernization: The Dynamics of Growth* (1966).
- Galanter, M. "The Study of the Indian Legal Profession," 3 *Law and Society Review* 201 (1969).
- Galanter, M. "The Displacement of Traditional Law in Modern India," 24 *Journal of Social Issues* 65 (1968).
- Galanter, M. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Review* 95 (1974).
- Garner, R. *The Politics of Urban Development in Singapore* (1972).
- Gardner, J.A. "The Legal Profession and the Third World: A Critical History of the Law and Development Movement, with Particular Reference to Latin America." (Unpublished manuscript) (1974).
- Gawalt, G.W. "Sources of Anti-Lawyer Sentiment in Massachusetts 1749-1846," 14 *American Journal of Legal History* 283 (1969).
- Geertz, C. "Primordial Sentiments and Civil Politics in the New States," in Geertz, Clifford (ed.), *Old Societies and New States* (1963).
- Geraghty, T. "People, Practice, Attitudes and Problems in Lower Courts of Ethiopia," 6 *Journal of Ethiopian Law* 427 (1969).
- Getman, J.G. "Development of Indian Legal Education: The Impact of the Language Problem," 21 *Journal of Legal Education* 513 (1969).
- Ghai, D.P. "What is a Basic Needs Approach to Development All About?" in ILO (1977).
- Ghai, Y.P. "Legal Education in Anglophonic Africa," ILC Working Paper (1972).
- Ghai, Y.P. "Legal Education in Kenya and Tanzania" (1976).
- Ghai, Y.P. and McAuslan, J.P.W.B. *Public Law and Political Change in Kenya*, Nairobi (1970).
- Ghai, Y.P. "Law and Another Development," 2 *Development Dialogue* 109 (1978).
- Ghai, Y.P. (ed.). *Law in the Political Economy of Public Enterprise: African Perspectives* (1977).
- Ghai, Y.P. "Notes Towards a Theory of Law and Ideology: Tanzania Perspectives," 13 *African Law Studies*

- 31 (1976).
- Ghai, Y.P. "Control and Management of the Economy: Research Perspectives on Public Enterprise," in Yash Ghai (ed.) *Law in the Political Economy of Public Enterprise: African Perspectives* (Uppsala and New York: Scandinavian Institute of African Studies and International Legal Center (1977).
- Ghai, Y.P. "Constitutions and the Political Order in East Africa," 21 *International and Comparative Law Quarterly* 403 (1972).
- Ghandi, M.K. *The Law and the Lawyers* (1962).
- Ghee, L.T. "A Success Story From Malaysia: Fisherman Find A Way," *International Development Review* 1978, No. 2 at 45 (1978).
- Gilb, C.L. *Hidden Hierarchies: the professions and government* (1966).
- Gillette, C. and Uphoff, N. "Cultural and Social Factors Affecting Small Farmer Participation in Forman Credit Programs" (Cornell University, 1973).
- Ginsburg, R.B. et al. "The Availability of Legal Services to Poor People and People of Limited Means in Foreign Lands," 6 *International Lawyer* 128 (1972).
- Gish, O. "The Political Economy of Primary Care and Health By People: An Historical Explanation, 9 *Issue: A Quarterly Journal of Africanist Opinion* 6 (1979).
- Gold, M.E. *Law and Social Change: A Study of Land Reform in Sri Lanka*, New York (1977).
- Goldthorpe, J.E. "An African Elite: A Sample Survey of Fifty-Two Former Students of Makerere College East Africa," 6 *British Journal of Sociology* 31 (1955).
- Gomes, O. "Historical and Sociological Roots of the Brazilian Civil Code, 1 *Inter-American Law Review* 331 (1957).
- Goode, W.J. "Community Within a Community: The Professions," 22 *American Sociological Review* 194 (1957).
- Gould, D.J. "Local Administration in Zaire and Underdevelopment," 15 *Journal of Modern African Studies* 349 (1976).
- Goulet, D. *Looking at Guinea-Bissau: A New Nation's Development Strategy* (Overseas Development Council Occasional Paper No. 9, 1978).
- Gower, L.C.B. "Preliminary Report of L.C.B. Gower on Legal Education in Africa," (1962).
- Gower, L.C.B., Johnstone, Q. and Stevens, R. *"Legal Education in Uganda: A Report to the Attorney General"* (1969).
- Gower, L.C.B., Cowen, S. and Sutherland, A. "The Ghana School of Law-Report of the International Advisory Committee on Legal Education," July 5, 1959.
- Gower, L.C.B. *Independent Africa: The Challenge to the Legal Profession* (Cambridge, Massachusetts: Harvard University Press, 1968).
- Grant, J.P. "Basic Human Needs and the World's Poorest Billion – What Future Prospects?" Transcript of an address delivered at the Conference on the next 80 years. Overseas Development Council, Washington. Development Forum, April, Geneva (1977).
- Green, R.H. and Seidman, A. *Unity or Poverty* (1968).
- Green, R.H. "Basic Human Needs: A Strategic Conceptualization Toward Another Development," in Dossier 2, November 1978, International Foundation for Development Alternatives, Nyon, Switzerland.
- Green, R.H. "Income Distribution and the Eradication of Poverty in Tanzania," in I.L. Horowitz (ed.), *Equity, Income and Policy*, (1977).
- Green, R.H. "Accumulation, Distribution Efficiency, Equity and Basic Human Needs Strategies: Some Political Economy Implications and Conditions." Paper prepared for the 1978 meeting of the International Economic Association held in Warsaw, June 19–24 (1978).
- Green, R.H. "The Political Economy of State/TNC Contracts in Africa: An Introduction" (1979).
- Greenberger, G.A. "Lawyers Confront Centralized Governments: Political Thought of Lawyers During the Reign of Louis XIV," 23 *American Journal of Legal History* 144 (1979).
- Griffith, J.A.C. *The Politics of the Judiciary* (1977).
- Hagen, E. *On the Theory of Social Change* (1962).
- Hager, M. "The Role of Lawyers in Developing Countries," 58 *American Bar Association Journal* 33 (1972).
- Hamer, J. "Prerequisites and Limitations in the Development of Voluntary Self-Help Associations: A Case

Appendix 1

- Study and Comparison," 42 *Anthropological Quarterly* 107 (1976).
- Hamer, J. "Development of Self-Help and Cooperative Associations" (Paper prepared for International Conference on Ethiopian Studies, Chicago, April 1977).
- Haq, M. ul. *The Poverty Curtain* (1976).
- Haque, W., Mehta, N., Rahman, A. and Wignaraja, P. "Towards a Theory of Rural Development," in *Development Dialogue* 1977:2.
- Harbison, F. and Myers, C.A. *Education, Manpower and Economic Growth: Strategies in Human Development* (1964).
- Harvey, C. "Rural Credit in Zambia: Access and Exit," 6 *Development and Change* 635 (1974).
- Harvey, W.B. *Introduction to the Legal System in East Africa*, Nairobi (1975).
- Hassan, R. "Social Structure and Access," ILC Working Paper (1976).
- Hattori, T. "The Legal Profession in Japan: Its Historical Development and Present State," in Von Mehren, A. (ed.) (1962).
- Havens, A.E. "Methodological Issues in the Study of Development," 12 *Sociologia Ruralis* 252 (1972).
- Hay, D. "The Economic and Political Functions of Criminal Law in Eighteenth Century England," in Hay *et al.*, *Albion's Fatal Tree* (1975), Chapter 1.
- Hazard, G.C., Jr. "Legal Problems Peculiar to the Poor," 26 *Journal of Social Issues* 49 (1970).
- Hazard, G.C., Jr., "Reflections on Four Studies of the Legal Profession," 13 *Social Problems* 46 (1965).
- Hazard, G.C., Jr., "Social Justice Through Civil Justice," 36 *University of Chicago Law Review* 699 (1969).
- Heady, F. and Stokes, S. *Papers in Comparative Public Administration* (1962).
- Henderson, D.F. "Law and Political Modernization in Japan," in R. Ward (ed.), *Political Development in Modern Japan* (1968).
- Hernandez, F. "The Caseload Problem: A Study of Resource Allocation in the Puerto Rico Legal Service Program," 39 *Review Juridica*, University of Puerto Rico 569 (1970).
- Hilbourne, T. "The Quality of Legal Aid in Singapore," 1969 *Malayan Law Journal* xlv.
- Hill, Polly, *Studies in Rural Capitalism in West Africa* (Cambridge, 1970).
- Hiller, J.A. "Language, Law, Sports and Culture: The Transferability on Non-Transferability of Words, Lifestyles and Attitudes Through Law," 12 *Valparaiso University Law Review* 433 (1978).
- Hoffman, R.J. "Classics in the Courts of the United States 1790-1800," 22 *American Journal of Legal History* 55 (1978).
- Hollnsteiner, M.R. "Think Small: A Strategy of Access for Urban Poor," ILC Working Paper (1976).
- Hollnsteiner, M.R. "People Power: Community Participation in the Planning of Human Settlements," in *Les Carnets de l'Enfance*, No. 40 (UNICEF, 1977).
- Hollnsteiner, M.R. "Mobilizing the Rural Poor Through Community Organizations," 27 *Philippine Studies* 387 (1979).
- Hood Phillips, O. *Shakespeare and the Lawyers* (1972).
- Hooker, M.B. *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975).
- Hopkins, M. and Norbye, O. "Meeting Basic Needs: Some Global Estimates." World Employment Programme, Working Paper, ILO, Geneva (1978).
- Horowitz, I.L.(ed). *Masses in Latin America* (1970).
- Horowitz, M. *The Transformation of American Law 1780-1860* (1977).
- Huber, S.K. "Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America," 44 *George Washington Law Review* 757 (August 1976).
- Huizer, G. "Betting on the Weak. From Counterpoint towards Revolution," in Wertheim, W.F., *Buiten de Grenzen* (1971).
- Huizer, G. *Peasant Rebellion in Latin America. The Origins, Forms of Expression, and Potential of Latin American Peasant Unrest* (1973).
- Huizer, G. "The Utilization of Conflict in Community Development and Peasant Organization - A Case from Chile," *International Review of Community Development*, No. 27-28 (1972).
- Hunter, G. *Education for a Developing Region* (1963).
- Hunter, G. "Agricultural Development and the Rural Poor: Declaration of Policy and Guidelines for Action," Overseas Development Institute, London (1978).
- Hyden, G. "Government and Cooperatives," in Hyden *et al.* (1970).

- Hyden, G., Jackson, K. and Okumu, J. (eds.), *Development Administration: The Kenyan Experience* (1970).
- Hyden, G. "Language and Administration," in Hyden et al. (1970).
- Igbozurike, M. *Problem-Generating Structures in Nigeria Rural Development* (1976).
- IBRD (International Bank for Reconstruction and Development). World Bank Annual Report, Washington (1978).
- IBRD (International Bank for Reconstruction and Development). Rural Development. Sector Policy Paper, World Bank, Washington (1975).
- Ietswaart, H. "The Truth About Fieldwork: Chile 1972-73," in Luckham (ed.) (1979).
- Illich, I. *Disabling Professions* (1977).
- Inayatullah. *Transfer of Western Development to Asia and Its Impact* (United Nations Asian and Pacific Development Administration Centre, 1975).
- India (Government of Ministry of Justice). *Processual Justice to the People: Report of the Expert Committee on Legal Aid* (1973).
- India, Government of. *Report of the Education Commission 1964-1966* (1966).
- Institute of Philippine Culture. "Kagawasan: A Case Study on the Role of Law in the Mobilization and Participatory Organization of the Rural Poor." (Research Report Prepared for the ICLD, 1979).
- ICLD (International Center for Law in Development). "Report of the Asian Workshop on Trade and Development" (cosponsored by the Marga Institute, the International Center for Law in Development and the Sri Lanka Foundation Institute, 1979).
- ICLD (International Center for Law in Development). "Research Priorities for Another Law," in *Development Dialogue* 1978, No. 2.
- ICLD (International Center for Law in Development). "Law and Legal Resources in the Mobilization of the Rural Poor for Self-Reliant Development," a Report to the International Foundation for Development Alternatives (1979).
- ICLD (International Center for Law in Development). "Law, Resource Administration and Distributive Justice," a Report on a series of workshops held in Asia, Africa and Latin America and country research reports on state administration of resources essential to the satisfaction of human needs (1979).
- ICJ (International Commission of Jurists). *The Dynamic Aspects of the Rule of Law in the Modern Age: Report of the South-East Asian and Pacific Conference of Jurists*, Bangkok (1965).
- ICJ (International Commission of Jurists). Seminar on Human Rights and the Rule of Law in a One-Party State, Dar es Salaam, 1976 (unpublished papers and reports).
- ICJ (International Commission of Jurists). *African Conference on The Rule of Law, Lagos, Nigeria, January 1961* (1961).
- ICJ (International Commission of Jurists). *The Rule of Law in a Free Society. A Report on the International Congress of Jurists, New Delhi, 1959* (1959).
- IFDA (International Foundation for Development Alternatives). "Report of a Workshop on Peoples Participation in Development," *Dossier*, No. 4, Geneva (1979).
- ILO (International Labour Office, Geneva). *The Basic-Needs Approach to Development* (1977).
- ILO (International Labour Office, Geneva). *Meeting Basic Needs: Strategies for Eradicating Mass Poverty and Unemployment. Conclusion of the World Employment Conference 1976* (1976).
- ILO (International Labour Office, Geneva). "Poverty and Landlessness in Rural Asia," International Labour Office (1977).
- ILO (International Labour Office, Geneva). "Employment, Growth, and Basic Needs." International Labour Office (1976).
- ILC (International Legal Center). Research Advisory Committee on Law and Development. *Law and Development: The Future of Law and Development Research* (New and Development: The Future of Law and Development Research (New York: International Legal Center, 1974).
- ILC (International Legal Center). Committee on Legal Services to the Poor in the Developing Countries. *Legal Aid and World Poverty: A Survey of Asia, Africa, and Latin America* (1974).
- ILC (International Legal Center). *Newsletters* (Nos. 1-17) (1968-1975).
- ILC (International Legal Center). International Committee on Legal Education in Developing Countries. *Legal Education in a Changing World: Report of the Committee on Legal Education in the Developing Countries* (1975).

Appendix 1

- Iyer, V.R.K. "Inaugural Remarks to the Asian Workshop on Legal Services to the Poor," sponsored by the International Legal Center (1974).
- Jackson, R.H. "Administration of Development in Kenya: Review of Problems Outstanding," in Hyden *et al.* (1970).
- Jackson, R. "Guide to the Legal Profession in East Africa" (n.d.) (1961?).
- Jacoby, E. *Man and Land. The Fundamental Issue in Development* (1971).
- Jain, M.P. "Recruitment of Law Students in India," 3 *Jurnal Undang-Undang* (1976).
- James, R.W. and Kassam, F.M. *Law and Its Administration in a One-Party State: Selected Speeches of Telford Georges* (1973).
- Jannuzi, F.T. *Agrarian Crisis in India: The Case of Bihar* (1974).
- Jaworski, M. *Soviet Political Thought: An Anthology* (1967).
- Jayaweera, N.D. "A Case Study from Sri Lanka," prepared for the Commission on the Churches Participation in Development. Workshop on "Peoples Participation in Rural Development," World Council of Churches, Geneva, October 1974.
- Jayawickrama, N. "Inaugural Speech to the Asian Workshop on Socio-Legal Research, December 26, 1973," ILC Working Paper.
- Jinadu, L.A. "Some African Theorists of Culture and Modernization: Fanon, Cabral and Some Others," 21 *African Studies Review* 121 (1978).
- Johnson, T. "Imperialism and the Professions: Notes on the Development of Professional Occupations in Britain's Colonies and New States," *Sociological Review Monograph No. 20*, 281 (1973).
- Johnson, T. *Professions and Power* (1972).
- Johnson, T. and Caygill, M. *Community in the Making: Aspects of Britain's Role in the Development of Professional Education in the Commonwealth* (London: Institute of Commonwealth Studies, University of London, 1972).
- Johnstone, Q. and Hopson, D., Jr. *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* (1967).
- Johnstone, Q. "American Assistance to African Legal Education," 56 *Tulane Law Review* 657 (1972).
- Joshi, P.C. "Land Reform and Agrarian Change in India and Pakistan in 1947," *Journal of Peasant Studies*, Vol. I, 1973-74.
- Kanesalingam, V. "The Impact of Government Policies and Programmes on Villages in Sri Lanka," in Asian and Pacific Development and Administrative Centre, *Approaches to Rural Development in Asia*, Vol. 3 (1975).
- Kanyehimba, G.W. *Constitutional Law and Government in Uganda* (1975).
- Kanyehimba, G.W. and McAuslan, J.P.W.B. *Urban Legal Problems in Africa* (1978).
- Karl, A.K. *Rural Development in Bangladesh*, January, Mymensing (1979).
- Karst, K.L. "Latin American Land Reform: The Uses of Confiscation," 63 *Michigan Law Review* 327 (1964).
- Karst, K.L. "The Study of Latin American Law and Legal Institutions," in *Social Science Research on Latin America* (1964).
- Karst, K.L. and Rosenn, K.S. *Law and Development in Latin America: A Case Book* (Berkeley: University of California Press, 1975).
- Kasemsup, P. "Legal Education and Development in Thailand," 4 *Jurnal Undang-Undang* 95 (1977).
- Kaunda, K.D. "Speech by His Excellency the President, K.D. Kaunda, at a Dinner Given by the Law Society," Friday, April 24, 1970.
- Kaunda, K.D. "The Functions of the Lawyer in Zambia Today," 3 *Zambia Law Journal* 1 (1972).
- Kay, G. *The Political Economy of Colonialism in Ghana*, Cambridge, 1972.
- Kennedy, G. "The Poor and the Law in Puerto Rico, 38 *Review/Juridica*, University of Puerto Rico 351 (1969).
- Kenya Government. "High-Level Manpower Requirements and Resources in Kenya 1964-1970," May 1965.
- Kerr, G.B. "Voluntary Association in West Africa: 'Hidden' Agents of Social Change," 21 *African Studies Review* 87 (1978).
- Khan, M.H. "Sind Hari Committee: 1930-1970: A Peasant Movement?" International Labour Office, World Employment Program Research Working Paper (1979).
- Kidder, R.L. *The Dynamics of Litigation: A Study of Civil Litigation in South Indian Courts* (Ph.D. Thesis,

- Northwestern University, 1971).
- Kidder, R.L. "Law and Order or Law and Freedom: India's Unfinished Struggle to Decide."
- Kidder, R.L. "Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India," 9 *Law and Society Review* 1 (1974).
- Kirchheimer, O. *Political Justice: The Use of Legal Procedure for Political Ends* (1961).
- Knight, C.F. "Legal Services Projects for Latin America," in ILC *Legal Aid and World Poverty* (1973).
- Közz, P. "Draft Report of a Conference on the Role of the Legal Profession in Asia, Kandy, Ceylon" (1968).
- Kothari, R. "India: An Alternative Framework for Rural Development," in M. Nerfin (1977) at pp. 208–226.
- Kucharov, S. *Courts, Lawyers and Trials Under the Last Three Tsars* (1953).
- Kusumaatmadja, M. "Problems of Legal Education in Indonesia: Challenge and Response," *Padjadjaran University Law Journal* (1969).
- Kuznets, S. *Modern Economic Growth Rate, Structure and Spread* (1966).
- Lamb, G. *Peasant Politics: Conflict and Development in Muranga* (1974).
- Lamounier, B. "Political Development, Political Participation and Access," ILC Working Paper (1976).
- Landsberger, H.A. *Rural Protest: Peasant Movement and Social Change* (1973).
- La Palombara, J. *Bureaucracy and Political Development* (Princeton 1967).
- La Porte, R. *Power and Privilege: Influence and Decision-Making in Pakistan* (1975).
- Larson, M.S. *The Rise of Professionalism* (1977).
- Laswell, H. and McDougal, M. "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale Law Journal* 203 (1943).
- Lehmann, D. (ed.). *Agrarian Reform and Agrarian Reformers: Studies of Perú, Chile, China and India* (1974).
- Lele, U. *The Design of Rural Development: Lessons from Africa* (1975).
- Lenin, V.I. "The State and Revolution," in Lenin, V.I., II, *Selected Works* (Moscow: Foreign Languages Publishing House) (n.d.).
- Leonard, D.V. *Reaching the Peasant Farmers in Kenya* (1977).
- Le Paulle, P.G. "Law Practice in France," 50 *Columbia Law Review* 945 (1950).
- Lev, D. "Bush-Lawyers in Indonesia: Stratification, Representation and Brokerage" (Program in Law and Society, University of California, 1973).
- Le Vine, V.T. *Political Corruption: The Ghana Case* (1975).
- Levy, M.J. *Modernization and the Structure of Societies*, Princeton 1966.
- Lewis, W.A. *Development Planning* (1966).
- Lewis, W.A. *The Theory of Economic Growth* (1955).
- Leys, C. *Underdevelopment in Kenya* (1975).
- Li, V. "Politics and Health Care in China: The Barefoot Doctors," 27 *Stanford Law Review* 827 (1975).
- Littlewood, S. "The Legal Profession in African Territories," in Anderson (ed.), *Changing Law in Developing Countries* (1962).
- Lloyd, P.C. *Africa in Social Change* (1968).
- Loken, R.D. *Manpower Development in Africa* (1969).
- Lowenstein, S. *Lawyers, Legal Education and Development: An Examination of the Process of Reform in Chile* (1970).
- Lowy, M. "The Use of Counsel and Cross Examination in a Ghanaian Court" (1973).
- Luckham, R. "The Economic Base of Private Law Practice," in Daniels and Woodman (1976).
- Luckham, R. "The Ghana Legal Profession: The Natural History of a Research Project," *African Law Studies*, No. 13, 106 (1976).
- Luckham, R. and Nkrumah, S. "The Constituent Assembly – a Social and Political Portrait," in Luckham and Austin, D. (eds.), *Politicians and Soldiers in Ghana* (1976).
- Luckham, R. (ed.). *Law and Social Enquiry: Case Histories of Research* (forthcoming 1981).
- Luckham, R. "Memorandum on Legal Profession Studies: Why Do Research on Third World Legal Professions?" ILC Working Paper (1975).
- Luckham, R. "The Political Economy of Legal Professions in the Third World," ILC Working Paper (1976).
- Luckham, R. "The Market for Legal Services in Ghana," 8 *Review of Ghana Law* 1, 1976 (1976a).
- Lufar, H., Trubek, L.G. and Greenberg, J. "Meeting Legal Needs Without Lawyers – An Experimental Program in Advocacy Training," Center for Public Representation, Inc., Wisconsin (1977).
- Lwewellyn, K. "The Crafts of Law Revalued," 15 *Rocky Mountain Law Review* 3 (1942).

Appendix 1

- Lynch, D.O. "Lawyers in Colombia: Perspectives on the Organization and Allocation of Legal Services," 13 *Texas International Law Journal* 199 (1978).
- Lynch, D.O. "Access to the Legal Profession in Colombia: A Study of the Distribution and Costs of Legal Services," ILC Working Paper (1976).
- Lynch, D.O. "Memorandum to the International Legal Center on the Study of Legal Professions," ILC Working Paper (1974).
- Lynch, D.O. *Legal Roles in Colombia*. (Forthcoming. Scandinavian Institute of African Studies and International Center for Law in Development, 1981.)
- Machado, K.G. "Politics and Dispute Processing in the Rural Philippines." (Paper presented to Asian Studies Association, 1978.)
- Mafeje, A.B.M. *Sociology and Development* (University of Dar es Salaam, 1970).
- Magavern, J., Thomas, J. and Stuart, M. Law, "Urban Development and the Poor in Developing Countries", 1975 *Washington University Law Quarterly* 45 (1975).
- Mahajan, U.J. *The Nationalist Movement in India and Its Leaders* (1962).
- Maine, Sir H. *Ancient Law* (1861).
- Maine, Sir H. *The Early History of Institutions* (1897).
- Manghezi, A. *Class, Elite and Community in Africa* (1976).
- Markose, A.T. "Indian Legal Education: Variations on an Inheritance," ILC Working Paper (1972).
- Martin, A. "Castle Bruce - A Case Study from Dominica, "prepared for the Commission on the Churches' Participation in Development; Workshop on "People's Participation in Rural Development," World Council of Churches, Geneva, October 1976.
- Martin, R. "The Ombudsman in Tanzania," 15 *Journal of Modern African Studies* 239 (1977).
- Maru, O. *Research on the Legal Profession* (1972).
- Marx, K. "The So-Called Primitive Accumulation," *Capital* (New York: International Publishers, 1967) Vol. 1, Part VIII.
- Marx, K. *Theories of Surplus Value, Part One* (1963).
- Maung, M. "Note, Lawyers and Legal Education in Burma," 1 *International & Comparative Law Quarterly* 285 (January 1962).
- Mayhew, L. and Reiss, A.J., Jr. "The Social Organization of Legal Contacts," 34 *American Journal of Sociology* 309 (1969).
- M'Baye, K. "Le Droit au Developpement comme un Droit de L'Homme," 5 *Human Rights Journal* (1972).
- Mbilinyi, S.M. (ed.) *Agricultural Research for Rural Development*, East African Literature Bureau, Nairobi, Kampala and Dar es Salaam (1973).
- Mbithi, P.M. "Legal and Law-Related Issues in Rural Development," ILC Working Paper (1974).
- Mbithi, P.M. and Barnes, C. *The Spontaneous Settlement Problem in Kenya*, East African Literature Bureau (1975).
- Mbithi, P.M. "Agricultural Extension as an Intervention Strategy," in Leonard (ed.) *Rural Administration in Kenya* (1974).
- McAuslan, J.P.W.B. "Administrative Procedures, Administrative Law and Public Participation in a One-Party State," in ICJ (1976).
- McAuslan, J.P.W.B. "Law, Housing and the city in Africa," in Kanyeihamba and McAuslan (1978).
- McClelland, D. *The Achieving Society* (1961).
- McDougal, M.S. "Legal Education in Newly Emerged Countries: Two Models in Aid (Singapore and Korea)," *The Asia Foundation Program Bulletin* No. 31 (June 1964).
- McNamara, R.S. *Address to the Board of Governors*, Nairobi 1973 (1973).
- McNamara, R.S. *Address to the Board of Governors*, Washington, D.C. (1977).
- Means, R. "Codification in Latin America: The Colombian Commercial Code of 1853," 52 *Texas Law Review* 18 (1973).
- Medina, J. "Access Needs of Agrarian Reform Beneficiaries in the Philippines," ILC Working Paper (1976).
- Meehan, E.J. *In Partnership with People: An Alternative Development Strategy* (1978).
- Meier, G.M. (ed.). *Leading Issues in Economic Development* (1970).
- Mendelson, W. "Law and the Development of Nations," 32 *Journal of Politics* 223 (1970).
- Menezes, J. "Housing Finance in Kenya," in Kanyeihamba and McAuslan (1978).

- Menon, N.R.M. *Legal Education* (Faculty of Law, University of Delhi (1974).
- Mercier, P. "Evolution of Senegalese Elites," 8 *International Social Science Bulletin* 441 (1956).
- Merryman, J.H. "Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement," 25 *American Journal of Comparative Law* 457 (1977).
- Merryman, J.H. *The Civil Law Tradition* (1969).
- Migdal, J.S. *Peasants, Politics and Revolution* (1974).
- Mishra, A. and Tripathi, S. Chipko Movement. (People Action For Development with Justice No. 1. General Editor Radhakrishna.) (Ghandi Peace Foundation, 1978)
- Mkude, T.L. "The Tanzania Legal Corporation," in ICJ (1976).
- Modi, N. "Notes of Mr. Nadir Modi on the Law Relating to Prevention of Pollution of Water Supply" (n.d.).
- Mokhzani, B.A.R. and Khoo Siew Mun (eds.). *Poverty in Malaysia* (1977).
- Monopolies Commission. *Report on Professional Services* (London: HMSO, 1970) Cmnd. 4463-4 (2 Vols.).
- Montgomery, J.D. and Siffin, W.J. (eds.). *Approaches to Development Administration* (1968).
- Moore, W.E. *The Professions: Roles and Rules* (1970).
- Morgan, D. "Lawyers in a Developing Country," 5 *Zambia Law Journal* 123 (1973).
- Morrison, C. "Munshis and Their Masters: The Organization of an Occupational Relationship in the India Legal Profession," 31 *Journal of Asian Studies* 309 (February 1972).
- Morrison, C. "Social Organizations at the District Courts," 3 *Law and Society Review* 251 (1969).
- Morrison, C. "Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation," 9 *Law and Society Review* 1 (Fall 1974).
- Mugerwa, P.N.K. "The Legal Profession and Legal Education in Uganda," in Vanderlinden (1968).
- Munoru, G.G.S. "The Development of the Kenya Legal System: Legal Education and the Legal Profession," 9 *East African Law Journal* 1 (1973).
- Murphy, J. *Legal Education in a Developing Nation: the Korean Experience* (Oceana, 1967).
- Murphy, M. *The Legal Profession in Korea: The Judicial Scrivener and Others* (1967).
- Mustafa, Z. "Some Thoughts About Legal Education in the Sudan" (1967).
- Mutunga, W. "The Impact of the Housing Shortage on the Implementation of the Rent Acts in Kenya," in Kanyeihamba and McAuslan (1978).
- Mutungi, O.K. "The Communication of Law Under Conditions of Development: The Kenya Case," 9 *East African Law Journal* 11 (1973).
- Myrdal, G. *Asian Drama: An Inquiry into the Poverty of Nations* (1968).
- Nadaraja, T. "Objectives in Legal Education," 2 *Journal of the Indian Law Teachers Association* 46 (December 1959).
- Nader, L. and Todd, H.F. *The Disputing Process in Ten Societies* (1978).
- Naib, V.P. *The Land Army: An Experiment in Rural Development* (1978).
- Narakobi, B.M. "Law Reform and Law Development in Papua New Guinea," 2 *Development Dialogue* 127 (1978).
- Nasution, A.B. "Some Legal Problems of Poor People: A Jakarta Case," ILC Working Paper (1976).
- Nayar, V. *Supercession of Judges* (1973).
- Nellis, J.R. "Who Pays Tax in Kenya?" 2 *African Review* 345 (1973).
- Nerfin, M. (ed.). *Another Development: Approaches and Strategies* (Dag Hammarskjöld Foundation, 1977).
- Nerfin, M. "The Possible Utopia." *Development Forum*, Vol. VI, No. 2, March, Geneva (1978).
- Newbold, C. "The Role of the Judge," 2 *East Africa Law Review* 127 (1969).
- Nigerian Bar Association. *Making Our Bar Sovereign* (1965).
- Nijar, G.S. "Legal Problems of the Rural Poor in Malaysia: A Study in Differential Access Needs of the Poor," ILC Working Paper (1976).
- Nonet, P. and Carlin, J. "The Legal Profession," 9 *International Encyclopedia of the Social Sciences* 66 (1968).
- Nwabueze, B.O. *Judicialism in Commonwealth Africa* (1977).
- Nyerere, J. *Address at the Dedication of University College, Dar es Salaam* (1964).
- Nyerere, J. "The Judiciary and the People," in Nyerere, *Freedom and Socialism* (1968).
- Nyhart, J.D. "The Role of Law in Economic Development," 1962 *Sudan Law Journal* 394 (1964).
- Nzongola, G.N. "The Bourgeoisie and Revolution in the Congo," 8 *Journal of Modern African Studies* (1970).
- Obwangor, M. "The Administration of Justice in Uganda," *Bulletin of International Commission of Jurists*, No.

Appendix 1

- 26, p. 25 (1964).
- OECD (The Organization for Economic Cooperation and Development). "The Development of Development Thinking," *Liaison Bulletin* 1977, No. 1; Development Centre of the OECD.
- Ollawa, P.E. "Rural Development Strategy and Performance in Zambia," 21 *African Studies Review* 101 (1978).
- Ollennu, N.A. "Legal Education and National Development," November 16, 1970.
- Organski, A. *Stages of Political Development* (1965).
- Paliwala, A. and Weisbrod, D. "Lawyers for the People: Reviewing Legal Services in an Independent Papua New Guinea," 15 *African Law Studies* 1 (1977).
- Palmer, I. "Problems of Access: Notes on Indonesia and Malaysian Cases," 6 *Development and Change* (1974).
- Parsons, T. "A Sociologist Looks at the Legal Profession," in *Essays in Sociological Theory* 370-85 (1954).
- Parsons, T. *Structure and Process in Modern Society* (1960).
- Parsons, T. "Social Structure and Dynamic Process: The Case of Modern Medical Practice," in *The Social System* (1951) (Chapter X).
- Pashukanis, E.B. *Law and Marxism: A General Theory*, trans. Barbara Einhorn, ed., and intro. Chris Arthur (1978).
- Patel, L. "Goals of Legal Education in Tanzania" (1970).
- Paul, J.C.N. "Legal Education and Development Planning: Some Notes on Literature Concerned with African Experience," ILC Working Paper (1972).
- Paul, J.C.N. "Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa," 35 *Ohio State Law Journal* 851 (1974).
- Paul, J.C.N. and Twining, W.L. "Legal Education and Training at U.B.L.S." (Report to the University of Botswana, Lesotho and Swaziland, 1971.)
- Paul, J.C.N. "Planning Legal Education: Some Notes for the Kuala Lumpur Workshop," 3 *Jurnal Undang-Undang* (1976).
- Pearson, N.J. "Latin American Peasant Pressure Groups," in Uphoff and Ilchman (1972).
- Pedamon, M. "The Teaching of Law in Francophonic Africa," ILC Working Paper (1972).
- Pedamon, M. "Legal Education in France," ILC Working Paper (1972).
- Perdomo, R.P. *El Formalismo Jurídico Y Sus Funciones Sociales en el Siglo XIX Venezolano* (Caras: Monte Avila Editores C.A. 1978).
- Phillips, Sir F. *The Evolving Legal Profession in the Commonwealth* (1978).
- Pillai, P.N. "Access and the Administration of Justice in Singapore: Pattern of Litigation Behavior and the Legal Profession," ILC Working Paper (1976).
- Po, B. *Rural Organizations and Rural Development in the Philippines* (1977).
- Pollock, S. "Legal Aid: A Tale of Two Nations," 62 *American Bar Association Journal* 1429 (1976).
- Poulantzas, N. *Political Power and Social Classes* (trans., Timothy O'Hagan) (1973).
- Pound, R. *The Lawyer From Antiquity to Modern Times* (1953).
- Pye, L.W. "Political Modernization: Gaps Between Theory and Reality," 442 *Annals* 28 (1979).
- Quah, S.R. "Different Accessibility of Modern and Traditional Health Services: The Case of Singapore," ILC Working Paper (1976).
- Rabinowitz, R.W. "The Historical Development of the Japanese Bar," 70 *Harvard Law Review* 61 (1956).
- Rahman, A. "A Methodology for Participatory Research With the Rural Poor," *Les Carnets de l'Enfance*, No. 41 (UNICEF). (1978).
- Rald, J. and K. *Rural Organization in Bukoba District Tanzania* (Scandinavian Institute of African Studies 1975).
- Reader, W.T. *Professional Men: The Rise of the Professional Classes in Nineteenth Century England* (1966).
- Reiss, A.J. *Occupations and Social Status* (1961).
- Report of a Workshop on "People's Participation in Rural Development" excerpts, Cartigny, October (1974).
- Reynjens, F. "Africa - South of the Saharas," in Zemans (ed.) (1979).
- Rheinstein, M. (ed.). *Max Weber on Law in Economy and Society* (1967).
- Rheinstein, M. "Problems of Law in the New Nations of Africa," in Geertz (ed.), *Old Societies and New States* (London, 1963).
- Ribeiro, R. "Hong Kong's Labour Tribunal. (A Case Study on Problems of Legal Access.)" ILC Working

- Paper (1976).
- Roberts-Wray, K. "The Adaptation of Imported Law in Africa," 4 *Journal of African Law* 66 (1960).
- Roberts-Wray, K. "The Independence of the Judiciary in Commonwealth Countries," in Anderson (1963).
- Robson, W. *Civilisation and the Growth of Law* (1935).
- Rodinson, M. *Islam and Capitalism* (1974).
- Rogers, M. "Legal Education in Kenya," July 28, 1970.
- Rosenn, K.S. "The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Development Implications," 19 *American Journal of Comparative Law* 514 (1971).
- Rosenthal, D. *Lawyer and Client: Who's in Charge?* (1974).
- Ross, M.H. "Community Formation in an Urban Squatter Settlement," 6 *Comparative Political Studies* 296 (1973).
- Ross, S.D. "A Comparative Study of the Legal Profession in East Africa," 17 *Journal of African Law* 279 (1973).
- Rostow, W.W. *The Stages of Economic Growth* (1960).
- Rowe, P. "Indian Lawyers and Political Modernization," 3 *Law and Society Review* 219 (1969).
- Rudolph, L.L. and Rudolph, S.H. "Barristers and Brahmins in India: Legal Culture and Social Change," *Comparative Studies in Society and History* (October 1965).
- Rudolph, L.L. and Rudolph, S.H. *The Modernity of Tradition: Political Development in India* (1967).
- Rudra, A. *The Basic Needs Concept and its Implementation in Indian Development Planning*. Asian Regional Programme for Employment Promotion, International Labour Organization, Bangkok (1978).
- Rueschemeyer, D. *Lawyers and Their Society* (1973).
- Rukwaro, G.K. "Redress of Grievances: The Case for an Ombudsman in Kenya," 9 *East African Law Journal* 43 (1973).
- Rwelamira, M.R.K. "Tanzania Legal Internship Programme: A New Horizon in Legal Education," *African Law Studies* 1977, 29 (1977).
- Rybicki, Z. and Rudnicki, Z. "Socialism - Law - Legal Education," ILC Working Paper (1973).
- Ryu, P.K. "Legal Education in Asian Countries," *Proceedings of LAWASIA: Kuala Lumpur Conference*, 151-164 (Law Book Co., Australia 1969).
- Ryu, P.K. "Legal Education in the Far East," 36 *Revista Juridica de la Universidad e Puerto Rico* 685 (1969).
- Ryu, P.K. "Legal Education in Korea," 6 *Seoul Law Journal* 155 (1964).
- Salah, A.B. "Tunisia: Endogenous Development and Structural Transformation," in M. Nerfin (1977) at pp. 242-265.
- Salih, K. "Unbalanced Growth and Persistent Poverty: The Consequence of Unequal Access in Urban and Rural Development," in Mokhzani and Khoo Siew Mun (1977).
- Samaraweera, V. "The Legal System, Language and Elitism: The Colonial Experience in Sri Lanka." (Paper presented at Seminar on Law, Language and Development, University of Windsor, 1978).
- Santos, B. de "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargarda," 12 *Law and Society Review*, Fall 1977.
- Saul, J. "The State in Post-Colonial Societies - Tanzania," *Socialist Register*, 1974 (1974).
- Sawyerr, G.F.A. and Hiller, J.A. *The Doctrine of Precedent in the Court of Appeal of East Africa* (1971).
- Sawyerr, G.F.A. (ed.). *East African Law and Social Change* (n.d., 1967?).
- Sawyerr, G.F.A. "Multinational Corporations and Development: The Case of the Rubber Industry in Ghana," in Ghai (ed.) (1977).
- Scarman, Sir L. *English Law - The New Dimension* (1974).
- Schaffer, B.B. "Administrative Legacies and Links in the Post-Colonial State: Preparation, Training and Administrative Reform," 9 *Development and Change* 175 (1978).
- Schaffer, B.B. "Exclusive Needs, Inclusive Services," 9 *IDS Bulletin* 19 (1978).
- Schaffer, B.B. and Wen-hsien, H. "Distribution and the Theory of Access," 6 *Development and Change* 13 (1974).
- Scheingold, S.A. *The Politics of Rights: Lawyers, Public Policy and Political Change* (1974).
- Schmithener, S. "A Sketch of the Development of the Legal Profession in India," 3 *Law and Society Review* 337 (1969).
- Schwartz, R.D. "Lawyers in Developing Societies with Particular Reference to India," 3 *Law and Society Review* 191 (1969).

Appendix 1

- Schwartz, R.D. "Reflections on the Status and Functions of the Indian Lawyer," 1 *Kerala Law Review* 14 (1968).
- Sedler, R.A. "The Development of Legal Systems: The Ethiopian Experience," 53 *Iowa Law Review* 562 (1967).
- Sedler, R.A. "Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System," 13 *St. Louis Law Review* 195 (1968).
- Seers, D. "The Meaning of Development," 11 *International Development Review* 2 (1969).
- Segall, M. "The Political Economy of Doctors' Social Practice and Training Under Capitalism" (1974).
- Seidman, R. "Law, Development and Legislative Drafting" (1978).
- Seidman, A. "The Inherited Dual Economies of East Africa," in Cliffe, L. and Saul, J., *Socialism in Tanzania: An Interdisciplinary Reader*, Vol. 1 (1972).
- Seidman, R.B. *The State, Law and Development* (1978).
- Sereni, H. "The Legal Profession in Italy," 63 *Harvard Law Review* 1000 (1950).
- Setavad, M. *My Life: Law and Other Things* (1971).
- Sevareid, P. *Introduction to Administrative Law in Kenya*, Nairobi. Government Printer, 1969, 126 pp.
- Sevareid, P. "The Work of Rural Primary Courts in Ghana and Kenya," 13 *African Law Studies* 145 (1976).
- Shamma, S. "Law and Lawyers in Saudi Arabia," 14 *International Comparative Law Quarterly* 1034 (1965).
- Shawana, E.J. "The Role and Organization of the Legal Profession," in ICJ (1976).
- Sheehan, C. and Hopkins, M. "Meeting Basic Needs: An Examination of the World Situation in 1970," 117 *International Labour Review* 5, Geneva (1978).
- Shils, G. *Political Development in the New States* (1962).
- Shivji, I.G. *Class Struggles in Tanzania* (Dar es Salaam: Tanzania Publishing House, 1975).
- Siddiqui, K.M. "The Political Economy of Land Reform in Bangladesh," ICLD/APDAC Working Paper (1978).
- Singer, P. and Lamounier, B. "Brazil: Growth Through Inequality," in M. Nerfin (1977) at pp. 125-151.
- Singhvi, L.M. (ed.) *Law and the Commonwealth: Papers for the Fourth Commonwealth Law Conference*, New Delhi (1971).
- Skolnick, J. "Social Control in the Adversary System," 1 *J. Conflict Resolution* 52-70 (1967).
- Smigel, E.O. *The Wall Street Lawyer: Professional Organization Man?* (1969).
- Smith, M.G. "The Sociological Framework of Law," in Leo and Hilda Kuper (eds.), *African Law: Adaptation and Development* (1965).
- Snyder, F.G. "Health Policy and the Law in Senegal," 8 *Science and Medicine* 11 (1974).
- Snyder, F.G. "Land Law and Underdevelopment: History of a Senegalese Case Study," in Luckham (ed.) (1979).
- Spalding, F.O., Hoover, E.L. and Piper, J.C. "One Nation, One Judiciary: The Lower Courts of Zambia." (Published as Volume 2 of the *Zambia Law Journal*, 1970).
- Sri Lanka (Government). *Paper No. 1* (1960).
- Stahl, M. *New Seeds in Old Soil: A Study of the Land Reform Processes in Western Wollega, Ethiopia* (1975-76).
- Starr, J. and Pool, J. "The Impact of a Legal Revolution in Rural Turkey," 8 *Law and Society Review* 4, Summer (1974).
- Stavenhagen, R. (ed.). *Agrarian Problems and Peasant Movements in Latin America* (1970).
- Stavenhagen, R. "Classes, Colonialism and Acculturation," in Horowitz (1970).
- Stavenhagen, R. "Seven Fallacies About Latin America," in Perras, J. and Zetlin, M. (eds.), *Latin America: Revolution or Reform* (1968).
- Stavenhagen, R. "Basic Needs, Peasants and the Strategy for Rural Development," in M. Nerfin (1977) at pp. 40-65.
- Stein, S. and Stein, B. *The Colonial Heritage of Latin America* (1970).
- Steiner, H. "Legal Education and Socio-Economic Change: Brazilian Perspectives," 19 *American Journal of Comparative Law* 39 (1971).
- Stetsorskii, I.I. "The Legal Standing of Soviet Collegia of Attorneys," in *Soviet Law and Government* (1977).
- Sunkel, O. and Fuenzalida, E.F. "Transnationalisation and its National Consequences," in Villamil, J.J. (ed.), *Transnational Capitalism and National Development* (1979).
- "Supplement on African Legal Education," 10 *Journal of African Law* 183 (1966).

- Svendsen, K. "Decision-Making in the National Development Corporation," in Cliffe and Saul (eds.), *Socialism in Tanzania*, Vol. 2 (1973).
- Tafara, W. *Judicial Administration in Ethiopia*. (JSD Thesis, Northwestern University, 1972).
- Tanaka, H. *The Japanese Legal System* (1976).
- Tarimo, E. "Health and Self-Reliance: the Experience of Tanzania," *Development Dialogue* 35, 1978:1.
- Taub, R.P. *Bureaucrats Under Stress* (1969).
- Thome, J.R. "Access of the Latin American Rural Poor to the Public Allocation of Goods and Services," ILC Working Paper (1976).
- Thome, J.R. "Enforcing Legal Norms: The Function of Procedural Mechanisms in the Process of Development: A Bolivian Case Study," ILC Working Paper (1971).
- Thome, J.R. "Expropriation in Chile Under the Frei Agrarian Reform," 19 *American Journal of Comparative Law* 489 (1971).
- Thome, J.R. "Legal and Social Structures and the Access of the Latin American Rural Poor to State Allocation of Goods and Services," in Spitzer (ed.), *Research in Law and Sociology*, Vol. II (1979).
- Thompson, E.P. *Whigs and Hunters* (1975).
- "The Tiahuanacu Manifesto." Prepared for the Commission on the Churches' Participation in Development Workshop on "People's Participation in Rural Development." World Council of Churches, Geneva, 1974.
- Tiewul, S.A. "United Nations Chapter of Economic Rights and Duties of States," 10 *Journal of International Law and Economics*. 645-88 (1975).
- Tigar, M.E. and Levy, M.R. *Law and the Rise of Capitalism* (1977).
- Tiruchelvam, N. "Access, Discretion and Redistributive Legislation," ILC Working Paper (1976).
- Tiruchelvam, N. "The Law Teacher in His Social and Historical Setting: A Case Study of Sri Lanka," 4 *Jurnal Undang-Undang* (1977).
- Toharia, J.J. "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," 9 *Law and Society Review* 3, Spring (1975).
- Tomasic, R. and Bullard, C. "Lawyers and Legal Culture in Australia." Paper for Research Committee on Sociology of Law, Ninth World Congress of Sociology, Uppsala, 1978.
- Traitler, R. "People's Participation in Development," document prepared for the Commission on the Churches' Participation in Development Workshop on "People's Participation in Rural Development." World Council of Churches, Geneva, 1974.
- Trubek, D.M. "Toward a Social Theory of Law: An Essay on the Study of Law and Development," 82 *Yale Law Journal* 1 (1972).
- Trubek, D.M. "Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America," 13 *Texas International Law Journal* 243 (1978).
- Trubek, D.M. and Galanter, M. "Law and Society: Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," 1974 *Wisconsin Law Review* 1062 (1974).
- Trubek, D.M. "Review of Balancing the Scales of Justice: Financing Public Interest Law in America," 1977 *Wisconsin Law Review* 100 (1977).
- Twining, W.L. "Legal Education Within East Africa," in *East African Law Today* (1966).
- Twining, W.L. "Pericles and the Plumber," 83 *Law Quarterly Review* 396 (1967).
- Twining, W.L. "Social Justice and the Law," in Sawyerr (ed.) (1967).
- Twumasi, Y. "J.B. Danquah: Towards an Understanding of the Social and Political Ideas of a Ghanaian Nationalist and Politician," *African Affairs* 73 (1975).
- Uganda, Government of. *Memorandum on the Report of a Committee Appointed to Study and Make Recommendations Concerning Legal Education*. Session Paper No. 3 of 1969.
- Umaña-Pavolini, F. "Some Considerations on the Concept of Access Within the Colombian Legal System," ILC Working Paper (1976).
- Unger, R.M. *Law in Modern Society: Towards A Criticism of Social Theory* (New York: Free Press, 1976).
- United Kingdom (Government). *Report of the Committee on Legal Education for Students From Africa*, Cmnd. No. 1255 (1961).
- United Nations, Commission on Human Rights. *Report of the Secretary General on Realization of Rights and International Dimension of Right to Development*, E/CN. 4/1334, January 1979, Geneva.

Appendix 1

- United Nations, Department of Economic and Social Affairs. *Popular Participation in Decision-Making for Development* (1975).
- United Nations, Department of Economic and Social Affairs. "Social Policy-Making," 1974 *Report on The World Social Situation* (1975).
- United Nations, Department of Economic and Social Affairs. *Social Programming of Housing in Urban Areas* (1971).
- United Nations, Department of Economic and Social Affairs. *The United Nations Development Decade. Proposals for Action. Report of the Secretary General* (1962).
- UNESCO (United Nations Educational, Scientific and Cultural Organization). *Basic Services for Children: A Continuing Search for Priorities* (1978).
- UNESCO (United Nations Educational, Scientific and Cultural Organization). The Development of Higher Education in Africa: Report of the Conference on the Development of Higher Education in Africa. Tananarive 3-12, September 1962 (UNESCO 1963).
- UNRISD (United Nations Research Institute for Social Development). *Rural Cooperatives as Agents of Change, A Research Report and a Debate*, Geneva, 1975.
- United Nations World Food Conference. *Assessment of the World Food Stratum, Present and Future (E/Conf/115/3)* (1974).
- University of Delhi. *Report of the Committee on the Reorganization of Legal Education in the University of Delhi* (1963).
- University of Kerala. *Report of the Commission for the Reorganization of the Legal Education of Kerala*, October 1964, University of Kerala, 1965.
- Uphoff, N. and Esman, M. *Local Organization for Rural Development: Analysis of Asian Experience* (Rural Development Committee, Cornell University, 1974).
- Uphoff, N.T. and Ilchman, W.E. (eds.). *The Political Economy of Development* (1972).
- Vacha, P.B. *Famous Judges, Lawyers and Cases of Bombay* (1962).
- Valdez, A.L. "Developing the Role of Law in Social Change: Past Endeavors and Future Opportunities in Latin America and the Caribbean," 7 *Lawyer of the Americas* 1 (1975).
- Valdez, A.L. "Law and Socio-Economic Change in Latin America and the Caribbean," 10 *Journal of International Law and Economics* 539 (Aug.-Dec. 1975).
- Vanderlinden, J. *Proceedings of the Conference on Legal Education in Africa* (mimeographed, Addis Ababa 1968).
- Verhelst, T.G. (ed.). *Legal Process and the Individual: African Source Materials. (Report on Conference of African Jurists, Addis Ababa 1971.)* (Faculty of Law, Haile Sellassie University 1971.)
- Von Mehren, A. *Law in Japan* (1962).
- Von Mehren, A. "Law and Legal Education in India: Some Observations," 78 *Harvard Law Review* (1964).
- Vries, J. de. "Agricultural Extension and Development - Ujamaa Villages and the Problems of Institutional Change. University of Dar es Salaam, 13 *Community Development Journal*, pp. 11-19 (1978).
- Wanda, B.P. "Legal Aid Services in Malawi," 11 *African Law Studies* 37 (1974).
- Ward, F.C. (ed.). *Education and Development Reconsidered: The Bellagio Conference Papers* (1974).
- Weber, M. *On Law in Economy and Society* (ed. Max Rheinstein) (Cambridge, Mass.: Harvard University Press, 1966).
- Welch, C.E. "The Right of Association in Ghana and Tanzania," 16 *Journal of Modern African Studies* 639 (1978).
- Weston, A.B. "Report on Legal Education in East Africa," *Journal of African Law* 10 (1966).
- Wexler, D.B. "The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects," 7 *Criminal Lawyer Bulletin* 139 (1971).
- Weyrauch, W.O. *The Personality of Lawyers* (1964).
- Whitcomb, E. *Agrarian Conditions in Northern India, Vol. 1, The United Provinces Under British Rule* (1972).
- White, G.E. "The Impact of Legal Science on Tort Law 1880-1910," 78 *Columbia Law Review* 213 (1978).
- Wiarda, H. "Law and Political Development in Latin America," 19 *American Journal of Comparative Law* 434 (1971).
- Widiss, A., et al. "Legal Assistance for the Rural Poor: An Iowa Study," 56 *Iowa Law Review* 100 (1970).
- Widstrand, C. (ed.). *Multinational Firms in Africa* (1975).
- Wiener, M. (ed.). *Modernization: The Dynamics of Growth* (1966).

- Wigmore, J.H., Freund, E. and Mikell, W. *Select Essays in Anglo American Legal History*, 3 volumes (1907).
- Willig, K.C.H. "The Bar in the Third Reich," 20 *Journal of American Legal History* 1 (1976).
- Wood, G. "Rural Development and the Post-Colonial State: Administration and the Peasantry in the Mose Region of North-East Bihar, India," 8 *Development and Change* 3 (1977).
- Woodman, G. "Land Law and the Distribution of Wealth," in Daniels and Woodman (1976).
- World Bank. *The Assault on Poverty* (1975).
- World Council of Churches. Commission on the Churches' Participation in Development, *Betting on the Weak: Some Experiences in Peoples Participation and Development* (1976) (Collection of Articles and Case Studies).
- Worsley, P. "How Many Worlds?" 1 *Third World Quarterly* 100 (1979).
- Yale Law Journal. "The New Public Interest Lawyers", 79 *Yale Law Journal* 1069 (1970).
- Zambia (Republic). *Committee Appointed to Review the Emoluments and Conditions of Service of Statutory Boards and Corporations and State-Owned Enterprises. A Report* (Lusaka, Cabinet Office, 1970).
- Zander, M. *Lawyers and the Public Interest. A Study in Restrictive Practices* (1968).
- Zander, M. (ed.). *What's Wrong With the Law?* (1970).
- Zemans, E.H. (ed.) *Perspectives on Legal Aid: An International Survey* (1979).
- Ziadeh, F.J. *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (1968).
- Zolezzi, L. "Notes on Access to the Legal System in Peru," ILC Working Paper (1976).

Appendix 2

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