

NOTES TOWARDS A THEORY OF LAW AND IDEOLOGY

TANZANIAN PERSPECTIVES*

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Most states rely on ideology as well as law to develop and maintain their socio-economic systems. Such a process is more obvious in the developing countries, where national cohesion is weak and the socio-economic formations are not well defined. The elaboration of an ideology to justify the state system is undertaken as a matter of priority. Often the ideology is mystification and serves to hide the underlying realities of the state system. Sometimes, however, the ideology is "honest," in the sense that the leaders who propagate it are genuinely committed to the values of that ideology and attempt to effectuate them. This paper is concerned essentially with the latter situation, although the distinction mentioned here cannot always be sharply drawn, and often an "honest" ideology can become mystification in the hands of a cynical faction of the leadership.

Ideologies operate at the level of ideas and attempt to influence the consciousness of the people, and in that way ultimately to affect behaviour. Law is intended to operate more concretely and to determine the behaviour of the people largely through a system of tangible rewards and punishments. The relationship between law and ideology is not simple or uniform.

It is possible to review the relationship between them from different perspectives. Except in special situations, the relationship at any particular level or from any particular perspective is seldom static, and indeed it is the dialectics of law and ideology that make a study of the relationship between them interesting and useful. It is especially important in countries like Tanzania, where pervasive and crucial tasks are assigned to ideology, to attempt an examination of this relationship. This paper is no more than a modest first effort to look at the multiple relationships between law and ideology, particularly in the context of developmental aspirations. Many of the statements made are no more than preliminary, and much more work than I have done so far would be necessary to test them.

It is useful at the outset to refer to the numerous ways in which people have perceived the relationship between law and ideology. Traditional Marxist theory regards law as part of ideology, both being of the superstructure. Law, however, is also an institution and as such has a direct effect on the forces of production. In either case, law is seen essentially as in harmony with ideology, either because it is part of ideology or because it is supported by ideology.

At the other extreme law and ideology are seen as being in a sharp clash, as in the popular bourgeois view. Ideology is in fact regarded as the very antithesis of law, importing qualities of arbitrariness and disregard of procedure, and contemptuous of the process of pluralism and consensus, which is alleged to be the essence of law. Another group of persons also regard law and ideology as clashing, but from a different perspective. Unlike the former case, where it is law which is seen to be compromised by ideology, in this other view it is ideology which is compromised by law. Law is regarded as a constraint, and sometimes worse, for it often tends to lead in directions away from those dictated by ideology. Others have seen law and ideology as not in any direct relationship of harmony or conflict, but as alternative methods of achieving goals and ordering society. Each method has its own peculiar mechanism and leads to specific consequences. So that the choice between law and ideology is a very significant one. It is important to state that some of these differing positions flow from different definitions of the terms, especially ideology. The contrariness in some other cases can be resolved by introducing the element of time, - a dynamic situation. We can then look at the relationship between law and ideology as a dialectical one, and this paper suggests some aspects of such a relationship.

Ideology can also provide a way of looking at law. Marxism, because it attacked the bourgeois state, provides a more polemical way of doing so. It regards law as an instrument of oppression of one class by another, and therefore necessarily a coercive force and destined to disappear when society becomes socialist - and thus classless. Such an ideological view of law provides not merely a critique, but also a guide. Movement away from law and legal institutions thus becomes a sign of societal development and progress.¹ The other major ideological concept of law is the bourgeois, which regards law as above sectional interests and embodying fundamental human values. Communities which have no law or weak law are regarded as backward, and so the strengthening of law and legal institutions becomes a way out of arbitrariness and towards development and progress. Ideological concepts of law are of course intimately tied to the various views of the relationship between law and ideology that have been mentioned already.

As the words law and ideology have no universally accepted meaning, it would seem best to start with a discussion of the terms, and to indicate the senses in which they are employed in this paper.

Law and Ideology

The Marxist frame of analysis provides a good starting point for a definition of these terms. According to this analysis, human society is conditioned by the mode of its

economic organisation. Man's primary function is the production and reproduction of the conditions of his existence, the satisfaction of his economic and other needs. The technology, the forces of production man employs for this task, is a fundamental influence on the organisation of society. It determines the relations of production, i.e. the relationships men enter into for the purposes of production, whether the form of labour is slavery, serfdom, wage labour, etc. The ownership of the means of production defines the relations of production, which are also called the economic base. The relations of production have a profound influence on the ideas and manner of thinking of the people. These ideas and manner of thinking - the social consciousness - include legal and political, moral and religious, philosophical, scientific and artistic ideas on the basis of which men evaluate social relations. These together constitute the ideology. The general effect of the ideology is to legitimize the relations of production, especially if they are antagonistic; indeed the ideology - as part of the superstructure - is indispensable to the maintenance of such relations. As Lange has said, "In every antagonistic mode of production for example, there must be legal and political relations arising from the activities of the state authority in protecting the privilege enjoyed by one part of society through its ownership of the means of production; there must be moral, religious, and philosophical ideas which convince the whole of society that the ownership of the means of production is in the right hands."² When the production relations are part of a mode of production which is antagonistic, ideology operates characteristically through misrepresentation, through providing rationalisations by beclouding true motivations; it is "false consciousness" and serves the purpose of "mystification." An important aspect of revolutionary activity consists in an attack on this ideology, and so in unmasking rationalisation to expose true reality.

The model sketched above is not static. The productive forces are constantly developing, and while the relations of production are dependent on the productive forces, they are not without influence on the latter. While the superstructure arises from and justifies the base, the superstructure can influence the base. If the prevailing ideology can be effectively demolished and a competing ideology established, the weight of the contradictions of the mode of production may lead to important changes in the relations of production.³ The superstructure itself is seldom completely internally consistent, as remnants of previous formations survive, while those who are dissatisfied with the prevailing mode of production offer alternative ideologies.⁴ So although there is generally one dominant ideology, different groups can hold different ideologies. In societies where no one

mode of production exists to the exclusion of others or has clear dominance, and where social classes have not crystallised, the impact of the superstructure is very considerable.

In so far as the battleground concerns ideology, and in so far as ideology seeks to change, certain characteristics of ideology become important. A good ideology is characterised by a vision of future goals of society that have the power to persuade people of their inherent goodness. It must provide an explanation of existing reality. It must be reasonably specific as well as comprehensive. Perhaps most important, to be effective an ideology should provide adequate guidelines for action. An ideology which is so abstract and intellectual that it can provide little guidance to its adherents on how they should act is unlikely to fulfill its function of changing society. Sometimes a distinction is made between pure ideology, which consists of a point of view, beliefs, etc., and its more operational aspects, called practical ideology, which provides guidance for concrete action.⁵ Ideologies, concerned as they are with political purposes and political power, have institutional implications. They may express a point of view about desirable and undesirable means for the achievement of their goals; in some, violence may appear to be an imperative necessity, in other, an evil to be avoided at all costs. They may express a view as to the mode of organisation, e.g., a tightly knit party as opposed to some kind of federal group. They may have their own sanctions for those who are disobedient, and perhaps the more militant the ideology, whether political or religious, the more severe the sanctions. And just as religions have popes and pundits, and the legal system has lawyers, ideologies have their own high priests and custodians. And just as the legal system has a hierarchy of rules by reference to which all controversies must be settled, so ideology often has its hierarchical and authoritative norms.

A definition of law is itself ideological, and hence controversial. Here, it is sufficient to refer to a cluster of features and characteristics which are generally associated with law and the legal system. For the purposes of this essay law is understood as a system of rules which are binding in society, either generally or over specified persons. The rules derive their validity either from a special form of promulgation (statute) or by a general rule of the legal system which recognises their validity (customary law). The rules have the sanction of the state behind them, and the state apparatus is available in a variety of ways to help the observance and enforcement of the rules. Law, of course, is more than a collection of rules; it is a system, a relatively autonomous structure. It has its own mode of organization, in which legislatures and courts play key roles

There are special "internal" rules for the operation of the system, which are bound up with much learning. Access to the system required knowledge of these technical internal rules so that special skills are needed to operate or manipulate the system. Long and special training becomes essential to learn the crafts of the system, and unlike ideology certification of professional skills is often necessary to be a practitioner within the legal system.

The notion of rules plays an extremely important part in the definition and understanding of law. Indeed, many of the characteristics and virtues associated with the idea of law spring from the notion of rules. The most important of its characteristics are as follow. The rules are established or recognised according to well understood procedures (internal rules), and, until changed in accordance with those procedures, continue in force. The basis for planning activities in the knowledge of legal consequences is thus provided. The rules apply generally, and only exceptionally to one or more specified persons. The rules are specific in their content, and indicate what may be done or not done, and how. They are thus a guide to action, and limit discretion in official bodies. Only that which the rules allow, explicitly or implicitly, may be done; thus the rules define the area of freedom and human security. An important feature of rules is that there are special procedures and institutions for their adjudication and enforcement, and there are generally understood principles (internal rules) as to the kind of factors such institutions may take into account in the performance of their duties, which typically exclude factors other than rules of law, such as exhortations.

An important function of the legal system is to determine the official use of coercion, the only mode of violence allowed, by and large, in a modern state. The legal system itself does not, of course, deploy force, but its sanction is necessary before the use of force by other agencies is legitimate. It determines rights and obligations, and in so far as the acts, whether of individuals or officials, are outside the scope of rules, they are illegal, and regarded as reprehensible.

Two further factors need to be mentioned or emphasized to complete the picture of the legal system for our purposes. That set of rules which state what might be done and how, are normally specific and so limit discretion. The model of rules is therefore associated with a certain degree of rigidity, and a way out of rigidity in particular situations necessarily requires resort to the procedure for changing rules. The individual who finds the rule irksome cannot do much about it himself. Secondly, many of the institutions which determine the content and application of rules are staffed by skilled professionals. Even though the establishment of rules is less dependent on them, and is the preserve of

politicians, in practice the specific drafting and its style are still determined by professionals, and the professionals play a particularly important role in subsidiary rule making (regulations and bylaws). There are clearly understood conventions or rules whereby, in important aspects of their work, particularly adjudication, the professionals are free to exercise their own skills and judgment without outside interference. The law and its system is thus a very special and specific technique for dealing with many persistent problems of human society. It is heavily biased towards professionalism, and towards its own procedures, which give it independence. It is thus a mechanism of decentralised decision-making in the institutional sense and for delegation of power.

It is, of course, possible to make criticisms of the model of law which has been sketched out above. It could be argued that I have exaggerated the autonomy of the legal system. It could be argued that I have been too uncritical of the notion of rules, in assuming that they are specific, and are applied in mechanical, predictable manner. As I discuss below, the feature of rules which is becoming increasingly important is their lack of specificity, and the grant of wide discretion. It could be argued that I overdo the professionalisation of institutions handling rules, and that many of the institutions that handle them are only secondarily legal and increasingly, as appeals to judicial tribunals are excluded, even the ultimate interpretation of rules is no longer the responsibility or privilege of law professionals. It could be argued that I have overlooked crucial historical, sociological and philosophical dimensions. All these criticisms are important. My description of law is for the limited purposes of analysing its relationship with ideology, and I think that in broad outline and in its tendencies my description is correct. Such a model allows sharper contrasts to be drawn with a system of ideology and enables one to bring into greater focus the relationship between the two. In so far as the legal model has been softened or fudged, I will discuss those features that tend towards that, and draw the implications for that relationship.

With this background it is useful to restate the relationship of law and ideology. The distinction between law and ideology is not easy to draw. At one level law is part of ideology; indeed its very definition is ideological. Our ideas about law, its characteristics and functions, are a part of our ideology. They have become an important means of bolstering and reinforcing the ideology, for they have been invested with fundamental and independent values, e.g. the Rule of Law. But law also develops its own ideology or sub-culture, which may not always fit easily with the more general ideology.⁶ Another, and sharper distinction, lies

in the mode of operation. Ideology, as a set of ideas, operates through rules. As rules which determine the rights and duties of groups and individuals and define property relations, the law is also an institution and part of the base. It is a concrete manifestation of power. Another distinction lies in their difference as technique. Ideology is more generalised than rules of law; it is less specific and less detailed than law. As modes of control or regulation, ideology is characterised by more specific rules, and the consequences of their respective operations are therefore different (and discussed later). Reference has already been made to ideological aspects of law, and it is proposed now to expand on that point. One view regards law as an important civilising influence, and as the major bulwark against arbitrariness and tyranny. It protects the weak against the strong, and ensures that justice is done in society, through its qualities of impartiality and equality. It is based ultimately on eternal human values. This view of law was strongly criticised by Marx and Lenin. They saw it as the ideology of bourgeois legal system, used to justify the oppression and exploitation of the working class through the mechanism of the state. In particular, specific concepts embodied in that system, like property and contract, are devices to enable capitalist exploitation, and are justified by reference to theories of natural law and the nature of man.

Some consequences of these opposing ideologies of law should be mentioned. If one holds the "bourgeois" ideology, one is likely to place considerable stress on the propriety in procedures and techniques, and to value orderly change. One is unlikely to make a sharp break with past institutions. The "Marxists," on the other hand, are unlikely to have too many scruples about law and its integrity and, inspired particularly by Lenin's argument that the road to socialism begins with the destruction of the existing institutions, are likely to have a bias towards treating the law and its institutions with deliberate hostility. They would want to experiment with other forms of organisation and would regard the constraint imposed by law as hindering the achievement of socialism. Among other things, it would be important to break the hold of bourgeois legal ideology in the masses. To some extent this can be done through a radical critique of the law and the legal system,⁷ but more may be needed. Georg Lukacs, writing in 1920, argued that it was important in practice to demonstrate that legality had no particular value.⁸ While law or state may depend on force, it cannot survive if it requires force each time a rule is disobeyed. What keeps the system going is its ideology, which is not merely a consequence of the system but a precondition for its survival. So long as these ideology of the legal system maintains its hold on people, the system seems to be the natural and obvious form of organisation, and no alternative

is feasible. A decisive gain for the revolution is made when the hold of this ideology breaks, and it becomes feasible to conceive of other systems. By continuing to obey law and submitting to legality, one ensures that the ideology is maintained. Lukacs advocated that a revolutionary movement should use whatever means, legal or illegal, were suitable. Lukacs's essay is very stimulating, although it has to be read in the context in which it was written. He was thinking of a situation when the revolutionary movement is aspiring to achieve power. In practice, socialist countries, with the possible exception of China, have found it expedient to work through the legal system, and indeed considerable importance is attached to observing the legal rules and forms.

Which analogy is more relevant for Tanzania depends upon one's view of the present leadership. If it is regarded as committed to socialist goals, then law will be seen as a useful tool. We discuss elsewhere in this paper the nature of the Tanzania ruling group but it needs to be reiterated that law is ultimately an instrument of those who wield the power of the state. Rules of law and their operation can only be understood in the context of specific situations, and in terms of competition for scarce resources. But there may arise occasions when the political rulers are unable to obtain mastery over the legal system, and contradictions between law and ideology may arise. Again when the ruling group is more a coalition than a monolithic class, while it may be inexpedient to challenge the ideology, the legal system may be operated to obstruct ideology. Also, although the autonomy of the legal system is often more apparent than real, since the class interests of the judges are the same as those of the executive, when old institutions survive into a new era, there may be some dissonance.

Ideology in Tanzania

Although Tanzania is said to have achieved an ideology only since 1967 with the adoption of the Arusha Declaration, Nyerere has long been conscious of the importance of ideas and social ethics. In the Introduction to Freedom and Unity⁹ he wrote that "whatever the size of the society and whatever its institutions, the freedom and well-being of its members depends upon there being a generally accepted social ethic - a sense of what things are right, and what things are wrong, both for the institution in relation to the members, and for the members in relation to each other." Indeed the volume was published in part to lead to the establishment of such an ethic. In 1962 when defending the omission of a bill of rights in the republican constitution, he argued that the real safeguard was a national ethic, and that it was important to build an ethic that would not tolerate tyranny.¹⁰ But while Nyerere was clear on the need to establish a set of values,

the values themselves were somewhat vague or so general that they could at best qualify as "pure ideology." The operational implications of these values were unclear. Indeed at this point Nyerere and other Tanzania leaders were anxious to make clear that they were not "ideological" and in his speech at the inauguration of Kivukoni College in 1961, essentially a Party college, Nyerere was at pains to emphasise the inhibiting influences of ideology, "the prison wall of dogmatism"; he denied that the country had any solutions to man's problems. "Our only claim is that we intend to grope forward in the dark, towards a goal so distant that even the real understanding of it is beyond us - towards, in other words, the best that man can become."¹¹ As late as December 1965, Chief Justice Georges, addressing a seminar of judges and magistrates, was able to argue that the Tanzania one party state was not ideologically based. "There has, as far as I know, been no explicit founding of the one party state on any theory even of African socialism, indefinable as that is. This means, therefore, that there is no pattern of jurisprudence to which the judicial officer is obliged to conform."¹²

It is proposed to discuss ideology and its development by looking at two factors: the nature and content of ethical values; and the institutional mechanism of the ideology, including sanctions.

The Arusha Declaration is regarded as the turning point. While there was talk of socialism before then, and Nyerere had written a major paper on it, its implications for policy were not understood, and in fact the first five year plan (1964-69) relied very heavily on foreign capital, especially foreign private capital. The views of important leaders as they become manifest in parliamentary debates, etc., especially during the debate on citizenship in late 1961, showed that Nyerere's own ideas had had little impact, and in the absence of clear policies, there was the danger of drifting and letting power pass to the bureaucrats through attrition in the party. Nyerere resigned in order to clarify the policies for which the party, TANU, stood, and to revitalise the party. While he was out of government, he wrote two important papers, one on ujamaa and the other on one party democracy, of which the former is important for the nature and content of ethical values, and the latter for institutional mechanism. The vision of society - the Utopia in Mannheim's sense - that is sketched out in "Ujamaa - The Basis of African Socialism,"¹³ is still the central theme in the Tanzanian ideology. While it is true that the paper was weak in providing guidelines for action, and was informed by unjustified optimism, the concept of the future society it set out underlies subsequent, more exacting ideological papers. Indeed, it was the increasing deviation from that image of society that led to its greater specification in

the Arusha Declaration. Three features are crucial: an attitude of mutual respect and obligation, common ownership of property, and the obligation to do one's share of work. Thus there are no great disparities of wealth, and no exploitation of one group by another, while those unable to look after themselves are taken care of by the community. In this way the qualities of helpfulness, co-operation and good neighbourliness. and communal ownership of productive assets, mark the good society. Nyerere claims to have found these principles in the traditional African community, and while important elements of such an organisation still existed colonialism had introduced individual acquisitiveness; and so the task now was to "reeducate ourselves; to regain our former attitude of mind." Nyerere very deliberately draws his inspiration from traditional African ideas. The paper was written when nationalism was a strong force in the country, and there was probably an ideological element in the choice and style of argument. There was a strong repudiation of Marxist socialism.

There was an assumption that Tanzanian society was autonomous: colonialism, though it did great damage, was over; only domestic factors were therefore considered. The Arusha Declaration contributes little to the content of ethical values, except that it adds democracy to the earlier socialist features. The context is no longer merely parochial, and there is an attempt to identify conflict and the source of exploitation in society. "Socialism and Rural Development,¹⁴ a follow up paper to the Declaration, is much more important. There is a vivid picture of life in communities which make up the country. Apart from reiterating the values mentioned in the Ujamaa paper, there is a detailed discussion of the decision-making processes in these rural communities. The concept of democracy at the village level introduces an important element: that of discussion and freedom. Persuasion and a commitment to a common set of values, rather than coercion, is to bind the community together. There is a clear discussion of the existing difficulties and problems in the rural areas, and what must be done to solve them. The objective of socialism is: "To build a society in which all members have equal rights and equal opportunities; in which all can live at peace with their neighbours without suffering or imposing injustice, being exploited, or exploiting; and in which all have a gradually increasing basic level of material welfare before any individual lives in luxury."

There is an emphasis on human relationships, even if the price is material progress. Gradually, the stress shifts to human and national dignity. In the TANU guidelines, Mwongozo¹⁵, issued in 1971, "development" is defined as "liberation." "Any action that gives them (the people) more control of their own affairs is an action for development, even if it does not offer them better health or more bread. Any action that reduces their say in their own lives is not

development and retards them even if the action brings them a little better health and a little more bread."

Mwongozo is important also in identifying with care the conflicts within society. Although the Arusha Declaration had discussed the external factors in Tanzania's political and economic life, Mwongozo places them in the forefront of obstacles to genuine liberation. Imperialism and external capital combine with the local bourgeoisie to continue the exploitation of Africa. It is necessary to fight these forces. Mwongozo uses the toughest rhetoric of any TANU document; it is indeed a call to battle. The romanticism of traditionalism has been shed, the ideas are more coherent, both to fight opposing points of view, and to provide a guide for action. The Tanzanian ideology has become gradually more coherent, specific, and action oriented. While the basis of the ideology can be traced to the Ujamaa paper, the mode of analysis has changed. Some comments will be made later on how effective a guide the ideology really is, but it is pertinent to state here that Tanzania probably still lacks a theory, that is, concepts and modes of analysis that help to locate contemporary issues in the context of overall aims. Nyerere himself remarked on the ad hoc nature of ideological development in Tanzania during his visit to China in 1974. "Our socialist practice has been the result much more of responding to a felt need than to understanding and application of a socialist theory."¹⁶ It would be helpful to look at the institutions and sanctions which back up the ideology before more comments are made on this point, which is crucial in explaining aspects of the relationship between law and ideology. The paper "Democracy and the Party System" was written about the same time as Ujamaa and it is possible to look at the former as spelling out the institutional implications of the latter.

Ujamaa is premised on development through harmony and persuasion, and it is implied that its achievement would be easy since its ideals have deep roots in the society. The institutional counterpart of such ideas is an open political system. The Party System paper assumes a universal consensus on objectives, and argues that a one party system is more congenial to democracy as well as more relevant to development than multi-party systems. But his one party is really a mass, broadly based national movement. The one party system would allow for maximum freedom of expression, and any member ("which in this context means any patriotic citizen since it is a national movement we are talking about") would have the right to contest elections, presumably on whatever policies he wished to put up to the electorate. So influenced is the paper by the picture of harmonious development that he sees no factions or groups emerging to challenge authority. There are no problems that cannot be solved through discussion. There would be no restriction on

speech. In a significant passage he explains why there can be no such restriction, "And what reason could we give them? We should have to convince them, and ourselves, that the 'party line' they were compelled to support was so fundamentally right that any deviation from it would be tantamount to a crime against the 'people', in other words, we would have to elevate policy decisions to the category of dogma. And once you deal in dogma you cannot allow freedom of opinion. You cannot have dogma without putting contrary ideas on the 'Index'."

The One Party Constitution, while heavily influenced by Nyerere's ideas, does not go as far as the extreme and unorganised democracy outlined in the essay. In particular, only party members can stand for elections. But the requirements for membership were minimal, and indeed the inauguration of the one party system was marked by the admission to the party of former dissidents who had either left the party or been expelled. The whip system in parliament was abolished, and MPs were encouraged to speak freely.

The Arusha Declaration upset the assumptions of the system and focussed attention on the implications of ideology for institutions and sanctions. The Declaration notes various conflicts and contradictions in the country, between external capital and national interests, between capitalists and the masses, between leaders and the people, and between the rural and urban areas. Difficulties of achieving socialism arise from the dependence on foreign capital, that most of the key productive and financial institutions are in private ownership, that leaders in party and government use their positions for acquisition of private wealth, accentuating social stratification, and that urban areas and industry have been allocated disproportionate resources to the detriment of the rural population. Remedies are offered: greater national self-reliance, nationalisation of key industries and resources, greater emphasis on rural development, and honest and dedicated leadership. For our present purposes, the main relevance of the Declaration is the increased emphasis on ideology (which is no longer a discredited word) and on the quality of leadership. If necessary, the party is to abandon its policy of trying to include all kinds of people and to put more emphasis on the belief of the party and its policies of socialism. Membership should be related to the acceptance of these policies. More specifically, leaders in party and government (a term widely defined) were to come under a new code to ensure that they were either peasants or workers, and "in no way associated with the practices of capitalism or feudalism." They were thus disqualified from owning shares in any company, holding directorships in any privately owned enterprise, receiving more than one salary or owning rental property. Those in breach of the code were to lose their leadership posts. Although

inspired by Nyerere, the Declaration was a party document and resolution, and with it ideology became not only respectable, but also imperative. The party emerged clearly as responsible for its dissemination, and although the responsibility for its implementation was entrusted to the government, the ground was cleared for the sanction of expulsion from the party for ideological defiance or deviation. Such a sanction is particularly crippling since a member of parliament must vacate his seat, and since employment of any kind may be difficult to obtain in a country where the state is now the major employer and dominates industrial and commercial sectors as well. Because of the possibility of such a sanction, as well as the review of, and veto over, parliamentary candidates by the TANU National Executive Committee, the 1965 Constitution has not needed change despite the major changes in constitutional policy implicit in the Declaration.

Further policy statements were issued to spell out implications of the Declaration in the areas of education and rural development. The latter pointed to the policy of ujamaa vijijini, villages which would be self-reliant socialist communities. Seminars were held up and down the country to explain the meaning and relevance of these policies.

Perhaps the most decisive break came with Mwongozo. The guidelines state unambiguously the obligation and responsibility of the party to lead the masses and national institutions. Not only must the party provide policy direction for all governmental and related institutions, but it must also supervise the implementation of these policies. The Party must concern itself more with matters of defence, and the guidelines defined the relationship between the Party and the armed forces in which the party leads the army. People's political consciousness must be raised for when the people are committed to a regime, subversive forces, whether internal or external, cannot succeed. The emphasis on the need to clarify and disseminate ideology and to improve the quality of leadership is reiterated. The image of the TANU leadership is stated in clear and forceful terms. "There must be a deliberate effort to build equality between the leaders and those they lead. For a Tanzanian leader it must be forbidden to be arrogant, extravagant, contemptuous and oppressive. The Tanzanian leader has to be a person who respects people, scorns ostentation and who is not a tyrant. He should epitomise heroism, bravery, and be a champion of justice and equality." The concern with the quality of leadership and the "purity" of the Party was underlined by the National Executive Committee of the Party in November 1974, when it extended the application of the leadership code to all the members of the party.¹⁹ The party thus turned away somewhat from its

original position, most clearly argued in the Report of the One Party Constitution Commission in 1965, that TANU was a mass and not an elitist or vanguard party. While it is of course unlikely that many members would be disqualified by the code, the decision shows the desire of TANU that the party should consist only of dedicated members. The quality of leadership was again emphasised. They must have socialist morality and lead by example. "A leader must be one who respects people; who makes an all-out effort to explain and interpret Party policy as well as implementing it; diligent in his work; eager to cooperate with his colleagues and those he leads; be in the forefront in dealing with public affairs; and finally, the Party directs that a leader shall by his conduct and practice be an example in good leadership; must be honest and in no way be a drunkard or a loiterer or anything implied by this."²⁰ To sum up, ideological understanding is very heavily emphasised; its custodian, the Party is to be purified, so that only those genuinely committed to the ideology are allowed to be members, and the leaders are to observe specially high standards of discipline, austerity and dedication.

Apart from strengthening its control over ideological questions, the Party has also sought to assert its supremacy over other institutions in the country. Although it was clear in the 1965 One Party Constitution Commission report that the Party was ultimately supreme, doubts about its nature and meaning have persisted, in part because of the language in the commission report itself about the role and status of Parliament. Beginning with the 1962 Republican Constitution when the government outlined the four basic principles of the constitution, one of which was that Parliament was sovereign,²¹ the importance of representative bodies and the electoral process has been emphasised, and indeed one of the justifications for a one party constitution was the strengthening of the legislature, and many of its detailed provisions were designed to achieve that.²² The early sessions of the One Party Constitution Parliament revealed that there was considerable confusion on the question of the relationship between the Party and the National Assembly. Some MPs, for example, criticised the government for the 1967 nationalisations without prior parliamentary approval, and later some members even went so far as to try to introduce motions in the Assembly for a multi-party constitution.²³ The supremacy of the Party was asserted with the expulsion of the dissident MPs by the NEC in 1969, with the consequence that they also lost their seats as MPs.²⁴ The supremacy of the Party over the Armed Forces is maintained, in part by the appointment of senior party officials as Commissars in the forces. In order to dispel any doubts on the question of party supremacy, it was decided by the National Executive Committee in 1974 that the Constitution should be amended to reflect the supremacy.²⁵ The custodian

of ideology is now the supreme institution in the country.

In the development of its ideology and related institutions, Tanzania has travelled a long way since independence. Compared with most other parts of Africa, this is a remarkable development, especially the institutional changes. Institutional development has responded to an important extent to the pressures of ideology. In his report on the first ten years of independence, Nyerere listed as the most important achievement the definition of the national goal. "Because of this, our progress is now towards a definite and understood goal. We know where we are going, and the general route which has to be taken."²⁶ For an assessment of the claim, we should perhaps make a distinction between ideology for leaders and ideology for the masses. It is a strong strand in the official ethic that development must come through the initiative and efforts of the people. Nyerere has repeatedly rejected the notion that development can be brought about through force or coercion. There is said to be a great concern to ensure that the people are involved in the decisions that affect them;²⁷ this factor was one of the reasons behind the decentralisation provisions. Tanzania's ambivalence towards an elitist party also underscores the importance attached to popular involvement and participation. Nor does Tanzania have the capacity for coercion, on any significant scale (although this is increasing). Thus the Tanzania ideology is aimed not only at the elite. In one sense it is easier to aim ideological clarification and training at the leaders, who are then entrusted with its implementation. Ideology for the masses poses additional problems, especially given Nyerere's reluctance to simplify matters. There are, of course, special responsibilities on the leaders, and it is therefore necessary to judge the efficacy of the ideology in terms of its communication to and understanding by both the leaders and the people in general.

Nyerere has discussed the difficulties of propagating a socialist ideology in post-colonial societies. There are two problems: the nature of the colonial way of life, with great disparities between the standard of living of the few urban based leaders and the people, and the legacy of racial hatred. The consequence is that the new leaders want to acquire the privileges of the old (colonial) leaders, and the people tend to view most matters from racial perspectives.²⁸ Thus the leadership code of the Declaration was greeted with dismay by the leaders,²⁹ while the nationalisations were welcomed by the people because they were seen as taking over the assets of the non-Africans.³⁰

A general assessment of the understanding or impact of ideology is difficult to make, for much of the necessary research has not been undertaken. What is often called

Tanzanian ideology is really Nyerere's ideology. There has been no other theoretician of significance in the party who has contributed to the elaboration of the ideology. The other leaders have merely echoed his words, and often in a way which shows little understanding of the principles underlying it. Nyerere's own assessment during a talk in China was pessimistic. After discussing the problems stemming from the colonial legacy, and the ad hoc nature of socialist development, he went on, "Even now, after defining our goal and our path in the Arusha Declaration, we are still learning more about the implications and requirements of socialism through our experiences as we try to build a socialist society. This method has the advantage of ensuring that our ideas remain relevant to the people and the problems of Tanzania. But it has the big disadvantage that we have no large and disciplined army of socialist leaders who understand the objectives in all their complexity, and who have clear ideas about how to promote the movement towards them. It is what the late President Nkrumah called the problem of trying to build socialism without socialists!"³¹ Many of the bureaucrats are hostile to the national ideology.³² There is often a lack of understanding of what is implied by the concepts used in the ideological debate, such as self-reliance.³³ Studies of the cell leaders have shown that many of them are not committed to socialist policies.³⁴ There is considerable evidence that regional leaders use coercion, when the official ideology is against coercion.³⁵ A study in the Tanga region shows that while people may be aware of party policies, they tend to be sceptical.³⁶ If one looks at the action of bureaucrats and party officials, it becomes clear that their understanding of ideology is weak, or that they are not committed to it.

While Nyerere continues to make the point that Tanzania is not a socialist society and criticises party and Government leaders for the lack of real commitment to socialist goals, the latter talk as if they were true socialist leaders and as if the country was already socialist. It looks increasingly as if the ideology is used as a smokescreen to cover or justify acts of pure political arrogance and arbitrariness. The considerable violence employed in moving people to ujamaa or development villages has perhaps to be interpreted as more than merely ignorance of the ideology; it is perhaps more validly understood as the deliberate violation of it, to the point that it has almost achieved the dimensions of a policy.

Along with the official ideology, there flourish other ideologies. There are the colonial attitudes of official arrogance and public submissiveness. There are strong strands of the "African personality" kind of ideology. The hold of a "petty bourgeois" mentality is still marked.

It may be a weakness of the official ideology that it has effectively failed to come to grips with these other ideologies. Ambiguities in the official ideology are sometimes attributed to its idealistic or utopian character. It is not based on a materialistic and class analysis. In part the reason lies in the circumstances in which the ideology developed. It emerged as the ideology of the ruling group and party, after several years in power. It was not an ideology of protest; it did not seek to transform the existing political system. To some extent it was precluded from a hard analysis of existing inequalities and of all the centres of exploitation. On the other hand, as Nyerere has pointed out, the ideology is based on the Tanzanian experience, and it is undeniable that where the ideology is sharp and explicit, it does reflect that experience. It is not so much that the ideology is unclear, but that all those who profess to follow it are not committed to it.

LAW

Broadly speaking, the legal system of Tanzania is based on the English common law. This means that the law and the institutions of the system closely follow those of common law. This is not to suggest that the two systems are identical. But many of the operating assumptions and rules of the common law apply.³⁷

The general or territorial law of the country is the written law which is either enacted by the legislature in Tanzania or applied from the United Kingdom or India. The latter is no longer important today, except in a few cases. The Constitution is the supreme law, and subject to that, Parliament can pass any law with binding effect on the mainland, and binding on Zanzibar in relation to union matters. There is therefore no question that Parliament has sovereign legislative power. In Zanzibar the Revolutionary council can legislate on all matters other than union matters. In practice, however, a significant volume of written law has been carried over from the colonial period. At the time of independence in Tanganyika, all the law then existing was preserved, and while there has been a great deal of legislative activity since which has repealed or modified the colonial law, much of the latter is still intact, e.g., the penal code, commercial law, torts. In Zanzibar at the time of independence the same rule was adopted whereby the existing law was continued in force, and later one of the first Decrees of the Revolutionary Council was to affirm the validity of such law.³⁸ The common law is important because of another provision which says that when there is no written law on a matter, the matter is to be resolved by reference to the "substance of common law, doctrines of equity and statutes of general application in force in England

on the twenty-second day of July, 1920." Pursuant to this provision the courts have frequently fallen back on the English law, often as interpreted by English courts in recent years. Even when there is written law in the country it is often a reproduction of English law, and here too the tendency of the courts is to look to interpretations in England. In addition, and perhaps most importantly, the rules and assumptions of interpretation that the Tanzania courts follow are those of the common law and its ethos. Thus the legal system, besides embodying much of the law of England, is still a significant carrier of values, assumptions and procedures - the ideology - of the common law.

The account in the preceding paragraph has to be qualified in two ways, both relevant to our present purposes. First, the residual English law, i.e., the common law, equity or statutes of general application which are to apply in the absence of a relevant written law, are to be applied "only in so far as the circumstances of Tanganyika and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary." There is thus a very considerable discretion in the courts to apply or reject the residual law, and to subject it to qualifications. Judicial discretion also exists in the application of customary and religious laws. Customary law is applicable in civil, as opposed to criminal, matters between members of a "customary law community" when customary rules on the matter exist. Under this provision Islamic law can also be applied where relevant to a community, in matters of marriage, divorce, guardianship, inheritance, waqf, and other questions of personal law. In the colonial period and during the first years of independence, the courts had a certain discretion in the application of customary law. They were to apply customary law in so far as it "was not repugnant to justice or morality."³⁹ Moreover, the superior courts were to be merely guided by customary law when it was relevant while the local courts were to apply it. Thus the superior courts had considerable discretion to repeal or modify customary law, and even the local courts had some. As the law now stands, the courts are required to "apply" the relevant rules of customary law; their discretion has been taken away by the abolition of the "repugnancy clause." Instead, in theory the legislature has replaced the courts as the principal modifier of customary law. At independence it was the aim of the government to codify the customary laws of the different ethnic communities. Some progress was indeed made, and there exists a code on bridewealth, marriage, divorce and status of children in respect of patrilineal Bantu-speaking peoples which has been brought into force in several districts.⁴⁰ But this strategy now appears to have been abandoned. Instead, a somewhat different strategy was pursued in the enactment of the Marriage Act of 1971 when a common law for everyone, regardless of race or religion, was

established on a number of matters relating to marriage, divorce and the custody of children. Customary law has also been modified when a particular evil was considered to result from it, as in the abolition of the Nyarubanja land tenure.⁴¹ In practice, however, the courts have continued to exercise considerable discretion in the application of customary law.⁴² While of course the very notion inherent in customary law is its flexibility and continuous adaptation to change, and so it is not always clear whether a court is exercising its discretion or merely applying the ever evolving rules of customary law, value judgements of the courts clearly enter into their decisions. During the colonial days, these value judgements were inspired by notions of the common law or British culture,⁴³ and it is one of the key questions in this essay to examine how far the new national ideology influences the discretion that the courts have arrogated to themselves.

The second qualification on the application of the "residual law" is the application of religious, personal laws. There is specific statutory authority for applying Hindu law and Muslim law to adherents of these faiths.⁴⁴ Combined with the various regimes of customary law, there is thus a distinct plurality in the legal system. As some of these specialised regimes are supported in part by their own institutions, there is a certain amount of decentralisation of decision-making, and indeed even law-making.⁴⁵ A question to be looked at is the impact of such a plural system on the implementation of ideology, particularly as each sub-system is buttressed, and indeed justified, by its own ideology, often at variance with the official ideology.

We now turn to the institutions of the legal system, which can broadly be divided into parliament, the administration, and the courts. Parliament, under our notion of a legal system, is the ultimate repository of legislative power. It is partly an elective body, and partly an appointed one. The constitution provides for few restrictions on its legislative competence, although a clear procedure is laid down for the enactment of law. Parliament also had important powers of control and supervision over the raising and expenditure of public money. In practice Parliament is a weak body, and the constitutional amendments asserting the supremacy of the Party have further underscored the subsidiary role of the National Assembly.

The administration is responsible for the implementation of governmental policy, which includes the implementation of laws. In theory, the administration is subject to law, and while the common law is less developed than some other systems of law as regards the regulation of administration, there are a number of well known rules which seek to regulate the acts and procedures of the Government. The foremost of these is that the administration cannot act in a way so as to affect

adversely the rights or status of individuals or groups unless there is an express authorisation for this in a law. It must observe strictly the limitations on its powers as laid down in legislation. It cannot levy taxation or spend public money without parliamentary authority. The administration itself is defined by law, and as a rule strict separation is still maintained between the administration and the party. The rights and obligations of the administration do not extend to the party, although of course certain officials occupy positions in both the hierarchies. This strict legal separation is increasingly inconsistent with practice, and some vexing problems in the administration of laws arise from the growing administrative role of the party.

The courts are the major means of adjudication and interpretation of the law, and it is with them that this section is mainly concerned. When the layman thinks of law, he generally associates it with the courts. Since independence, Tanzania has moved steadily in the direction of a separate, independent judiciary (although that movement may have been slowed in 1971 when the post of the Chief Justice was localised, but its occupant given only a contractual appointment of limited duration). Prior to independence, administrative officers and chiefs discharged judicial functions in the districts and provinces, and in practical terms had almost exclusive jurisdiction over Africans, except for serious criminal offences.⁴⁶ They were not legally trained, although the administrative officers had to pass some basic law examination. Since independence there has been a strict separation of judicial and administrative functions, so that all magistrates are full-time judicial officers and their appointment or removal is not subject to the administration.⁴⁷ They are given some legal training, and the intention seems to be that, over a period of time, all court holders, or at least those who preside over the District Courts, will have basic qualifications in law. The other important change initiated as a result of independence was to provide for a single system of courts to which all the people will be subject, to replace the colonial system under which, in effect, different courts existed for the Africans and the non-Africans, with the African part of the system closely tied to the administration, and lacking some of the procedural and evidentiary safeguards of the common law. So in both respects, the movement has been towards the model of the legal system that was sketched out earlier in the essay. Arguably the ideology of national integration rather than socialism has been the primary inspiration behind these efforts. An important exception remains: just as in the colonial period, lawyers are not allowed to appear and represent parties in the primary courts, which have replaced the local courts. At one time the exclusion of lawyers was explained on the basis of the rather limited legal knowledge of the holders of

these courts and the fear of their being confused by professional lawyers, as well as the paucity of lawyers.⁴⁸ There still seems no intention to allow lawyers in the primary courts, but it is probable that the reasons are different. Finally, it ought to be mentioned that the final court for most matters in respect of Tanzania is the East African Court of Appeal, which Tanzania shares with the other East African countries, and over whose operations she has little control. Tanzania, however, determines how far it shall be subject to the appellate jurisdiction of that court, and the gradual restriction of jurisdiction suggests a reluctance to submit disputes to a truly independent tribunal.

Constitutively the courts are independent, and judges cannot be removed except for good cause. Judges have to have certain legal qualifications, training or experience. The courts are hierarchically organised, and their affairs come under the administration of the Chief Justice and the Registrar of the High Court. They have the ultimate power to resolve legal controversies. Two qualifications need to be made. One, that there is nothing in the Constitution that prevents the legislature from conferring power to settle disputes or resolve legal controversies on other bodies; the only exception to this is questions regarding the interpretation of the Constitution itself, which must be resolved by the full bench of the High Court. As we shall see, while the formal structure and procedure of the courts have been little affected by the TANU government since its ideology crystallised, what can be called "judicial jurisdiction" has been conferred on various other bodies, often to the exclusion of the courts.⁴⁹ Second, quite apart from these special exceptions, the law has always tolerated, and indeed encouraged, a certain amount of dispute settlement outside the formal legal system. There is a general prohibition of "usurping judicial powers," but customary arbitration is encouraged.⁵⁰ Dispute settlement by tribal elders and chiefs has been quite common and while the latter have been prohibited from engaging in this task,⁵¹ the former continue. Various other agencies, e.g., the TANU cell leaders, engage in work of this kind,⁵² and in 1969 an attempt was made to set up the informal settlement of disputes on a systematic basis.⁵³ There are sharp differences between settlers of disputes in the formal system and those outside it; the former are legally trained, the latter not; the former come under the administration of the judicial authorities, the latter are often associated directly with TANU: the former apply rules of law, while the latter work with more flexible standards. As a simplification, one may say that the former apply law, the latter ideology. The fact that it may be too much of a simplification is argued below.

It was stated earlier that a picture of a legal system is not complete without a discussion of its own ideology and the place of it in the public consciousness. We conclude this section by examining the attitudes of Tanzania leaders towards law and the legal system. As in the discussion of ideology, we shall be looking principally at the views of Nyerere, but also at those of Kawawa and Karume. Kawawa has been more influential than Nyerere in the development of the legal system, while Karume fashioned a distinct pattern of legal development in Zanzibar. It is interesting to compare Nyerere's concept of law with that of Karume. Karume's views were, of course, not coherent, and were often opportunistic, but they were not without influence on the system in Zanzibar. He regarded colonial law as an instrument of oppression, and believed that the colonial courts had been used to suppress the struggle for independence.⁵⁴ Declaring the Court of Appeal unwelcome and unnecessary in Zanzibar, he said, "The meaning of independence was to get hold of power together with the means of production in the country and be run by the people themselves. The court must also be run by the people in order that the law-breakers could be reformed and reeducated in the socialist way of life by preventing crimes." A free state would never be respected by other countries if the laws of that country were still the same as those of the colonial era. "Laws of the country must reflect the interests of the people and not of the few," he continued. On another occasion he asked for the scrapping of the colonial laws, and said that the TANU guidelines and the revolution in Tanzania would only succeed if the colonial inherited laws were replaced by a well defined socialist legal framework.⁵⁵ He considered that the people ought to play a greater role in the administration of justice, and he was sceptical of professionals. In the system of courts that he devised, the Party members and officials played a key role.

Nyerere, on the other hand, has a more benign view of law. In fact his views bear close resemblance to the bourgeois concept. He has constantly emphasised the equal and impartial administration of law, and has said that it is the duty of judges to enforce law even if it is unjust. Their job is to enforce the law fearlessly, and the responsibility for bad laws is not theirs.⁵⁶ His most explicit discussion of law is his lecture, "The Courage of Reconciliation," given a few days after the mutiny of 1964. In that he notes a basic conflict in society, the conflict that a man's freedom must restrict that of others. At the same time, the basis of human progress is co-operation, and as co-operation among men increases, so does the scope for conflict. "Co-operation and conflict are two sides of the same coin; both arise out of man's relationship with his fellows... It is law and authority which transform this situation - of co-operation constantly endangered by conflict - into a situation of expanding human development. Only a system of rules governing inter-

personal behaviour, and the enforcement of these rules, makes co-operation between men possible and fruitful."⁵⁷ But not any rules would do, although as these rules - the law - are backed by coercion, they might keep society going for a time. "But the peace resulting from imposed law is short-lived. The moment a man feels himself strong enough he tries to throw off this law and substitute another more to his liking. Or he may even break out in sheer destructive desperation if the law appears to him to be threatening his life or that of his family, or even just demanding too high a price in terms of liberty and manhood. The only system of law which brings stable peace is a system which is based on the fundamental human equality of all the people under its suzerainty, and which aims at reconciling to the greatest possible degree man's conflicting desires for individual freedom and the benefits of communal life. For peace in a society to be ensured these three things are essential - a system of law which respects the equal human rights of every member of society; which treats them all equally in both its guarantees of protection and its restrictions on individual license; and which can be changed by peaceful agreements of the citizens governed by it." A little later he says, "And just as law must be impartial between men if it is to bring lasting peace, so the enforcement of it must be impartial between them. It is essential that both the law and its enforcement depend on something other than the brute force of the men involved in a relationship - who in times of conflict become the contestants. There must be an outside authority in which men acquiesce, which is both willing and able to act fairly between them."⁵⁸

He considers that there is an intimate relationship between law and socialism. "The purpose of socialism is to enlarge the real freedom of man, to expand his opportunity of living in dignity and well-being. An obviously essential part of this is that the laws of the society shall be known, be applied equally, and that people shall not be subject to arbitrary arrest, or persecution by the servants of the society. The Rule of Law is a part of socialism; until it prevails socialism does not prevail. By itself the Rule of Law does not bring socialism; but you cannot have socialism without it, because it is the expression of man's equality in one facet of social living." He considers that law is an instrument which reduces oppression. "It is the gradual growth of law, and the principle of equality before the law, which ease the severity of oppression until the people are in a position to take control of their own destiny."⁵⁹ He has emphasised that formal equality in law may not be enough, for then there is no real equality between the rich and the poor. "The Rule of Law, and Equality before the Law, are one essential means of preventing exploitation. But they are only practical when the society as a whole is based on the principles

of equality - when, in other words, a socialist policy is being followed."⁶⁰ In this argument Nyerere seems to be standing bourgeois theory on its head - that law is only possible in a socialist society, but he does not develop the argument, and I have seen no other discussion of his in these terms. It is evidence of his deep commitment to legal values that Nyerere felt it necessary to make his considered defence of the Preventive Detention Act which, he acknowledged, contravened some of these values.⁶¹ (But, as we shall see, there may be a somewhat abstract quality to his commitment, for some of his actions show a disregard for legality.)

Nyerere has said that he regards the work of the judiciary as particularly important, "for the work of the judiciary is nothing less than the maintenance of respect for law in this country. Judges are, and must be, nothing less than the buttress wall supporting the individual justice for which our people struggled when they fought for national independence... Unless your work is done properly, none of the objectives of our democratic society can be implemented."⁶² Judges should be independent of executive influence, and should do justice according to law, although they need not isolate themselves from the people. He has said that the function of the judges is to apply the law, even if it is a bad law. The responsibility for bad law is not the responsibility of lawyers, but of politicians; the task of lawyers is the impartial administration of law.⁶³ Nevertheless the judges should apply the law in the spirit of the ethics of the society. Nyerere underestimates the discretion that judges actually have, and so he has never developed this position clearly or coherently.

Although Kawawa was the Minister responsible for Justice from the mid-sixties to the end of 1975, it is difficult to find many statements by him which would give an indication of his views on law. He has tended to comment on different parts of the legal system, particularly the courts, rather than make general statements on the role and function of law. He has defined the independence of the judiciary as meaning that the executive or the party would not interfere with the actual decisions of the courts. But that did not mean that a judge should not consider the consequences of his decisions on the community, and should take into account the hopes and aspirations of the people. This was particularly important when determining punishments. Nor did it exclude the party from considering questions concerned with crime and the performance of the legal system - the magistrates, conciliation processes, etc. He has been critical of the manner in which the courts have discharged their functions.⁶⁴ His critique of the legal system has extended to the contents of the laws, which he considers have not been suf-

ficiently reviewed to see if they are compatible with the new policies, an omission which he ascribed to lack of adequate personnel.⁶⁵ He has been critical of the "professional" model towards which the legal system moved after independence, which he considers is alien to the people's conception of how justice is administered, and has ascribed the crisis in the courts to the new modes of settling disputes introduced by the post-independence changes.⁶⁶ He has favoured the institutionalisation of traditional arbitration procedures, and an increased role of laymen in decision-making, at least in the primary courts. His views have been very influential, and most of the changes in the system of courts after 1963 are due to his initiative. These changes are discussed later.

When we turn from political leaders to professional leaders, there seems at first glance a similar ambiguity. Mark Bomani, who was Attorney-General from the early sixties until the beginning of 1976, has argued that the rule of law is important, but he is critical of many aspects of the imported British model.⁶⁷ He considers that the legal profession is motivated largely by its own self-interest, and considers that it is necessary to widen the concept of rule of law to take into account the need to create conditions of human justice and economic and social development. He considers that many of the concepts of the common law unduly favour the individual at the expense of the community, and that it may be necessary to provide for penal sanctions against those who sabotage the economy, as in the Soviet Union. The procedural rules are inadequate, for they assume a passive role for the judge, when in practice the accused is often un-represented by counsel.

We discuss finally the views of Telford Georges, who was the Chief Justice during the important period when key changes in the legal system were being implemented, from 1965 until 1971.⁶⁸ He was deeply committed to a legal system in which the independence of the judiciary was maintained. He believed in the values of law, based on the concept of law traditionally held in the West. He was, for example, opposed to the dilution of the "professional" model of the legal system, and considered that justice would be better delivered with the increasing professionalisation of the bench.⁶⁹ He was therefore anxious that the fundamentals of the western legal system should take root in Tanzania. On the other hand, he came to Tanzania just a few months before the One Party Constitution, and the Arusha Declaration which followed. The atmosphere was not very congenial to the notions of law he held. Georges' response to the situation was to emphasise those aspects of the constitutional and political system which were favourable to the principles of independent courts. He thus repeatedly referred in his speeches to the Preamble of the 1965 One Party Constitution, which says that human rights and dignity are best maintained in a democratic society "where

the courts of law are free and impartial". He also referred to the Preamble (as well as the Principles in the TANU Constitution) for evidence that Tanzania was committed to fundamental human rights, which should be maintained under the rule of law. In a speech after the Arusha Declaration he claimed that the principles behind the Declaration were values which were deeply enshrined in the law and cherished by lawyers. "I always say that no one could possibly appreciate the ideals lying behind the Arusha Declaration more than can a lawyer... the ideals and goals of the Arusha Declaration are really nothing more than the ideals and the goals of the discipline in which we have been trained."⁷⁰ He thus argued that not only was there no conflict between law and Tanzania's evolving policies and system, but that essentially they were supportive of each other.

His strategy was to get the judiciary (and the legal profession generally) to identify itself with the political system, to the extent consistent with its independence. He urged magistrates to take part in TANU activities, and himself went to political rallies. The judges' role was to educate the people about the importance of law and independent courts, and the party provided a valuable platform from which to do so. So long as the political leaders were not hostile to the judiciary, it was up to the judiciary "to carve for it a place in the new society as a body of persons committed to the development of the country and anxious to further this objective. If this can be done, then the support of public opinion can be won, and if this is done, the existence of free and impartial courts as envisaged in the preamble to the Constitution will be preserved."⁷¹ While he believed that the Judiciary ought not to isolate itself from the rest of the society, his views on the subject were not free from ambiguity. Isolation, he believed, helped one to maintain judicial independence, although too much of it would in the long run undermine it.⁷² A man of his own outstanding abilities was able to strike a balance, but he was to some extent performing a tight rope act. The attempt to involve the judiciary in political life without politicising it introduced ambiguities in the situation, which can in one sense be described as his legacy to Tanzania. At the same time it highlights a fundamental dilemma inherent in the attempt to adapt the basically common law legal system to the new policies and situation in the country.

We find, therefore, that there is a division of opinion among the leaders on many important aspects of law and the legal system. Like ideology, ideas have been changing over time as regards the role of law, but there is still diversity of views. The colonial experience, the lack of legal training of any important political leader, and the style of the nationalist movement combined to play down the law. The dominance of immigrant lawyers, at least until recently,

in conjunction with alien institutions through which the law often operates, has no doubt contributed to a measure of hostility toward the legal system. Apart from Georges, who has now left the country, perhaps only Nyerere regards law as an important and independent value, although even he has stated that law has to respond to other societal changes and needs. Many of his actions, as we shall see, are difficult to square with his professed principles, and as the instances of violation increase, his statements on law begin to sound hollow. Others have a more flexible and instrumental view of law, and regard it as a variable in the service of social goals. This difference of views no doubt affects the way the relationship of law to the ideology of TANU is perceived.

RELATIONSHIP BETWEEN LAW AND IDEOLOGY

1. An Introduction

We have examined law and ideology as they are perceived or operated at the top; and we have looked largely at what the leaders say rather than what they do. In other words, we have looked at law and ideology as instruments of power, as essential constituents of the mechanism of the state. Law and ideology are regarded as agents for change. But how effective can they be if - as superstructure - they are dependent on the base? While the economic base is the ultimately determining force, there is a dialectical relationship between it and the superstructure, and the superstructure is not without influence on the base. Engels elaborated on some aspects of this relationship, and suggested how the superstructure, by achieving a certain degree of autonomy, can modify the base.⁷³ The question of the inter-action between the base and the superstructure is extremely complex. Without going into the complex debate,⁷⁴ it may be said that the importance of the use of the power of the state - the superstructure - in post-colonial societies is being increasingly recognised.⁷⁵ The accession to the instruments of the state, when social classes are inchoate or weak, provides a real opportunity to determine the development of society. By means of state power, the relations of production can be redefined and even if they are not, the accession to power of a new political group in post-colonial societies generates certain contradictions between the colonially determined base and the new superstructure. These contradictions have to be resolved somehow. Operating through the superstructure a determined leadership can do much to change the basic economic relationship. By redefining the relations of production - the ownership by property - it can capture much of the surplus and plough it back in more socially desirable investments. There are of course constraints imposed by the place of the domestic economy in the wider international, especially capitalistic, eco-

conomic system, and by the domestic class or other interest groups.

The role of law and ideology, therefore, depends in considerable degree on who is in power. That question itself is difficult to answer for Tanzania, for there are few clearly formed social classes.⁷⁶ Many of the arguments of this paper assume that there are no firm social classes, although there are different interest groups, many of whom share in political power. The paper also assumes, for example, that there is some difference in outlook between the policy-making bodies of the party and the state bureaucracy, although some influential writers, including Shivji, have denied this. The assumption is that important elements of the leadership are genuinely committed to the implementation of the ideology. Equally, influential elements of the leadership are lukewarm, if indeed not hostile. It is in part because there are contradictions within the leadership that the issues discussed in this paper are of some relevance.

A second preliminary point relates to the relationship between law and ideology. Both are part of the superstructure, but law is more than that. It is also an institution. The productive relations, for example, are largely defined by legal forms and definitions. Ownership, which is defined and regulated by law, is an essential aspect of the productive relations.⁷⁷ Ideology operates in a less direct manner, and acts more as a rationalisation. The link between law and ideology would seem to be that there is an ideology of law, a sense of understanding or consensus about law and the imperatives of obedience to it which can be called part of the superstructure. So in one of its aspects, law is a part of ideology, but in another it is an independent phenomenon. When ideology is defined as a set of goals, the relationship between law and ideology may be different. While there may still remain the ideology of law - a belief in the value of obedience to it - its contents may be seen to run increasingly counter to the ideology. The relationship between law and ideology is rather complex, then, for ideological factors both reinforce and undermine law. Also, although law and ideology, as instruments of power, have different organisational and institutional characteristics, they can sometimes be regarded, and utilised, as alternative ways of regulating society.

2. Law and Ideology in Conflict

Conflict between law and ideology can arise in several situations. Of course conflicts on specific points can arise in any system; what is relevant here is a situation where the discrepancy between law and ideology is widespread. Such a situation can occur when there has been a change in government or leadership. This can happen with the end of colonial

rule or the election to power of a new group with an orientation radically different from the groups previously in power, as with Allende's election in Chile. It is also possible that a shift in ideology can take place without change in government, and to some extent this can be said to be the case in Tanzania. The problem arises from the persistence of law, for the laws do not automatically change with the change of policy. The situation can be resolved by changing the law so as to serve the goals of the new ideology, but in practice the problem is more complex. Law works through a huge body of rules, and while ideological orientation can be changed and directed through a few general norms, much more detailed and technical work is required to bring law fully into harmony with ideology.

Problems of dissonance between law and ideology spring not only from these two factors: one of time lag, and the other a lack of the legal skills necessary to bring the law into harmony with ideology. There is also another situation of dissonance, when law itself is the cause. In the first two situations it is assumed that the proponents of the new ideology are in command of the state and that remedial action can follow in course of time. The third situation can arise when the leaders of the new ideology have acceded to only parts of the state mechanism. The basic law or the constitution prevents them from either making or implementing law to further the ideology. For example, if new leaders accede to executive power, the legislature may be unco-operative and refuse to pass the necessary legislation; or the courts may be obstructive; or the legislature may make law which the executive refuses to enforce. Chile under Allende was a classic case of this kind. Such a situation is of little relevance to Tanzania, where the TANU leaders are ultimately in control of most state institutions. It is, however, instructive to examine some of the issues and problems in that situation, in part because they throw some light on the issues in Tanzania, and more generally because they highlight some problems of law and ideology.

Allende obtained the highest votes of any candidate in the Presidential elections in 1970, but failed to obtain a majority.⁷⁸ Under the Constitution, it was the responsibility of Congress to elect one of the candidates. Despite the convention that the Congress elects the candidate with the highest votes in the popular election, Allende was asked to subscribe to a Statute of Guarantees of human rights as a price for his election. The Congress was dominated by the opposition groups, especially the Christian Democrats.⁷⁹ Allende, while a Marxist and leader of the Unidad Popular, had committed himself to achieving socialism through legality. He defined legality as working within the established legal rules, including the procedure for changing rules. In the Congress he did not have a majority, and the bulk of the

judiciary, who were conservative and right-wing, were opposed to his goals. The Constitution within which Allende had to work was typically bourgeois with many checks and balances, including public officials whose function was to ensure the legality of all government actions. The fact that the social forces in the country were finely divided and balanced, with a strongly entrenched bourgeoisie, gave reality and effectiveness to the complex nature and checks and balances of the Constitution. Allende found himself in a straitjacket as a result. Nevertheless he was able to achieve several of his socialist goals by working within the system, although as we know he was ultimately unsuccessful. Of the many interesting and vital legal issues that relate to and arise from the Chilean experience, we examine two which are of particular relevance to a discussion of law and ideology. The first is, how was Allende able to achieve whatever he was of his socialist purposes working through the medium of bourgeois laws? Second, what was the price that he had to pay for working within the framework of bourgeois laws?

As to the first, the key lay in the contradictions of the bourgeois legal system. Over the years as the economic or the political system had run into crises, special laws had been passed, which departed from the main tenets of bourgeois laws. These often had the effect of vesting great powers in the executive. Other laws authorised greater state intervention in the economy through, e.g., price control, wages control, etc. A state development corporation was set up to strengthen the private sector. Another factor which helped Allende's government was that in the early part of this century, a left-wing government had been in power briefly, and during that period had enacted some progressive legislation. Such laws were not repealed by the bourgeois parties when they came back to power, and in accordance with legal doctrine, they continued to be valid laws. Allende's legal adviser has written how they searched carefully through old statute books for such laws or laws passed by the bourgeois parties but which reflected the contradictions of the capitalist economic and political system.⁸⁰ Most of these laws were at the disposal of the government, and so Allende was able to make use of them. He used the state development corporation to acquire shares in important companies, including banks; he used wages legislation to increase the income of workers; he used labour legislation which authorised the government to take over the management of industrial enterprises if there was disruption of production to acquire those factories after the workers went on strike and thus the production was interrupted. He pushed vigorously the land reform legislation of his predecessor Frei, which had been passed more as a public relations exercise. While the contradictions of the bourgeois legal system enabled him to achieve some nationalisation, to increase the income of workers, to accelerate the pace of land reform, he quickly reached the limits. Working through his strategy of legality, he could only have pushed his revolution further if

he had been able to acquire new legislative powers, and these were repeatedly denied to him by the Congress.

We come to the second question, the price paid for the strategy of legality. How far Allende's failure resulted from a commitment to legality can never be answered with any certainty (although it is well to ponder whether he had any real alternative). One thing, however, seems evident. There was a tremendous conflict between law and its ways, and ideology. Given Allende's rather limited initial support, and the fact that there were several groups whose objective interests lay with him but who had not supported him, it was crucial to his survival to mobilise them. But mobilisation was difficult so long as there was an exaggerated sense of legality. In one sense, by making such an issue of legality, Allende was caught in his own trap. The bourgeois press and parliamentarians, not to say the courts, were only too ready to attack him on the slightest pretext for any departure from legality, by which they meant slow, orderly, almost non-political action. And yet it was difficult to mobilise workers and peasants except through action which was almost militant. It has been suggested that the workers and the peasants had to be made conscious of their power, and that it was necessary to destroy bourgeois myths. Workers and peasants could most effectively be made conscious of their power by direct take-overs of factories and latifundias. And yet these take-overs were illegal, and often the government would intervene to return the assets to their bourgeois owners, thus dampening popular enthusiasm. Again, the whole vocabulary of discourse and controversy, suffused with erudite and complex jurisprudential concepts and terms, was not conducive to raising political consciousness. It would seem clear that Allende lost tactical advantages by transferring the battles from the factories and the political rallies to parliamentary chambers and court rooms.⁸¹

The Chilean experience shows both that there is potential for change through laws based on a different ideology, by exploiting its contradictions, and that there may be a heavy price to pay for subordinating ideology to law and legal forms. The Chilean situation was very different from that in Tanzania and comparisons run the danger of being facile. TANU control over the various institutions of the state is more thorough-going, the bourgeoisie is much weaker and smaller, and international, especially United States involvement in its economy and politics is less. But it is worth exploring how far the contradictions of the colonial legal system have facilitated the implementation of Tanzanian socialism, and to make some attempt at assessing the costs and benefits of a "legal" strategy. We start with the proposition that there is a clash between law and ideology in Tanzania. As we have seen, Karume made such an assertion

and urged the establishment of a socialist legal system. Professor Rudolph James has also argued that there is a clash between law and ideology, has noted the tensions within the legal system which result from this situation, and has urged a more principled and consistent use of laws and the legal system.⁸²

It is important to recognise that each time a party official or administrator chooses to by-pass the law, it does not mean that there is a clash between law and ideology. Many leaders in Tanzania, including Nyerere himself, have on occasions decided to ignore legal procedures, when it is not evident that the use of those procedures would have resulted in a setback to the implementation of ideology. We are not here considering situations of administrative impatience or political arrogance.

It is important to make this point, for the attack on the law comes, in large part, from officials and politicians who are resentful of the safeguards or discipline of the law. It is then all too easy to attack the law for its "technicalities." Thus there have been several instances of unlawful detention of persons who for some reason have run a foul 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.⁸³ Some of these measures could have been legalised, for legislation is relatively easy in Tanzania; and in any event, the ideological significance of these measures is not immediately evident. 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.⁸⁴ 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.⁸⁵ The President also ordered the expulsion from the University of a large number of students in 1966 for protesting against the 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.⁸⁶ 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.⁸⁷ One may ask why Nyerere, who has so often professed his commitment to the law, acts in this way. He justified the first of the cases discussed above on the ground that police resources were not adequate to deal with the situation,⁸⁸ so that it was necessary to use the extra-legal methods.⁸⁸ On the use of the Detention Act, the defence has been that corruption is a serious offence which has to be fought by all available means. Using the normal legal machinery would have been cumbersome or unproductive. First, police investigations would have been seriously hampered if the suspects had been released on bail, and second, it would have been difficult to prove charges of that kind.⁸⁹ It is likely that the President, and other authorities, have lost confidence in the efficacy of the legal system. The repeated criticism of the high rate of acquittal indicates some reservation about the courts.⁹⁰ Whether there is a crisis of confidence or merely impatience, it is arguable that this is not a case of a conflict between law and ideology. It may be that there is a scarcity of the resources necessary to deploy the legal system efficiently as well as fairly. But it seems more likely to represent a weakening commitment to legal safeguards and procedures, with the argument of ideology being used merely as mystification to cover arbitrariness.

Law can be said to be in conflict with ideology when a decision reached by applying the rules of law runs counter to the needs of ideology and policy. A conflict may also exist when the processes of law are used to delay the implementation of policy or hold it up indefinitely.⁹¹ James discusses an example in which the legal rules and judicial procedures requiring that compensation be paid to farmers evicted to make room for an ujamaa village frustrated the development of those villages. The fact that a law is colonial does not in itself mean that it must be in consistent with TANU ideology. The colonial state was administrative and bureaucratic par excellence, vesting wide powers in the government. The TANU government has become heir to such powers, giving it tremendous scope for its initiatives. Individual laws from the colonial times may, of course, be opposed to the new ideology, but it is necessary to look at each rule to see how it obstructs policy. It is also necessary to appreciate that even though many of the colonial laws may still be on the statute book, they may remain dormant. The law does not operate itself; it generally requires someone's initiative to bring it into action. Irrelevant or obstructive law can stay on the books without doing much damage, unless there are strong disaffected private groups able to mobilize the legal system, which appears not to be the case in Tanzania. This is not to deny that such laws ought to be abolished or reformed, for the threat

exists that they can be used to embarrass the government. It is also important to note that while Tanzania had a basic legacy of a colonial legal system its legislature has been quite active. A great deal of new law has appeared on the statute books since independence, and much of the old law has been either repealed or modified. Karume's statement that Tanzania has colonial laws needs to be qualified. A final introductory point to be made is that TANU's ideology is neither simple nor unambiguous. It is committed to a restructuring of society in fairly drastic ways, but claims to seek that goal through persuasion and orderly procedures with a strong emphasis on human freedom. The implications of ideology for law are far from clear cut. If there are the tensions in the legal system which James and Karume have noted, they may merely reflect tensions between the different strands of the ideology itself.

We now look at some specific areas where law and ideology are visibly in conflict. The conflict can arise from a substantive rule of law, or from the allocation and distribution of power and responsibility as affected by law. Professor James has pointed out an instance of the former in land law. The requirement that a person whose land is taken should be paid compensation for the unexhausted improvements potentially conflicts with the primacy given to ujamaa development in the rural areas. The rule itself is not inconsistent with the ideology, since for compensation improvements made by the owner is no more than just reward for his work.⁹² The problem is said to arise from the fact that if the rule were to be applied in all or even a majority of the cases in which it is relevant, serious difficulties might arise in the establishment and success of ujamaa villages, although little evidence has been produced to substantiate this statement.

It has been suggested that the law and the courts lean too heavily in favour of the individual at the expense of the community.⁹³ This is said to be inappropriate in view of the collectivist orientation of the ideology and the fact that much of the economy is now under public ownership. One of the earliest cases where such complaints could be made arose in 1963 when the former Paramount Chief of the Chagga was awarded heavy damages in a suit for breach of contract against the Kilimanjaro District Council for the abolition of chieftaincy, although it was the government's policy to abolish the institution of chieftaincy throughout the country, and it had indeed promoted some legislation towards that end.⁹⁴ Soon afterwards the courts were taken to task for the relatively light sentences imposed upon the 1964 mutineers, whose actions had put the entire security of the state in jeopardy.⁹⁵ There are still complaints that the accused enjoys too many procedural advantages, and that

the courts give lenient sentences. An interesting case study is provided by the judicial treatment of the Minimum Sentences Act, which required the imposition of severe punishment following conviction for specified crimes, mostly theft of public property.⁹⁶ Applying the common law principle of interpretation that penal statutes must be strictly construed - and "the more penal the statute the stricter the construction"⁹⁷ - the courts progressively whittled down the application of the Act. At an interpersonal level, a great many of the rules of customary and religious law are inconsistent with the ideological emphasis on the equality of man and woman. Since many of these rules are applied by primary courts whose decisions are not reported and do not ordinarily get publicised, and since various traditional and other community leaders settle a great many disputes informally by applying these rules, in practice much that transpires in the name of law would not pass muster. Such tendencies are perhaps inherent in the rather decentralised legal system of Tanzania. Apart from increasing centralisation of the system, which may not be practicable, various other strategies are possible, some of which are discussed below.

We now turn to another potential conflict. Administrative behavior, including rule-making, is governed in part by legislation and in part by the doctrines of the common law. In the absence of substantive limitations on the power of the executive, these rules are concerned largely with matters of procedure. Questions about how the administration might act and what the courts can do to control the administration are complex. In general, it can be said that the answer to these questions can be found in the legislation providing for the powers in question. The courts tend to interpret these powers strictly, as is demonstrated by a case decided soon after independence.⁹⁸ The liquor license of the Bukoba Gymkhana was not renewed by the Township Liquor Licensing Board, on the ground that the Club was still discriminating. The Board based this conclusion on the fact that a candidate for membership had to be nominated and seconded by existing members. There was, however, nothing in the legislation which authorised the Board to take such factors into account in deciding on license applications. The court held that the Board's decision was therefore unreasonable. It is clear that the Board's general approach was in keeping with the government's policy against all forms of racial discrimination, yet the court held that the legislative language did not justify the Board's decision.⁹⁹ The courts can also object on the ground that the decision is made by an officer who is not legally authorised. To the extent that TANU desires to participate in administrative or licensing matters, the rules would be a serious problem, if someone were minded to raise an objection. The courts also generally require

that when discretion is given to an official, he must not be subject to the instructions of others. This would effectively preclude TANU from instructing these authorities.¹⁰⁰ The structure and rules of administration would therefore seriously interfere with the growing leadership role claimed by TANU.¹⁰¹ The Party has still, by and large, remained outside the framework and scope of legal rules. Much of the administration engaged in by TANU is, in strict legal theory, invalid. The political system, however, does not easily countenance a challenge to these actions, and the crisis implicit in the clash between the supremacy of the party and administrative law has been averted. But it has been averted largely by a practical weakening of the courts, and a growing reluctance to challenge illegal actions of the executive or the Party.

When there is a conflict between law and ideology, and the proponents of ideology are politically dominant, there can be several responses. One possibility is to abolish the old law completely, but as a general rule this has not been considered a satisfactory solution, as it can lead to a period of chaos. Another way out of the dilemma may be compromise: the old body of law is maintained in force, but interpretation and application are made subject to certain overriding principles, so that there is no legal "vacuum" and at the same time the ideological goals are not subverted by old legal forms or doctrines.

The best known example of this technique comes from the Soviet Union. After the October Revolution, pending the establishment of new legal codes, the courts were instructed to apply the old imperial codes, but with caution. No former law was to be applied unless it corresponded to the requirements of the new society as established by the "revolutionary consciousness" of the judges.¹⁰² When new civil and criminal codes were prepared in 1922, the judges were authorised to be flexible in applying the law: the judge could depart from the letter of the civil code when private rights were exercised in contradiction to their social and economic purpose (Art. 1); the judge was instructed to use the criminal code as a guide in punishing acts deemed socially dangerous even if they were not so defined in the code (Art. 10). This technique can be useful not only during the transition period, when the old laws have to be used, but even subsequently, since when a society is being transformed it is often difficult to predict precisely what legal problems might arise. Of course there are hazards in such an approach to legal development; it produces uncertainty and can promote arbitrariness, and is best regarded as a temporary device. A former Tanzania High Court Judge, Earle Seaton, once proposed something similar for Tanzania, following the Arusha Declaration.¹⁰³ He suggested adding a phrase to the Interpretation and General Clauses Ordinance (as it was then, Cap. I),

stating that "the provisions of all laws (including customary law) must be applied so as to guarantee: a harmonisation of the interests of the individual and the community, that rights should be exercised in accordance with their social purpose, that the abuse of rights is forbidden and that citizens work together in a spirit of mutual aid in performing community obligations." He argued: "Would one be too optimistic in anticipating, under the inspiration of such general provisions, freedom and socialism slowly broadening down, from precedent to precedent?"¹⁰⁴ As it is, Tanzania law seems to require that judges be guided by rules of the English courts in interpreting statute and precedent. Recent amendments to this rule seem merely formal, and it remains to be seen whether the deletion of the reference to English practice will lead courts to a more relevant standard in interpretation.¹⁰⁵

The more drastic solution, of dispensing with written laws and relying on the "revolutionary consciousness" of law administrators, has also been employed. Russia tried this briefly when a 1918 act abrogated all imperial laws and instructed judges to settle controversies on the basis of their "socialist concept of justice." Communist China has experimented with a similar approach at various points in its history.¹⁰⁶ At first sight it might seem that such a system would be appropriate to Tanzania, both because of the need for flexibility, and because of its similarity to traditional dispute settling mechanisms. (Some tendencies towards this at the lower levels of the legal system are noted later.) It seems to be generally accepted that in traditional African societies disputes were settled with a primary concern for the maintenance of certain social values and structures. While there certainly were rules prescribing behaviour, they influenced rather than controlled the adjudicator, who applied them flexibly in an effort to restore community cohesion. It is important to point out, however, that revolutionary consciousness is something different from traditional consciousness, which was conservative and oriented toward the status quo. It is possible to "revolutionalise" traditional methods, as China seems to have done with considerable success in using mediation.¹⁰⁷ But this calls for well trained cadres with a deep understanding of ideology - a commodity in short supply in Tanzania as we have seen. Otherwise the device would be exploited to perpetuate traditional values, or become a vehicle for arbitrariness and intimidation. Such an approach is also inappropriate in dealing with complex economic issues, and in adjusting relations between the citizen and the state.

Another expedient is to reform the law. If those committed to ideology control state institutions, there should be no great difficulty in doing this. We have seen, however,

that problems can arise from the lack of these technical skills necessary for changing the law. In such a situation there will be a tendency to ignore the law and its processes, especially if there is little possibility of challenge from the private sector. As we have seen, this has happened in Tanzania to a significant extent. Orders of various kinds are issued by party and governmental bodies which seek to alter the rights and obligations of individuals. These are not authorised or sanctioned by law and are, in a strict sense, illegal. At the time of independence there was considerable concern with technical legality. Retro-active legislation was enacted to validate legally unauthorised acts, whenever such acts were found to have occurred.¹⁰⁸ But implementing a programme within the legislative framework was not easy. It was difficult to foresee all the eventualities so that often, when a new problem arose, it could only be resolved by going back to the legislature for a fresh authorisation. A feature of early post-independence attempts at pursuing policy through law was the frequent and repeated amendment of legislation.¹⁰⁹ Another reason for amendment, of course, is that policies do change, and this has been happening in Tanzania, especially with the ideological shift in 1967, but also before and after that date, although less spectacularly. Thus there have been important changes in policies on rural development, foreign private investment, education, and so on. These require repeal of the old legislation, and enactment of new, and the more frequently policy changes, the more cumbersome it becomes to work within the legislative framework. The tendency, again, has been to ignore the law and to work through direct administrative fiats.

A tendency towards "flexibility," open ended concepts and procedures, arises not only from the difficulty of predicting future legal problems during a transitional period. It could also arise from a distrust of the professional classes, who are necessary for a more technical, formal legal system. A cause of tension between law and ideology can arise even if the law has been reformed, so long as the operation of the legal system is in the hands of professionals with their own distinct ideology or ethics. This is especially likely to be true of lawyers trained in the common law, which is firmly committed to capitalist principles, and contains influential and effective ways of rationalising decisions. As long as one works through legal institutions, and political leaders lack legal skills, the role of the legal profession is considerable. If they can not be controlled by the ideological leaders, conflict persists. The problems are aggravated the more professional values differ from those of the leaders, and the greater the formal independence of the legal institutions from the political. There has been considerable resentment of the profession, for reasons which may have less to do with

ideology than personal power, and the result has been what one would expect, i.e., a restriction on the jurisdiction and powers of lawyers. A pronounced tendency of this kind can be observed in Sri Lanka, where the established legal profession has had considerable influence in politics and the economy. Because the profession was closely allied with the system that came under attack from the Bandernaike Government, one of the first steps of that government was to alter the legal and constitutional system to reduce the significance of the legal profession, and especially that of private lawyers.

The legal profession has never been nearly as strong in Tanzania, and the legal system has never allowed as much scope to challenge authority. Nevertheless, there has been a distrust of the profession, which until recently has been largely expatriate, and of the courts. Combined with a desire for greater party and bureaucratic control over decision-making, the distrust has led to two developments: first, to take some jurisdiction away from the 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 1965,¹¹⁰ to replace the Fugitive Criminals Surrender Ordinance.¹¹¹ 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.¹¹² 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 the 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.¹¹³

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.¹¹⁴ In 1969 their opinion was given greater force:¹¹⁵ they each have one vote, and so can outvote the sole magistrate. 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.¹¹⁶ The Tribunals consist of five members nominated by the TANU Branch Committee within whose jurisdiction the Tribunal falls.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.

There is some literature to the effect that institutions of "popular justice" contribute to the development of, and are a feature of, socialism. In the abstract, this is an erroneous view of "popular justice." Taking power away from the legal profession does, of course, provide less scope for the operation of its values, but it does not follow that the new arrangements are more conducive to the implementation of socialist ideology. This will only be the case if the people to whom power is transferred have a better understanding of, and commitment to, that ideology. It was suggested earlier that success in achieving such understanding and commitment has been limited.

There are few studies of how the cell leader exercises his dispute settling functions. The more general studies suggest that he does not bring to it the application of ideology.¹²⁰ Indeed, in some areas the cell leaders are themselves quite conservative,¹²¹ and in many areas the cell leaders are really extensions of traditional authori-

ties.¹²² They tend to apply traditional principles of settlement, with the emphasis on conciliation. It has been noted that the fact that the cell leader is elected means that he must conform to the values of the local community.¹²³ Such a stance is often in conflict with his role as an ideological moderniser. Nor is there any reason to believe that the assessors in the primary courts are more ideologically disciplined and inclined than the magistrates, although there has been no study of how they perform their tasks. The assessors were first conceived of as the elders of the community, whose participation in adjudication would lend dignity and acceptability to the courts presided over by rather young magistrates.¹²⁴ It may be that as TANU assumes a more active involvement in the selection of assessors, they will perform a more radical and radicalising function. As for the discretion granted to civil servants and bureaucrats, there is evidence that it has not always been exercised in a way that shows much understanding of ideology. Apart from the highhanded actions of local officers, one can point to the practices of the public enterprises, where vast discretion is vested in the management. Many of these enterprises have been run in a manner which differs little from the capitalist firms they were intended to replace. The reluctance of these managers to promote participation by their workers in decision making,¹²⁵ the stress on material incentives and bonuses,¹²⁶ and the notion of service to the elite,¹²⁷ demonstrate that discretion does not automatically lead to the implementation of ideology.

Indeed, it will be argued that when ideological understanding is weak, the law must play a specially important role. For the time being, we state that when the exercise of discretion and extra-legal power is unprincipled, there is the danger of losing some of the safeguards and advantages associated with the law, without gaining any advantages in terms of the clarification and implementation of ideology. When the leaders of a country are confronted with the choice whether to work within a legislative framework or to dispense with it, it is important to make careful calculations of the costs and benefits of each approach. We shall return to this point when we discuss law and ideology as alternatives. In the next section we discuss a situation where there is compatibility between them.

3. Law and Ideology in Harmony

It could be argued that over the long term, law and ideology must be in harmony. This proposition is implicit in the Marxist critique of law and ideology, where both support each other, and in turn support the economic base. There are problems in societies in transition from one system to another, but once those problems are sorted out, and

the necessary changes effected in the substance and procedures of the law, law and ideology should revert to a situation of compatibility. Ideology should strengthen respect for law, just as law would help to entrench and disseminate ideological values.¹²⁸ Tanzania is not yet at such a stage. We have seen that there are too many contradictions in the legal system. It is in the stage of transition, when the relation between law and ideology remains uneasy. There are trends, however, which indicate that a better fit between law and ideology is developing. In this section, these trends are analysed by discussing the legislation enacted to give effect to certain political decisions, the open texture of rules which facilitates "appropriate" interpretation, and the attitudes of the legal profession.

Little needs to be said about the first. The Tanzanian legislature has been very active, and much of the legislation has been inspired by ideological considerations. The constitutional system is appreciably different from that introduced at independence. It recognises the political monopoly as well as the supremacy of TANU, and reduces the autonomy of the civil service and judiciary. It establishes an entirely new structure for political activity.¹²⁹ Land is another area where many legislative changes have taken place, inspired by ideological considerations.¹³⁰ Soon after independence, freehold tenure was replaced by government leasehold, which in turn was replaced by rights of occupancy.¹³¹ Development conditions can be imposed, and enforced through forfeiture, and dealings in such land can be controlled by requiring government consent. Attempts have been made to remove the elements of feudalism and landlordism in the land held under customary law, which includes the overwhelming bulk of rural land.¹³² There has been widescale nationalisation of real estate.¹³³ New laws have had a major impact on the economy, especially in establishing and regulating the public sector. Beginning in 1967, when banks, insurance companies, external trade and some major industries were nationalised, the law has helped to establish numerous new institutions, and regulated the relationship between them and the government, the public, and the private sector.¹³⁴ These developments have made the public sector of the economy much more extensive and important than the private sector. This has transformed the milieu in which companies law operates, and created alternative institutions to the company. Law has also been enacted to regulate or prohibit the activities of political and bureaucratic leaders.¹³⁵ The concept of 'economic' crimes -- offences against public property -- has been introduced, and in certain cases the burden of proof has been shifted to the accused.¹³⁶ These are but a few examples of legislation passed to implement TANU's ideology. But much of this legislation does not operate automatically, and it is necessary to examine the attitudes of persons entrusted with its enforcement.

Before we do that, it is important to make a point about the discretion inherent in the application of legal rules. While the core meaning of words and concepts used in law may be clear, there is generally an area where ambiguities persist, where the agency charged with enforcement has a choice between two or more interpretations. In such instances, while there is a body of rules to guide the decision-maker, it is clear that he has real discretion, and his personal views and values play a role in the exercise of that discretion. Moreover, rules usually are not self-enforcing. Someone has to set the enforcement machinery in motion, and it is possible that those charged with that responsibility will decline to do so if they are out of sympathy with the law. It is not only professional lawyers who are granted such discretion. Perhaps the most distinctive feature of legislation in Tanzania (as in many other developing countries) is the wide discretion vested in administrators, over whom judicial control is decreasing. Lawyers are much less important than administrators for an understanding of law in action in Tanzania. The image of the lawyer before the court needs to be replaced by that of the administrator in his office, and very occasionally, before his Minister who is holding an administrative tribunal.

The element of discretion and the values of those who exercise it are important from another point of view. So far we have been concerned with a dichotomy between colonial and independence laws, as if the former must somehow be contrary to the new ideology. But a great deal of colonial legislation was cast in broad terms, vesting wide discretionary powers in the bureaucrats. The colonial state has, after all, been called the administrative state par excellence. Legislation granted wide discretion to officials, and seldom prescribed criteria for its exercise. With the persistence of these laws, that discretion remains, and can be used for different purposes. We have seen how Allende's government used old legislation to implement socialist policies. The successor to the colonial state finds itself with both more discretion, and fewer of the checks and balances that characterised the Chilean legal system. One of the more interesting, and important, instances of such discretion occurs in land law. According to various colonial statutes, many transactions under each of the systems of land holding required the consent of the minister of lands. This provision was enacted to control the alienation of land by the indigenous people to immigrants or foreigners, and applied only in the case of alienation by a "native" to a "non-native".¹³⁷ The provision still exists, but the requirement of consent has now been extended to all transfers of statutory rights of occupancy, regardless of the race or citizenship of the parties.¹³⁸ This is a very formidable device for controlling private dealings in land. It is unfettered by any legislative restriction or guidance on its use. Other examples are the power of the Minister of Finance to exempt transactions,

activities or parties from different kinds of taxes and levies in his absolute discretion,¹³⁹ the powers of the Minister of Agriculture and the various agricultural authorities to regulate the growing, marketing, distribution and price of most of the important cash crops,¹⁴⁰ and the discretion under the foreign protection investment legislation to grant certificates of approval.¹⁴¹ How far one can use the colonially derived legal system to bring about progressive change depends in large part on the values and attitudes of the relevant actors.

We begin with the legal profession. At first sight, it would seem that lawyers would be out of sympathy with the ideological developments. Until recently, most of the senior members of the profession, whether in the public or the private sector, were non-Africans, and thus belonged to the more privileged sections of the community. Secondly, and this also applies to the now largely African profession, their training was in the traditions of the common law, many of whose basic concepts are antagonistic to socialist development. They are taught to believe in the sanctity of private property and individual freedom, and to look askance at the intervention of the Party in administrative and judicial functions. We would expect these attitudes to be particularly marked in the private bar, whose income depends on the private sector of the economy. There is, however, little reliable information available about the attitudes of the profession. The submission of the Law Society to the Commission on the One Party State reveals its negative attitude towards the concept of a one party state.¹⁴² The gradual but steady emigration of private practitioners can be explained in part by their disenchantment with a state which has moved toward the socialisation of property, but may also be a response to the general disregard of legal forms. On the other hand, one can say that the private practitioners have tried to come to terms with ideological developments, and in 1968 organised a workshop on Law and the Arusha Declaration, to explore the implications of the latter for the former. However, the debate was conducted within a narrow framework, and the only concrete suggestion to emerge was that lawyers should provide legal aid.¹⁴³

There is a little more evidence on the attitudes of the lawyers in public service. As far as the judges and magistrates are concerned, an invaluable source of information is the decisions given in open court, and readily available in the law reports. No analysis of these decisions has been made from this point of view, and my own research is not yet far enough advanced for any conclusions to be offered. Here I concentrate on the speeches and writings of judges and magistrates as to how they perceive their roles and see their relationship to the government. Since the Arusha Declaration, there has been considerable discussion about its implications

for their own role in particular, and for the law in general. Their analysis proceeds from the assumption that the political leaders are all powerful, and that legal institutions are under attack. Indeed, it is possible to view the judicial reaction as the response of a group on the defensive. 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,¹⁴⁴ while at the same time extolling the objectives of TANU and appearing to be striving to achieve them.¹⁴⁵ Members of the judiciary have joined the Party. But of course it is necessary to go beyond the rhetoric, and an examination of judicial decisions would give a better picture of their attitudes.

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, which have been discussed earlier.¹⁴⁶ On the whole, it is probably the case that the legal profession, if not enthusiastic about ideology, is not inclined to take on the government and the party. The private bar has little ideological or organizational coherence; it received a severe blow with the establishment of the Legal Corporation in 1969, which handles the legal work of public enterprises, and with the nationalization of real estate in 1971. Whatever remains of its corporate character is likely to be destroyed after the government proposals to reorganise the profession are implemented.¹⁴⁷ The profession has a weak base and its interventions are too public to be safely undertaken.

The bureaucrats are in a different position. They are both more important and more sheltered. There have been several allegations that they are out of sympathy with the policies of the Party, and even that they constitute the main threat to the realisation of socialism in the country.¹⁴⁸ While it is possible to point to individuals whose conduct is dubious, it is difficult to come to a conclusion. We have seen how the Arusha Declaration sought to prevent a conflict between the public duty and the private interest of public officers. There is evidence that the attempt has been only partly successful.¹⁴⁹ There are increasing numbers of cases of embezzlement and corruption by bureaucrats. Since it is inevitable that efforts towards socialism have to be made in large part through the grant of wide discretion to the bureaucrats, especially in the economic area, their values and attitudes are a key variable. If the bureaucrats are unfavourably disposed towards socialism, political leaders are likely to de-emphasise law. While much of the discussion in this paper has proceeded on the assumption that it is the legal

professional who acquired power through the legal system, the bureaucrat is vested with even greater power by rules. If those rules are fairly determinate and independent bodies are charged with interpreting them, they enhance the importance of lawyers as opposed to the bureaucrats. But if the rules grant wide discretion to officials, with little independent review of their application, then they enhance the power of bureaucrats, as against lawyers on the one hand and politicians on the other. The political response to this can be either to de-emphasise the role of law and emphasise direct political methods, or to gain control of the legal system by subordinating it unambiguously to the political system. As we have seen, both trends are apparent in Tanzania.

It is clear that there still exists considerable tension between the substance and processes of law and ideology. While the tension arises in part from the inheritance of a colonial legal system, it is caused more by the distribution of political and managerial power. Political power continues to be consolidated and centralised, but in the party rather than the institutions of government. It is possible that this trend will lead to a further attenuation of the legal system since the party prefers to work through more directive, political methods. However, it is more likely that as party political supremacy is established, it will become easier to use the legal and administrative system to achieve the goals of ideology. Before we speculate further on this question, we look at law and ideology as alternative methods of ordering society.

4. Law and Ideology as Alternative Methods

We have seen that law and ideology share several characteristics. Both seek to regulate human behaviour. Both operate through norms and values. Both set goals. Each possesses its own sanctions. Both can be used as means of deception, a form of rhetoric which hides the real intentions.¹⁵⁰ Each has its own institutional forms, its own high priests or custodians. Both need a system of communication. While these characteristics are shared, there are differences in the mode of operation. Thus, although norms and rules are open textured in both, they tend to be more specific in the case of law, and more diffuse in the case of ideology. The specification of norms in law follows clearly defined procedures, while in ideology concretisation is less mechanical, and indeed one sign of a poor ideologue is mechanical thinking. There may also be a difference in the completeness of the norms. Law claims to be a seamless web, with no gaps, however, problematic some issues might be. This makes the selective use of law difficult, because inconsistency causes great tension.¹⁵¹ Because ideology operates with fewer and more abstract norms,

such problems are less likely. The nature of sanctions is generally different. Law depends on coercion, while the strength of ideology derives from persuasion and the internalisation of values. Law has a large variety of sanctions. The high priests of law tend to be professionals whereas the high priests of ideology tend to be politicians, for whom educational qualifications are not important, although some ideologies, whether Marxist or religious, do indeed require a high degree of intellectual sophistication. The professionalism of the system also affects the degree of law participation in it. Law is regarded as less amenable to popular participation, or indeed understanding, while ideology is a system of a guided, popular participation. Both this factor, and the fact that ideological norms tend to be less specific than legal rules, means that a greater diversity of interpretation and practice may be inevitable in an ideological system. Ideology can therefore be more flexible than law, if also less certain.

It is therefore possible to look at ideology and law not only as conflicting with or supporting each other, but also as two quite different ways of achieving the same result. We have seen that there is a tendency to rely on the ideological system, when political leaders feel uneasy about the intricacies of the legal system, or are suspicious of lawyers and bureaucrats. Sometimes one may rely on the ideological system for other reasons. It may be argued that ideology is concerned with the ultimate vision, the final state of society. Law is generally concerned with the next, intermediate, step, and seeks to set up a machinery to implement policy. The machinery has to be appropriate for the particular period in the process of transition. Because legal institutions tend towards permanence, there is the danger of the premature hardening of the superstructure. While legal institutions may help to achieve some progress, they can become an obstacle to further progress. The superstructure begins to exercise an undue and negative influence on the base. It is possible to see such reasoning behind the Chinese policy. The concept of the permanent revolution is based on the fear of the premature hardening of the superstructure. The legal institutions have to be changed constantly. The Party has to be kept separate from the state and legal institutions.¹⁵²

At several points it has looked as if Tanzania has turned its back on the legal system, and preferred to work through ideological persuasion or party institutions. Fredric DuBow has argued, for example, that in contrast to the colonial practice of forcing agricultural and social change through coercion in the courts, the independent government has relied on persuasion and incentives.¹⁵³ As is well known, there was considerable opposition to the colonial attempts to change agricultural practices. Consequently, regulations were en-

acted which provided for criminal penalties in case the prescribed practices were not followed.¹⁵⁴ DuBow estimates that nearly half the criminal convictions in the local courts arose out of the breach of these regulations.¹⁵⁵ Since independence, little use has been made of these or similar regulations, according to him. Instead, a policy of exhortation, persuasion and reward has been followed. Instead of the reliance on courts to ensure compliance, the main burden now falls on the party.¹⁵⁶ But of course the party does not necessarily rely on ideological persuasion; it can, and does, employ coercion.

A more vivid illustration of this tendency comes from the development and promotion of rural settlement. In 1964, with the inauguration of the first Five Year Plan, Tanzania embarked on an ambitious programme of new settlements, in part to improve agricultural output. These settlements were to be provided with technology, seeds and fertilisers, as well as the services of extension staff. Elaborate legal provisions were enacted to implement the programme. A special body was set up to promote, develop and control rural settlement.¹⁵⁷ Its responsibilities and powers, as well as its procedure, were carefully set out in the legislation. It was to report periodically to the government, and its report was to be laid before the National Assembly. Another law provided in detail for the rules of land tenure in the settlements, and the organisation of the settlement, including the rights of the members inter se, as well as against the settlement authorities. Rules of inheritance, disposition or forfeiture of rights in the settlement were set out carefully.¹⁵⁸

Despite this impressive legal framework, and the considerable sums of money which were spent, the programme was not considered a success, and in 1966 it was abandoned. In an influential article, it is argued by Cliffe and Cunningham that important causes of its failure were a lack of emphasis on ideology and an over-bureaucratisation of the management of the scheme.¹⁵⁹

Nyerere himself has admitted that a weakness of the scheme was the lack of an ideology, and in his paper Ujamaa and Rural Development, the ideology for the new programme of villagisation is given very heavy emphasis. There are various aspects of the ujamaa villagisation programme that are of interest, as indicating a shift from law to ideology. As contrasted with the settlement programme, there was remarkably little law on ujamaa villages, at least until 1975.¹⁶⁰ For example, there was no legal definition of an ujamaa village, although the expression has been used in legislation; the villages had no legal corporate personality; and there was no law which defined the relations of the villagers inter se, or between them and the outsiders. Al-

though a number of difficulties and problems can arise, and have arisen, such as in providing loans to an unincorporated body, and in the settlement of internal disputes, there was a policy against the enactment of legislation.¹⁶¹ Relevant legislation on co-operatives was sometimes used, and occasionally a law would be passed to deal with a special problem, but when the law seemed to be against policy, it was ignored, even if this meant denying access to courts.¹⁶² The reasons given for the reluctance to legislate was that it was important to maintain maximum flexibility in the development of ujamaa, and that legislation would tend to narrow the choices. It would produce bureaucratic rigidity, and might not be able to accommodate the different strategies necessary for different parts of the country. Another reason has been suggested. TANU is anxious to maintain control over ujamaa villages, and in fact its Central Committee has resolved that they should all come under TANU supervision.¹⁶³ It is considered important to provide the necessary ideological training and commitment, and to avoid the bureaucratism of the previous experience. TANU control may be facilitated by the absence of legal rules. The actions of its officials are less open to challenge, and it is easier to ward off the bureaucrats.¹⁶⁴ Regional and local TANU officials and committees discharge important functions in the development and organisation of ujamaa villages. They dismiss village leaders considered to be dishonest or inefficient, settle disputes, and intercede with governmental authorities on behalf of villages.¹⁶⁵

There are other instances where the Party or its officials have tried to issue orders directly and to enforce them. At various points, TANU groups have proclaimed "regulations" on dress, and youth wingers have tried to enforce compliance with them. It is difficult to see what connection such regulations have with the ideology of TANU, and the fact that no law has been passed to give legal effect to the "regulations" suggests that the top leadership is not persuaded of their ideological necessity. Indeed, the courts have ruled that the regulations have no legal effect, and that it would be against the law to try to enforce them.¹⁶⁶ The Party has also tried to control the parastatal sector by summoning and questioning the managers of the enterprises, although it has no constitutional or legal authority to do this. It has intervened in an ad hoc manner, e.g., by overruling action lawfully undertaken by the enterprises.¹⁶⁷ The Party institutions have sometimes exercised disciplinary powers, and used coercion, when it would appear that they had no legal powers.¹⁶⁸

Thus it might look as if Tanzania is jettisoning law and seriously developing alternative methods of control. But it is unlikely that it has turned its back on the law. Nyerere has recently stressed the importance of obeying the

law and the constitution.¹⁶⁹ He has also appointed a commission to undertake a wide-ranging enquiry into the legal system. Its main task is to review the judicial system with a view to making recommendations "which will ensure justice for the individual and for the state, by striking a proper balance between the public interest and the interest of the accused person, in the context of the country's socialist goals."¹⁷⁰ TANU has promoted constitutional changes which recognise explicitly the supremacy of the party over the executive. All these developments show a continuing concern with the constitutional and legal system and are hardly consistent with its total abandonment. It is, nevertheless difficult to forecast the trends, and on the assumption that law and ideology provide alternative ways to order society, it may be worthwhile to discuss the costs and benefits of each.¹⁷¹

The system of ideology provides for greater flexibility. Because there are no firm rules laying down what might or might not be done, it is easier to change strategies and methods as necessary. Thus the system of ideology may be particularly relevant in times of rapid and fundamental change. The communication of its norms may be easier.¹⁷² The system of ideology obviates or reduces the need for technically trained professionals, and thus makes it possible for the general public to participate in the legal system and ensures that political leaders do not lose control to professionals. It increases possibilities of popular control over the administration. Ultimately the system of ideology, which depends on persuasion, may be more efficient than the system of law, which depends on coercion. If the population can be persuaded of the ideology, control through the internalisation of norms should be easier in the long run. Decentralisation is safer to attempt and easier to achieve if there is a general understanding of, and commitment to, ideology. Decentralisation which depends largely on legal provisions and structures not backed by ideological understanding is unlikely to be successful; it could lead to chaotic conditions and secessionist tendencies. Also, as we have suggested, ideology should ensure that there is no premature hardening of the superstructure, and that the ultimate goals are not lost sight of.

While the system of ideology may be superior in several ways, it is also more difficult to operate. It depends on a genuine understanding and internalisation of norms, both of which are very difficult to achieve. Ideology is frequently ambiguous, and in concrete situations there may be considerable doubt about the correct line of action. The machinery for the resolution of particular controversial interpretations is not readily available, and there may often be political reasons why ambiguities are best left as ambiguities. The legal system would appear to have a better mechanism for the resolution of ambiguities. The courts are under an obligation to

decide controversies, although it is of course possible for them to decide these on narrow grounds, and so still leave room for debate. Quite apart from the function of courts in this regard, the nature of legal rules tends towards certainty and predictability. In the economic area, these qualities are important assets. It can also be argued that public accountability is better achieved through law. Rules specify what might or might not be done, and institutions exist to ensure compliance. Law may be important to inculcate discipline, regularity of procedures, and control over lower level bureaucrats. Law may be more efficient in ensuring the consolidation of social and economic gains. While it is true, as Nyerere has argued, that laws guaranteeing individual freedom cannot be effective without a national ethic, it is probably true that individual liberty may be seriously threatened without law. Arbitrariness can flourish under the guise of an ideological imperative, and cherished human values can be trampled upon in the name of ideological progress. It is true that such excesses and arbitrariness are a distortion, indeed a betrayal of socialist ideology, but part of my argument is that it is difficult to get sufficient diffusion of, and commitment to, the norms of the ideology. Despite the need for specialists, and complex institutional arrangements, the legal system may be a better device for organising the tasks of government and governing. But this assumes that the law is responsive to ideology, not opposed to it.

Conclusion

We have looked at various aspects of the relationship between law and ideology. While each has been discussed separately there is no suggestion that an aspect exists to the exclusion of others. The relationship is much more complex than any single aspect would suggest. This is not to suggest that similar relationships exist in all countries. There are different emphases in different kinds of society. Sometimes these are the result of a deliberate choice, as in the US and China, and sometimes it is unplanned, more a response to the day-to-day pressures. There is little evidence that Tanzania has made any deliberate choice in the matter. Different sections of the leadership hold different conceptions of the importance of law. Often the practice does not live up to what is professed. We have seen at least two points of view on this state of affairs. The "legalists" have argued that such inconsistency is dangerous and contributes to serious injustice. They have called for greater reliance on legal rules and legal institutions. Another group considers that the situation does not merit serious concern, and that "legal chaos" is inevitable in the transition to socialism. In so far as law strengthens the hand of bureaucrats and other professional groups, they would positively prefer "legal chaos."

Questions of this sort cannot be determined in the abstract. Ideology has already served valuable functions in defining national goals and establishing criteria by which to judge policy and action. It has given a sense of direction to the nation and helped to legitimise valuable ideas of human justice, equality and dignity. But we have also seen that the ideology is not yet theory, and is a weak guide to concrete action. There is insufficient understanding of, or adherence to, it on a wide basis. There are sections of the population, including many among the administration, who are hostile to it. Many of the arguments advanced in this paper in favour of regulation through ideology assume a well developed coherent ideology which is widely understood and accepted. If these conditions do not obtain, the role of law is important: to provide procedures which insure that all relevant information is gathered before decisions are taken; to specify criteria for the exercise or discretion, thus concretising the ideology; and to limit excesses of power. Fidelity to law should be insisted on so that those not committed to TANU ideology can be held accountable. The arrogance of power, increasingly recognised as a problem, can to some extent be checked by an insistence on the people's legal rights, and the administrators' public duties.

It may be, as the Chinese experience seems to suggest, that the system of ideology is more suitable for rapid and radical change, but that the system of law is then necessary to consolidate the gains of that change and to provide for a period of stability. As TANU increasingly asserts its supremacy over other institutions, the legal system should be regarded as an asset, rather than as something to avoid. That law has been used by minority, exploiting classes, that it can be employed to delay or frustrate political decisions, and that an overlegalised society creates problems of access to justice and can vitiate the political and social processes, are valid criticisms, but in Tanzania, where TANU is now in control of most institutions, law and the legal systems should be used to promote socialism. As the public sector of the economy expands, the need for discipline, and conformity to economic planning, becomes crucial. It is doubtful if political exhortations can do much to control the public enterprises.

The more principled attack on law comes from certain strands in Marxist thought. But much of Marxist literature is a critique of bourgeois systems, and the criticisms of legal institutions have to be understood in that context. Lukacs' piece was based on an optimism that socialism would be achieved quickly once the capitalist relations of production were abolished. After progressive political leadership is in power, the law becomes a means at its disposal. The support of its followers should be consolidated through the law,

while those opposed to it should be checked and controlled through the law.

It is not suggested that Tanzania should convert every relationship, and every problem, into a legal one. There are certain areas where law should only be a last resort. The methods of dispute settlement that persist are important to ensure a sense of community and to encourage lay participation. Many inter-personal and local problems are best left to local regulation. Law, on the other hand, is better suited for the regulation of complex economic institutions. There is no suggestion that ideology should be underplayed; law must not be used to emasculate the political process. Perhaps ideology is better addressed to the masses, in order to provide a general orientation to norms and change, but law should be addressed to bureaucrats, setting forth with specificity how public power is to be used. As we get into the complex problems of economic management, it is probable that law will have to provide discretion and flexibility, but these can only be employed correctly if there is a strong ideological understanding. Nor is it suggested that no initiatives or programmes should be undertaken before there is law. Optimum arrangements and detailed policy often become apparent only after some experience has been gained, as in the ujamaa villagisation programme. Legislation based on such experience is clearly likely to be more relevant and durable than legislation planned in advance of experience.

If law is to serve its proper role in the achievement of socialist goals in Tanzania, it will be necessary to make it more intelligible to the layman.¹⁷³ It is necessary to move away from the present drafting style, so that law is more easily understood. When legislative proposals are still published in English, it is not improbable that few legislators realise the purport of the law they are debating and enacting. There is need for a more concerted effort to move away from many of the traditions of the common law, and in particular to emphasise that the Tanzania courts are free from the shackles of English precedent. There is need for new institutions of control, like the Soviet procurator, and modification of the Permanent Commission of Enquiry, to ensure that law is strictly binding on, and adhered to by, bureaucrats and other public agencies. There is need to relate legal education more clearly to the objectives and strategies of socialism. There is need for a greater, general understanding of the mechanisms and techniques of law.

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FOOTNOTES

¹This stands on its head much of the criticism levelled at African societies for having no "law." Africans and "liberal" foreign scholars were often concerned to argue that Africans did have "law." Both positions stemmed from bourgeois ideologies of law. It could, on the other hand, be argued that it shows the superiority of African societies that they needed no "law."

²Oskar Lange, I Political Economy, 25 (1963).

³For a vivid and succinct account of this process, see Marx, Preface to the Critique of Political Economy.

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this merely expresses the same thing in legal terms - with the property relations within the framework of which they have operated. From forms of development of the forces of production, these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundations lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic - in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of produc-

tion.

⁴An attempt has been made to apply separate terms to the ideology which justifies an existing system and one which looks to a new system. Karl Mannheim suggested that "ideology" be reserved for the former and "utopia" used for the latter. See his Ideology and Utopia, 1946.

This suggestion has not generally been accepted, partly because of the ambiguities in the word utopia. Marx and Engels had attacked their socialist predecessors for being utopian, and claimed that their own methods were scientific. See Engels, Socialism: Utopian and Scientific, (1892) in Marx & Engels, Selected Works 379 (1970).

⁵For an elaboration of the distinction, see Frank Schurman, Ideology and Organisation in China, 1968.

⁶Engels has discussed the factors leading to a certain degree of autonomy in the legal system. Among them he mentions the pressure of the system towards the internal consistency of its rules and concepts, arising from the fact that the system is administered by professionals. See his letters to Bloch (p. 692) and Schmidt (p. 694) in Marx and Engels, Selected Works (1970).

⁷Discussions of the nature of law then become more than merely academic arguments. Such, for example, was the case in Chile during Allende's regime. The left-wing scholars attacked the traditional manner of viewing law as "the written expression of the dominant spirit in society, expressing the co-existence of all in harmony." They saw law as promoting the interests of certain classes. The right-wing scholars retaliated, and typical of their argument was the statement in the conservative newspaper, El Mercurio, "that those who strive to make law descend to the level of human interests compromise the autonomy of legal science and of society itself." See Zemelman and Leon, in Medhurst, Allende's Chile 92 (1974).

⁸Georg Lukacs, "Legality and Illegality," in History and Class Consciousness, 1971.

⁹Julius Nyerere, Freedom and Unity 20 (1966).

¹⁰Hansard, 28 June 1962.

¹¹Freedom and Unity, p. 121.

¹²Reprinted in his collected speeches, Law and its Administration in a One Party State (1973), compiled and edited by James and Kassam, p. 69. He went on to say that the retention of the law in force before independence is "an indication

that the traditional concepts of law and justice are still applicable."

¹³Reprinted in Freedom and Unity, p. 162.

¹⁴Reprinted in Nyerere, Freedom and Socialism, 1968, p. 337.

¹⁵The guidelines were issued in the wake of the coup d'etat in Uganda when Amin overthrew Obote, and the attempted invasion of Guinea by Portugal. On the guidelines, see Biamark U. Mwansasu, I (4) The African Review 1 (1972).

¹⁶The Daily News, 10 April 1974.

¹⁷Freedom and Unity, p. 201.

¹⁸The One Party Constitution was promulgated in 1965, following the recommendations of a special Presidential Commission to advise on its form. Report of the Presidential Commission on the Establishment of a Democratic One Party State, Dar es Salaam (1965). For an analysis of the Constitution, see McAuslan and Ghai, "Constitutional Innovation and Political Stability in Tanzania" 4 J. Mod. Af. Stud. 479 (1966).

¹⁹The Party decided in May 1974 to change the rules to ensure that only the dedicated joined the ranks of the Party. Daily News, 14 May 1974. Since this paper was written, the party has further decided that no one shall be admitted to membership unless he has studied the ideology of the party for a minimum period of 3 months. Daily News, June 1975.

²⁰Daily News, 28 November 1974.

²¹The four principles were: 1. As far as possible our institutions of government must be such as can be understood by the people. 2. The executive must have the necessary power to carry out the functions of a modern state. 3. Parliament must remain sovereign. 4. The Rule of Law must be preserved. For a comprehensive analysis of the 1962 Constitution, see McAuslan, "The Republican Constitution of Tanganyika," 13 Inter. and Comp. Law Quart. 502 (1964).

²²It was argued by both Nyerere and the Presidential Commission that the de jure recognition of TANU as the sole party would allow the removal of strict party discipline and the "whip" system, make election to the National Assembly more widely contested since there would no longer be need for an official TANU candidate, and permit freer debate in the Assembly.

²³See Thoden van Velzen and J.J. Sterkenburg, "Stirrings in the National Assembly," in ⁴ Kroniek van Afrika, 298 (1968).

²⁴van Velzen and Sterkenburg, "The Party Supreme," in ¹ Kroniek van Afrika, 65 (1969).

²⁵The decision to amend the constitution was taken by the National Executive Committee at its meeting in November 1974. The amendments were adopted in June 1975 (Interim Constitution of Tanzania (Amendment) Act, 1975). The preamble is modified to reflect the commitment to socialism, the number of directly elected members is reduced. There is an increase in the indirectly elected members. Each region is to be represented by a member chosen by the Assembly from nominations submitted by the regional TANU committee. It is probable that the decision to amend the constitution was taken in response to the rejection by the Assembly in 1973 of the budget which increased taxes. The President threatened to dissolve the Assembly, and so force new elections both to the Assembly and the Presidency. The TANU study groups criticised the MPs, and said that the incident showed that the Party had not achieved its declared objective to control all national institutions. Daily News, 4 December 1973.

²⁶"Ten Years after independence," reprinted in Freedom and Development 282 (1973).

²⁷Freedom and Socialism, pp. 24-25.

²⁸Freedom and Socialism, p. 27.

²⁹In April 1967, Nyerere offered to answer questions from the MPs on the Arusha Declaration. Almost all the questions related to the leadership code, and tended to be critical of the restrictions imposed by it. Arusha Declaration: Answers to Questions (1967).

³⁰See Nyerere's "Socialism is not Racism," in Freedom and Socialism, p. 257.

³¹Daily News, 10 April 1974.

³²This position has been most strongly argued by Issa Shivji, see The Silent Class Struggle (1969) and The Silent Class Struggle Continues (1973). See also van Velzen, "Staff, Kulaks and Peasants," in Cliffe and Saul, ² Socialism in Tanzania 152 (1973). Shivji's position has been attacked by Reginald Green: "The Tanzanian public sector elite have accepted material rewards very substantially below those of neighbouring states and below those which pertained in Tanzania itself in the late 1960s. Neither morale nor, a fortiori

loyalty has faltered generally, nor can it realistically be said that broad elite efforts to sabotage the implementation of the Arusha Declaration and Mwongozo have been the order of the day. Creative and energetic attempts at implementation have been at least as common with an intermediate stance in which a genuine puzzlement as to how to proceed and a tendency to be quite cautious in making changes more common than either of the two extreme positions." "Towards Ujamaa and Kujitegemea: Income Distribution and Absolute Poverty Eradication Aspects of the Tanzania Transition to Socialism," IDS Discussion Paper, no. 66 (Univ. of Sussex, 1974).

³³See, e.g., Cliffe, "Socialist Transformation and Party Development," in 1 Socialism in Tanzania 266, 273 (1973). He says "My favourite example is the District Council which decided the most important step they could take to implement the policy of Socialism and Self-Reliance was to become more self-reliant financially by cutting down on the practice of refunding school fees to the very poorest inhabitants!"

³⁴E.g., Samoff, Tanzania, chap. 8 (1974).

³⁵See Nellis, A Theory of Ideology (1972) and Ingle, "Compulsion and Rural Development in Tanzania," 4 Canadian Journal of African Studies 77 (1970); Finuncane Rural Development and Bureaucracy in Tanzania: The Case of Mwanza Region (1974).

³⁶Ingle, op. cit.

³⁷See on this point, Sawyerr, "Internal Conflict of Laws in East Africa," in Sawyerr (ed.) East African Law and Social Change, 1966. For a summary of the Tanzania legal system, see Ghai "Tanzania" in the National Reports, International Encyclopedia of Comparative Law (1974).

The relevant legislation is Judicature and Application of Laws Ordinance, 1961 (Cap. 453) and the Magistrate Courts Act, 1973 (Cap. 537).

³⁸Decree No. 1 of 1964.

³⁹Tanganyika Order in Council, 1920, art. 24.

⁴⁰The power to promulgate the Declarations is provided for in Sec. 9A of the Judicature and Application of Laws Ordinance. The Declaration on the Law of Persons, covering marriage, divorce and guardianship, was promulgated by GN. 279 of 1963, and the Law of Inheritance by GN. 436 of 1963.

⁴¹Nyarubanja (Enfranchisement) Act, No. 1 of 1965; repealed and replaced by the Customary leaseholds (Enfranchisement) Act, No. 47 of 1968. See on this, James, Land Tenure

and Policy in Tanzania chap. 3 (1971).

⁴²See for example, Kapasya s/o Mwaiping v. Mwendilemo s/o Mwakyusa (1968) H.C.D. n. 88, when the High Court refused to accept a rule of customary law on the ground that "it would be contrary to the principles of natural justice." For other cases where the High Court has adopted a similar attitude, see Chibaya s/o Mbuyape v. James s/o Mlewa (1967) H.C.D. n. 43, and Mtariro Musita v Mwita Marianya (1968) H.C.D. n. 82. For a useful discussion of the problem, See Earle E. Seaton, "Customary Law and the Courts" (mimeo, 1970).

⁴³See for example, R. v. Amkeyo (1917) 7 E.A.L.R. 14, for the attitude of the courts towards customary marriages. When there was a clash between traditional African values and British values, the former gave way. As it was said in Hakan Bibi v. Mohammed (1955) 28 KLR 91, 112: "It is a matter of common sense that there cannot be in one colony at one and the same time two conflicting concepts of natural justice, public order or morality. If there is conflict then it is the concepts of the Suzerain Power which will prevail."

⁴⁴Muslim law is applicable to African muslim communities under the Magistrates Court Act, 1968, sec. 91 (1); and to Asian muslims by practice as affirmed in Maleksultan v. Jeray (1955) 22 EACA 142. Hindu law is applied under the Marriage, Divorce and Succession (non-Christian Asiatics) Ordinance, cap. 122.

⁴⁵The Ismaili community has, for example, its own constitution which deals, inter alia, with matters of family law, and its own tribunal which, at least until the Marriage Act, 1971, adjudicated in cases of divorce and guardianship. The Hindus also had considerable autonomy in matters of family law.

⁴⁶See Morris and Read, Indirect Rule and the Search for Justice (1972), especially chap. 5.

⁴⁷Georges, Law and its Administration in a One Party State, chap. 1.

⁴⁸Memorandum by the Tanzania government to the African Conference on Local Courts and Customary Law, 1963. Reprinted in the Proceedings of the Conference 107 (1963).

⁴⁹See, for example, the Buildings Acquisition Act, 1971, which excludes appeals to courts. In the area of land matters, see the discussion by McAuslan, in Sawyerr, op. cit., and James, op. cit.

⁵⁰See paras. 98-99 of the Re-Statement of Customary Law (GN 279/1963)

⁵¹African Chiefs Act, No. 53 of 1969.

⁵²See Samoff, op. cit., and Njohole in Proctor, The Cell System of the Tanganyika Africa National Union 4 (1971): "of all the functions performed by cell leaders, the one which takes most time is handling disputes between cell members."

⁵³Magistrates Courts (Amend.) Act, 1968 (No. 18). It sets up Arbitration Tribunals in all the wards to which the parties may submit their disputes. If the decision of the Tribunal is acceptable to the parties, it becomes binding and may be enforced as if it were an order of the primary court. See Martin, Personal Freedom and Law in Tanzania 70-71 (1974), and Read in Annual Survey of African Law, 1969, 137-139 (1973).

⁵⁴The Standard, 27 August 1970.

⁵⁵Nationalist, 3 March 1971.

⁵⁶Freedom and Unity, p. 131.

⁵⁷Freedom and Unity, p. 268.

⁵⁸Freedom and Socialism, p. 8.

⁵⁹Freedom and Socialism, p. 304. Compare the very similar views of Allende who, speaking of the importance of the principle of legality, said "that it was achieved after the struggle of many generations against absolutism and the arbitrary use of the power of the state." See his first annual message to Congress, 21 May 1971, reprinted in Allende, Chile's Road to Socialism, 147 (1973).

⁶⁰Freedom and Socialism, p. 304.

⁶¹Freedom and Unity, p. 312.

⁶²Freedom and Socialism, p. 110.

⁶³Freedom and Unity, p. 132.

⁶⁴This has been one of the themes of his speeches at judicial conferences. See his call to TANU elders to act as watchdogs over courts. Standard, 5 Feb. 1971.

⁶⁵See his speech to the Judges and Magistrates Conference, Nov. 11, 1968 (mimeo).

⁶⁶See his speech in the National Assembly introducing the 1969 amendments to the Magistrates Courts Act. Mentioning complaints against the primary courts, he said, "The government

has endeavored to investigate the reason behind this matter. One thing discovered after this investigation is that many indigenous people in this country still remember the old system in decision-making that all their disputes were heard and decided by a group of people and not by a single person. It was a certain group of elders of a certain area who met either under a chief or any other leader and they as a group heard and gave decisions on all disputes brought to them. They heard the evidence brought to them and because they took in consideration the social values prevailing in the area and because thought was given to the gravity of the dispute including the social effects involved, eventually their decision satisfied more people generally and this brought respect to such elders."

Kawawa also inclines towards more direct, "popular" modes of doing justice. In May 1971 he urged workers to take possession of the property of their employers who run away from the country without meeting their obligations to the workers. Such employers were thieves, whose property shall be confiscated by the workers who should look after it and then inform the government. Sunday News, 2 May 1971. More recently he has said that the only remedy against thefts of public money is to give power to the people to bring the culprits to book. Workers have a better knowledge of those who defraud, and even if such defrauders are acquitted by courts because of legal technicalities, their property should be confiscated and they should be put behind bars. Daily News, 18 June 1975.

⁶⁷Bomani's pronouncements on the subject are few. This paragraph is based on a talk he gave at the then University College, Dar es Salaam, on "The Machinery of Justice," which is reprinted in the East Africa Journal 16 (May 1966).

⁶⁸He gave several public speeches during his stay in Tanzania. These have now been compiled and edited by James and Kassam and published as Law and Its Administration in a One Party State (1973).

⁶⁹"Traditionalism and Professionalism," Id. 33.

⁷⁰Id. 63-64.

⁷¹Id. 29.

⁷²Id. 92-93, 109.

⁷³See Engels' letters to Bloch and Schmidt, Marx and Engels, Selected Works 692, 694 (1970).

⁷⁴Ibid.; see also L. Althusser, "Contradiction and Overdetermination," 41 New Left Review (Jan-Feb 1964); Lange, *supra* note 2, chaps. 2-3.

⁷⁵See H. Alavhi, "The State in Post-Colonial Societies - Pakistan and Bangladesh," 74 New Left Review (July-Aug. 1972); J. Saul, "The State in Post-Colonial Societies: Tanzania," in R. Milliband and Savile (ed.) The Socialist Register (1974).

⁷⁶For some discussion on this, see Shivji, Class Struggles in Tanzania (1976) and Saul, supra note 75.

⁷⁷See particularly Pashukanis' essay, "The General Theory of Law and Marxism" (1927) reprinted in Soviet Legal Philosophy (1951) (Babb trans.).

⁷⁸In the Presidential elections in 1970, Allende obtained 36.3% votes; his two opponents, Alessandri and Tomic, obtained 35% and 27.8% respectively.

⁷⁹For the considerable literature on the Chilean episode, see Debray, Conversation with Allende (1972); Allende, Chile's Road to Socialism (1973); Sweezy and Magdoff (eds.) Revolution and Counter Revolution in Chile (1974); Birns (ed.), The End of Chilean Democracy (1974); Medhurst, Allende's Chile (1974).

⁸⁰See Eduardo Novoa Monreal, 7 Revista de la Universidad Tecnica del Estado (April 1972); see also Viera - Gallo, "The Legal System and Socialism," (1972) Wisconsin Law Review 754.

⁸¹Capturing the spirit of the debates, Debray writes:

In a continent where every lieutenant-colonel gives three speeches a day on the National Revolution, the Chileans have to be satisfied with a government which modestly calls itself "popular." The punctilious prose of speeches, of editorials in the major newspapers, of television discussions, of parliamentary debates and of the principal ongoing polemics will thrill no one, unless he is a graduate in Constitutional Law. The principal objects of these disputes are whether this bill is legal, whether that nationalization decree is or is not within the powers of the Executive, whether the workers have not inadvertently misinterpreted some article of the Constitution in throwing out a bankrupt factory owner. From top to bottom of the administrative hierarchy, from one end of the country to the other, the front of the stage is occupied by an interminable legal wrangle, its terms provisions of the legal code, verdicts in the lower courts, grounds for a decision, counter-charges and appeals. The key word in all these disputes, deliberately inflated to the dimensions of a national drama by the bourgeoisie and its means of communication, is not Revolution, or Justice, or Liberation, or Proletariat, but Legality, the tabu

term, the obsessional leitmotif, and the visible stake. Since jurisprudence is limited in these questions and no one yet knows precisely who is the arbiter or who has the last word - in the Popular Government, in the Supreme Court, Parliament and perhaps one day among the interested parties themselves - there is enormous confusion and interest is rapidly waning. But then one realizes that this whole spectacle is a trompe-l'oeil, and that the reality behind this screen resembles neither a court-room, nor a tribunal, nor a panel discussion, but a closed field in which exploitee and exploiters, peasants and big landowners, workers and trusts, patriots and imperialists, directly confront one another in every corner of the country. Conversations with Allende (1972).

⁸²James, "Implementing the Arusha Declaration," 3 (2) The African Review 179 (1973).

⁸³See the discussion in Martin, Personal Freedom and the Law in Tanzania (1974).

⁸⁴Id. 98, quoting from an article by Boehringer, "Development in Criminology in Tanzania."

⁸⁵The 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 ordered the police to round up all the cattle rustlers in the area. Daily News, 22 November 1974.

⁸⁶The legislation is the Collective Punishment Ordinance, cap. 74 and the Stock Theft Ordinance, cap. 422. Both were enacted during the colonial period.

⁸⁷Martin, note 83 *supra*, p. 92-93.

⁸⁸Ibid.

⁸⁹Ibid.

⁹⁰Thus, 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.

⁹¹There have been complaints by the Registrar of Buildings that certain tenants use the legal process to frustrate action against them. When attempts have been made to evict illegal tenants, they have sought court injunctions, and sometimes the suits have taken two years, while tenants continue in possession. Daily News, 8 January 1975.

⁹²As James points out, Nyerere himself has agreed that such compensation is just and proper, *supra* note 82, at 183.

⁹³See, e.g., Bomani, *supra* note 67. See also the paper by a resident magistrate, Maganga, "Need for Criminal Law Reform After the Arusha Declaration," prepared for the Judges and Magistrates Conference, Dar es Salaam, 1968.

⁹⁴See Martin, *supra* note 83, at 57.

⁹⁵See Nyerere's remarks on the sentence, which he said the government must accept nevertheless. Freedom and Unity, p. 298.

⁹⁶See Read, "Minimum Sentences in Tanzania," 9 J. Af. Law 20 (1965); Huber, "Statutory Interpretation and Judicial Discretion," J. of the Denning Law Society 99 (1967).

⁹⁷R v. Mwalipamila Kadine, Tanz. Gaz. Supp. No. 2 of 1966.

⁹⁸Re An Application by Bukoba Gymkhana Club (1963) E.A. 478.

⁹⁹Similar cases have also arisen in Kenya, where attempts have been made to implement Africanisation policies through colonial licensing legislation. See Fernando v. Kericho Liquor Licensing Court (1968) E.A. 640.

¹⁰⁰It is not unusual for TANU or other officials to direct how discretion should be exercised by the licensing authorities. See, e.g., The Nationalist, 11 October 1967: the Transport Licensing Authority was committed by the Party to preferential treatment of public corporations, parastatals and African traders in granting transport licenses. Under Mwangozo, the party is committed even more strongly to giving such directions.

¹⁰¹Some of these problems are discussed by Bayne, "Administrative Authorities and Government Policy," 2 Eastern Africa Law Review 343 (1969).

¹⁰²Hazard, Communists and Their Law 71 (1969).

¹⁰³"Current Trends in the Administration of Justice in Tanzania," (mimeo), Judges and Magistrates Conference, 13-15 June 1969, Mwanza.

¹⁰⁴Id. 9. For a somewhat similar approach, see Eorsi, "Some Problems of Making the Law," 4 East African Law J. 272 (1967).

¹⁰⁵Penal Code, s. 4, as amended by the Administration of Justice (Miscellaneous Amendments) Act, 1971 (no. 26). The section previously had required the courts to apply principles of English law in the interpretation of the Code. The courts are now to be guided by the "principle of natural justice."

A new Interpretation and General Clauses Act was passed in 1974.

¹⁰⁶See J. Cohen, in The Criminal Process in the People's Republic of China, Introduction (1968).

¹⁰⁷Lubman, "Mao and Mediation: Dispute Settlement in Communist China," 55 California Law Review 1284.

¹⁰⁸The Ministry of Justice kept a close eye on violations of law by the government and prepared reactive legislation whenever necessary (Information in 1964 from the then Parliamentary Draftsman).

¹⁰⁹See, for example, repeated amendments to the legislation on land, trade dispute settlement, agriculture, and rent restriction in the first few years of independence.

¹¹⁰No. 15.

¹¹¹Cap. 22.

¹¹²In 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."

In a case in 1963 (Rep. v. Salum Mwifal & Others, Cr. Rev. No. 305), it was held that the amendment did not make the refusal of a person to participate in a self-help scheme an offence. Perhaps the local authorities continued to regard such a person as an offender, for the issue came up again before the courts in 1967 when the earlier interpretation was affirmed, Saidi Bakari Kionywaki v. Rep. (1967) H.C.D. 443.

¹¹³No. 47. Conflicts between courts and tribunals have arisen over the question of jurisdiction. See James, *supra* note 82.

¹¹⁴Magistrates Court (Amend.) Act, 1964, no. 67.

¹¹⁵Magistrates Courts (Amend.) Act, 1969, no. 18.

¹¹⁶Ibid.

¹¹⁷Arbitration Tribunal Regulations, G.N. 219 of 1969.

¹¹⁸See note 52, *supra*; for an account of why the post of cell leader was established, see Levine, in Cliffe and Saul, I Socialism in Tanzania 39 (1973).

¹¹⁹See Nijohole, p. 4-5, in The Cell System, *supra* note 52. It is not clear what the function of the cell leader is in this regard now with the establishment of the Arbitration Tribunals.

¹²⁰A useful summary of studies of cell leaders is to be found in Levine (see note 118).

¹²¹See, e.g., Samoff, *supra* note 52.

¹²²See studies in The Cell System, *supra* note 52.

¹²³See Levine, *supra* note 118, pp. 332-333.

¹²⁴This was Kawawa's point. See note 66. Georges, on the other hand, argued that primary court magistrates were not young. "The figures showed that about 40 per cent of Primary Court Magistrates were over 40 years old, and another 40 per cent between 20 and 40 years old. Only 4 per cent were under 29 and 2 per cent under 25." Law and its Administration in a One Party State, p. 38.

¹²⁵Management resistance to worker participation, and indeed the very narrow concept of worker participation itself, is discussed by Mapolu, "The Organisation and Participation of Workers in Tanzania," The African Review 381 (1972).

¹²⁶Public enterprises continued the practice of the previously private firms of paying bonuses to their employees. In 1972, when the National Bank of Commerce awarded bonuses equivalent to 10 per cent of an employee's salary, there was a considerable public outcry, and the National Executive Committee denounced the awarding of bonuses as contrary to the national ethic and as pandering to base motives.

¹²⁷In 1969 the National Bank of Commerce, through a subsidiary, Karadha, announced a scheme to provide hire purchase finance for purchase of private vehicles by Party and govern-

ment leaders, as well as senior civil servants. The NEC again reacted strongly, criticised the decision as contrary to the Tanzania ethic of frugality and egalitarianism, and instructed the government to issue directives for the scrapping of the scheme.

¹²⁸It has been said that law in the Soviet Union is "embryonic communist morality" (Tay, "Gemeinschaft, Gesellschaft, Mobilisation and Administration: The Future of Law in Communist China," Asia Quarterly 267 (1971)) and Berman thinks that education is one of the chief purposes of the law in Russia. See "The Educational Role of the Soviet Court," 21 Int'l. & Comp. L.Q. 81, and Justice in the USSR (1963).

¹²⁹On the evolution of the constitutional system, see McAuslan, note 21 supra, McAuslan and Ghai, note 18 supra, and Ghai, "Constitutions and the Political Order in East Africa", 21 Int'l. & Comp. L.Q. 403 (1972).

¹³⁰For a study of land reforms see James, note 41 supra. Fimbo argues that these reforms are not particularly socialist, "Land, Socialism and Law in Tanzania," in Ruhumbika (ed.), Towards Ujamaa (1974).

¹³¹Freehold Titles (Conversion) and Government Leases Act, 1963, No. 24, and Government Leasehold (Conversion to Rights of Occupancy) Act, 1969, No. 44.

¹³²Nyarubanja Tenure (Enfranchisement) Act, 1965, No. 1, and Customary Leaseholds (Enfranchisement) Act, 1968, No. 47.

¹³³Buildings Acquisition Act, 1971, No. 13.

¹³⁴See particularly Bradley, "Legal Aspects of the Nationalisation in Tanzania," East African Law Journal 149 (1967), and Rahim, "Legislative Implementation of the Arusha Declaration," 4 East African Law Journal 183 (1968).

¹³⁵This has been achieved primarily by giving legal effect to the leadership code of the Arusha Declaration. For a discussion of how this was done, see Rahim, note 134 supra.

¹³⁶Written Laws (Miscellaneous Amendments) Acts, 1970 adds a new section, 284A, to the Penal Code penalizing an employee of the government, Party, or a public agency, including public enterprises, if he "by any willful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes his employer to suffer a pecuniary loss or any damage to any property owned by or

in the possession of his employer." He can thus be ordered to pay compensation to the employer for the loss caused.

Instances of shifting the burden of proof can be found in Sec. 12 of the National Security Act, 1970, Secs. 10 and 14 of the Prevention of Corruption Act, 1971, No. 16, and Sec. 58 of the Exchange Control Act, 1971.

¹³⁷For a history of the provision, and a discussion of how it operates today, see Sawyerr, "Discriminatory Restrictions in Private Dispositions of Land in Tanganyika: A Second Look," 13 J.A.L. 2 (1969).

¹³⁸See Lyall, "Consent to Disposition of Land in Tanzania: Socialism or Extension of Private Property?" 4 EALR 247 (1971).

¹³⁹The Local Industries (Refund of Custom Duties) Ordinance, cap. 289, enables the Minister of Finance to refund duties on goods imported for use in approved industries. Approved industries are set out in the schedule to the legislation, but it is possible for the Minister to add to the schedule. The order of the Minister can set out the terms on which, and duration for which, the refunds are permitted, as well as the person or persons eligible. The Customs Tariff Act authorises the Minister to remit custom duties on imports. He may remit in whole or in part any duty payable by any person on any goods imported if he is satisfied that it is in the public interest to do so. The Imports, Exports and Essential Supplies Act enables the government to restrict or prohibit imports of any goods or from any countries.

¹⁴⁰The most important legislation in this regard is The Agricultural Products (Control and Marketing) Act, 1962, No. 56, now cap. 486.

¹⁴¹Foreign Protection Investment Act, 1963, Cap. 533. The Act provides for a certificate of protection which then entitles the holder to the benefit of the guarantees. But the certificate is given at the discretion of the Minister for finance. This is post-colonial legislation.

¹⁴²The Law Society's memo, which stressed the need to protect the bourgeois conception of human rights, was printed in 20 Bulletin of the International Commission of Jurists, 50-56 (Sept. 1964).

¹⁴³Carey, "The Law Society Seminar: a forward look," 1 EALR 102 (1968).

¹⁴⁴We have seen that this was in part Georges' response. See also a paper by M.H.A. Kwikima, then a senior resident

magistrate and later a judge of the High Court. "Most fortunately the Declaration itself lays down Democracy as a cardinal condition of socialism. And who can isolate democracy from the Rule of Law? The two are bedfellows. One cannot exist in the absence of the other. No individual can enjoy his fundamental rights unless the Rule of Law prevails." ("The Arusha Declaration and the Role of the Magistrate," p. 2 (Judges' and Magistrates' Conference, 1969, Mwanza) mimeo.)

¹⁴⁵See Seaton, "Current trends" Id. The two positions are not incompatible with each other, and in the paper cited in the previous footnote, Kwikima goes on to warn his colleagues that they should identify themselves with the people, "live with the people, talk their language and think their thoughts. This is our only salvation" Id. p. 8.

¹⁴⁶The African Confidential (1964) reports 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." (Personal Information).

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 criticised 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.

¹⁴⁷In 1974, in a circular to The Law Society, the Government announced its intention to reorganise the private legal profession. Under the proposals, lawyers would work in firms of 4 or 5, all of which firms would be members of the Law Society. There would be a ceiling on salaries, although bonuses would be allowed from the income of the firm. All the assets of the firms would be vested in the parent association.

¹⁴⁸See footnote 34.

¹⁴⁹See The Weekly Review (Nairobi), 12 May 1975, which suggests that there is widespread evasion of the code. When

the Buildings Acquisition Act was passed, one of the justifications was that it would get at those leaders who had evaded the code. The establishment of the Leadership Code (Enforcement) Committee (Act of 1974) suggests that difficulties have been encountered in its enforcement. The Party has expelled certain members for non-compliance.

¹⁵⁰For law reform as a means of deception, see Fedder, "Counterreform," in Stavenhagen (ed.) Agrarian Problems and Peasant Movements in Latin America (1970); see also M. Edelman, The Symbolic Uses of Politics (1964).

¹⁵¹James' criticism, note 82 supra, stems in considerable part from the inconsistent use of the rule of compensation for unexhausted improvements. The courts readily award such compensation when an ujamaa village is not a party.

¹⁵²As Schurmann has said, "The more an organisation turns into a command-issuing body, the more it has to grapple with the concrete technicalities of command. This inevitably begins to limit the freedom needed for a wide range of innovative and creative decisions," op. cit., p. 111.

¹⁵³DuBow, Justice for People: Law and Politics in the Lower Courts of Tanzania, pp. 45, 71. (Ph.D. Thesis, Sociology, Univ. of Calif. Berkeley, 1973).

¹⁵⁴Cliffe, "Nationalism and the Reaction to Enforced Agricultural Change in Tanganyika during the Colonial Period," in Cliffe and Saul, I Socialism in Tanzania 17 (1973). The British policy of coercion through the law is said to have given TANU the opportunity to mobilise the people in opposition to colonial rule.

¹⁵⁵Op. cit. supra note 153, p. 45.

¹⁵⁶DuBow's conclusion is doubtful. Two recent studies have shown the continuing use of regulations, some of which have been passed since independence. See Ingle, "Compulsion and Rural Development in Tanzania," 4 Canadian Journal of African Studies 77 (1970), and McHenry, "The Utility of Compulsion in the Implementation of Agricultural Politics: A Case Study from Tanzania," 7 Canadian Journal of African Studies 305 (1973). Fimbo, note 130 supra, has argued that the use of regulations continues.

Towards the end of 1974 bylaws were passed or proposed for several regions, requiring all unemployed persons to engage in farming. One of the proposed bylaws had provided that "any unemployed person may be required by an authorised or police officer to produce proof that he is an active member of a farming family in a particular village or he owns a garden of not less than 1/2 acre cultivated and planted

with crops." Penalties of a fine up to 500 shillings or imprisonment of not more than 3 months, or both, were provided for in the draft. Daily News, 17 December 1974.

157 Rural Settlement Commission Act, 1963, No. 62.

158 Land Tenure (Village Settlement) Act, 1965, No. 27. For a detailed discussion, see McAuslan, "Control of Land and Agricultural Development in Kenya and Tanzania," in Sawyerr (ed.) East African Law and Social Change 172, 214-27 (1966).

159 Cliffe and Cunningham, "Ideology, Organisation and the Settlement Experience in Tanzania," in Cliffe and Saul, 2 Socialism in Tanzania 131 (1973).

160 Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975. But see Tanzania Rural Lands (Planning and Utilisation) Act, 1973, which gives the Minister wide powers of disposition over rural land.

161 James says that a proposal to enact legislation on ujamaa villages was rejected by the Cabinet, op. cit. supra note 41. Kawawa, however, has stated on a number of occasions that legislation, especially amendment of the Co-operative law, would be enacted, see Daily News, 16 November 1973. It is reported in the Daily News of 30 April 1974 that Kawawa promised new legislation on ujamaa villages. "The law in this context has the duty to promote our ujamaa villages and other forms of co-operatives as effective means of achieving our socialist goals." In June 1975 draft legislation was introduced in Parliament to confer legal personality on villages.

162 Much of the financial assistance to the villages has been in the form of outright grants, often through the Regional Development Fund, and so problems of credit security and legal personality have not been important. These are important when a village seeks to raise a loan from, e.g., the Rural Development Bank. If the village itself is not registered as a co-operative, sometimes a loan is given to a primary or secondary co-operative society to channel to the village, although co-operative societies have been reluctant to participate since they have the legal obligation of repayment.

163 Sunday News, 5 October 1969. The decision was taken at the time that the government dissolved The Ruvuma Development Association, an independent association of ujamaa type villages. It has been alleged that the RDS was outlawed because it fell foul of the various Regional and Area secretaries who resented its independence. Cliffe and Saul, "The District Development Front," in Cliffe and Saul, 1 Socialism in Tanzania 306 (1973).

¹⁶⁴While some ujamaa villages are registered as co-operatives, and thus overcome some problems of legal personality, it has been suggested that TANU does not favour this solution, for this would create a conflict between the supervisory powers of the Registrar of Co-operatives, in whom the powers are vested by the statute, and TANU, James, op. cit. supra note 41, at 246.

¹⁶⁵See, e.g., the report in the Daily News (15 November 1974) that three ujamaa village chairmen in the Mtwara Rural District were suspended from leadership by the TANU Executive Committee of the District for failure to organise agricultural programmes in their villages. The Shinyaga District TANU secretary expelled six members from the old Shinyaga village for allegedly obstructing others from using a piece of land. (Daily Nation, 25 November 1974). Such incidents are not unusual.

¹⁶⁶On the dress issue, see Martin, op. cit. supra note 53, pp. 96-98. The court ruling was given early in 1971. In 1973 the Party again issued directions on dress. When asked why no legislation was enacted to give legal force to the directive, Kawawa said that it hoped to change people's attitude through persuasion, not coercion. Yet he has also said that if a person persisted in wearing the proscribed dress after two warnings, he would be locked up in prison for an unspecified time. Daily News, 3 October 1973.

¹⁶⁷See notes 126, 127. See also Ghai, "Law and Public Enterprise in Tanzania," in Ghai (ed.) Law, Economic Planning and Public Enterprise (forthcoming; tentative title).

¹⁶⁸For example, the TANU Executive District Committee dismissed the co-operative leaders in Bukoba after the co-operative society had incurred a considerable loss. They were also ordered to refund the money. Daily News, 18 November 1974.

The Regional TANU Secretary in Tabora has ordered that peasants who have moved into new villages would not be allowed to travel outside their villages unless they could prove that they had finished cultivating the piece of land allotted to them. Divisional and ward secretaries were authorised to give the permission, Daily News, 11 November 1974. In September 1974 the District Development Committee in Kibondo decided to sack all workers who could not read and write by the end of that month, in an attempt to raise literacy. It authorised villages to fine an illiterate villager who did not join literacy classes, and resolved that those who were literate should have priority in claims to social services. Daily News, 9 September 1974. The Regional TANU Executive Committee in Kilimanjaro decided to abolish the "kihamba" system, as it led to uneconomic splitting up of land. It was

henceforth to be the responsibility of the Party to allocate land to young people who reached adulthood. The TANU District Executive Committee were to meet to work out the machinery. Daily News, 2 January 1975.

A Greek farmer who was given land by the Moshi district authorities was prevented from ploughing the land by the Kilimanjaro Regional TANU Working Committee because giving land to him was "against country's policy." Daily News, 9 March 1974.

¹⁶⁹See his Union Message, 26 April 1974, printed in the Daily News, 30 April 1974.

¹⁷⁰From a press release by the Commission. Daily News, 2 June 1975. The Commission is chaired by Msekwa, Vice-Chancellor of the University, and previously the Executive Secretary of TANU. Its terms of reference are:

- (i) To examine the present structure and functioning of the Courts in Tanzania and suggest improvements.
- (ii) to examine the structure and functioning of the Departments of Criminal Investigation and Public Prosecutions, and recommend what changes, if any, would increase their efficiency.
- (iii) to examine the system of defence lawyers and make appropriate recommendations.
- (iv) to examine the laws pertaining to the administration of justice, particularly the Law of evidence, the Criminal Procedure Code and the Civil Procedure Code; and recommend any desirable improvements.
- (v) To make recommendations on any other matter which would lead to general or specific improvements in the administration of justice.

¹⁷¹An interesting discussion of somewhat similar issues in China is to be found in Victor Li, "The Evolution and Development of the Chinese Legal System," in Lindbeck, China: Management of a Revolutionary Society (1971). Li makes a contrast between the external or formal legal system (western derived) and the informal or internal system (indigenous). In many, but by no means all, respects the latter approximates to what I have called the system of ideology.

¹⁷²While communication in the system of ideology might be easier, considerable difficulties can arise when the system of ideology, with its ease of communication, co-exists

with the system of law with its stringent tests. A striking illustration of this problem is provided by the case of R v. Kasella Bantu & Ors, (High Court, unreported), reported on appeal as Mosa v. R (1970) E.A. 42. The accused in this case were charged with killing cattle thieves. They claimed that an MP and other TANU leaders in Ngeza District had told a rally that there was to be a law giving people the authority to arrest cattle thieves and to kill them, if necessary. There was a considerable controversy at the trial as to what the leaders had actually said, but the defence of all but the first accused was that they thought that it had been stated that a law had been passed which authorised what they had done. No such law had in fact been passed, and the courts, applying the maxim of ignorantia juris non excusat, held all the accused (other than the first) guilty of murder. The first accused was tried for incitement to murder, and the charges were dismissed. For a brief discussion of the case, see Seidman, "The Communication of Law and the Process of Development," (1972) Wisconsin L. Rev. 686, 712-13. It is probable that with a more active administrative role envisaged for TANU, problems of this kind would multiply unless very clear guidelines on the relationship between the Party and the Government are widely disseminated and understood.

¹⁷³For a new style of drafting in China which seeks to make it easier for the ordinary person to participate in its implementation, see Dicks, "A New Model for Chinese Legislation: The 1972 Shipping Regulations," China Quarterly 63-83 (1974).