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When Lawyers Shut Up: The Law Society of Kenya's Silence during the Colonial Era

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Abstract

This paper explores moments when the Law Society of Kenya (LSK) remained silent in the face of excesses of the colonial administration. The LSK is an important agent in restraining the Kenyan state from violations against the rule of law. Yet since its emergence in the 1920s as a premier lawyers' organisation, this has not always been the case. The organisation has had episodes of silence in the face of state violation of the rule of law. The paper conceptualizes the rule of law as implying checks and balances, existence of rules which apply to everyone and respect for due process, and silence as constituting LSK actions which were inadequate in countering given state excesses. It uses entanglement, sourced from the poststructuralist intellectual tradition, along with related concepts of ambivalence and hybridity as well as conviviality, as the conceptual framework to explain LSK's silence in the face of colonial government excesses. Further, the paper employs the ex post facto research design and uses available archival accounts as sources of primary data and books and journals for secondary data to establish what constituted the most egregious violations of the rule of law under colonial rule. It also identifies LSK's reaction to the violations, whether this was through pronouncements, actions or non-action. The paper also examines the dynamics which informed the organisation's reaction. It concludes by elaborating on the organisation's character as a result of the silence, challenging assumptions that it was a consistent defender of the rule of law in Kenya across time.

Keywords: Entanglement, rule of law, state excesses, silence

INTRODUCTION

Colonial rule in Kenya was characterised by a minimal adherence to the rule of law. Although the colonial era was attended to by existence of a judiciary and legislative council (LegCo) which acted as checks and balances on the colonial executive, the two institutions did not check the excesses of the colonial executive against indigenous Africans. Africans were governed through arbitrary ordinances and administrative edicts issued by the colonial executive. These became the basis of colonial excesses against Africans (Ojwang', 2000: 150-154; Lonsdale, 1989: 6).

The objective of this paper is to examine the reaction of the LSK to violations of the rule of law under colonial rule between 1920 and 1963. Since its emergence in the early 1920s, the organisation underwent numerous changes which empowered and elevated it to promote the rule of law, including restraining the colonial administration from its violation (Ghai and McAuslan, 1975: 86). Yet the organisation did not always speak in defence of the rule of law. It had episodes of silence in the face of state violation of the rule of law. This paper examines the organisation's episodes of silence during the colonial era.

The paper first identifies entanglement and its related concepts of ambivalence and hybridity and conviviality, all linked to the poststructuralist intellectual tradition, as the conceptual framework for explaining LSK's reaction to state excesses against the rule of law. Secondly, it explains the ex-post facto (after-the-fact) historical research design and methodology employed in sourcing for the evidence on which the paper is based. Thirdly, the paper establishes what

constitutes violations of the rule of law under colonial rule. Fourth, the paper examines LSK's reaction to the excesses, whether this was through pronouncements, actions or non-action. The paper concludes by examining the dynamics which informed the organisation's silence in the face of colonial state excesses. In doing so, it draws out the character of the LSK when faced with certain state excesses against the rule law.

Conceptual framework for LSK silence

The reaction of the LSK to state excesses can perhaps best be explained using the poststructural intellectual tradition with its theoretical paradigms. The tradition's main strength lies in its conceptualisation of the relationship between the state and institutions of state restraint such as the LSK as one involving an entanglement. Entanglement basically means that the state and institutions such as the LSK are tied together and therefore perpetually reinforce and/or diminish each other.

Related to the concept of entanglement are other concepts from the same tradition. Three of the most relevant are Homi Bhabha's hybridity and ambivalence and Achille Mbembe's conviviality. Each of these concepts provides details of what happens in the relationship between the state and institutions such as the LSK. According to ambivalence and hybridity, although the state and the LSK live in an environment of domination and being dominated, there is constant interaction between them. This leads to the two entities influencing each other. For conviviality, the relationship between the two entities is attended to by compromises and accommodation on either side (Omeje, 2015: 1 – 28; Gikandi, 2004: 97-119; Osha, 2000; Mbembe. 2015; Mbembe. 2001: 1-14; Mbembe. 2001; Hoagland, 2009: 51 – 57; Ralphs. 2007).

Applied to the examination of LSK's relationship with the colonial administration in Kenya, ambivalence, hybridity and conviviality can explain the organisation's conduct towards the administration. Ambivalence and hybridity would be manifested in the many instances in which the LSK, despite its ambivalent position towards the colonial administration, influenced the administration's ordinances. On the other hand, conviviality can be seen in the series of compromises and accommodation between the organisation and the administration, where the LSK never challenged the administration, while the administration largely left the LSK to its own devices. Together, entanglement as elaborated through hybridity and ambivalence as well as conviviality explain the silence of the LSK in the face of excesses of the colonial state (Ibid).

METHODOLOGY

The objective of this paper is to examine the reaction of the LSK to violations of the rule of law under colonial rule between 1920 and 1963. It draws out the character and identity of the LSK when faced with certain state excesses against the rule law. The paper uses the ex post facto (after the fact) historical research design to examine LSK history during the colonial era. It sourced information from at least two sources, namely archival data from the Kenya National Archives in Nairobi and secondary literature from books, journals and magazines. While archival data was the primary source of information on LSK activities during the colonial era, it was corroborated by accounts from the secondary literature. The two sources of information provided the evidence for the paper.

RESULTS AND DISCUSSION

Violations of the rule of law in Kenya under the Colonial Administration

Under colonial rule, the governmental arrangements which the British Empire imposed on Kenya were characterised

by a minimal adherence to the rule of law. Although there existed both a judiciary and LegCo as checks and balances against the colonial executive, the two institutions served the partisan interests of non-indigenous groups and neglected those of indigenous Africans. As a result, Africans were governed using ordinances issued by the colonial executive. The ordinances had far-reaching consequences for Africans. Perhaps the three most consequential were the Crown Lands Ordinance of 1902, the Native Reserves Ordinance of 1908 and the Native Tribunals Ordinance of 1907. Whereas the Lands and Reserves ordinances dispossessed Africans of land, the Tribunals ordinance denied Africans access to British-type justice (Ojwang', 2000: 150-154; Lonsdale, 1989: 6).

With ordinances featuring heavily as the main tools for governance during much of colonial rule, this inevitably led to many acts of impunity. These traversed all spheres of African life, including the political (such as banning African political organisation until 1960), economic (such as the destocking of African livestock without due compensation) and social (such as using rigid ethnic identities to recruit Africans into various professions, which arguably ignited tribalism) spheres (Ogot, 2000: 22-23; Zeleza, 1989, 42-62; Magaga, 2000; 79-80; Mbembe, 2001; Lonsdale, 1989: 6-11; Karume and Gethoi, 2009: xviii-xx; Atieno-Odhiambo, 2000: 7-8; Elkins, 2005: 345-351).

The LSK reaction to Government Excesses in the Colonial Era

The LSK emerged as an organised group in the early 1920s, almost at the same time as when Kenya was declared a Crown Colony in July 1920. It was thus present and active throughout the years when the colonial administration engaged in excesses against African populations. Its responses to these excesses were not only notably mute but also confined to only two cases on record. Instructively, the responses were directed at bureaucratic procedures within the courts of law, rather than on issues of substantive justice (KNA/AP/1/903:1919; Ghai and McAuslan, 1975: 87; Cox and Ojienda, 2010: 84).

The first response from the organisation was in early 1920, when the Secretary of the Nairobi Law Society wrote to the Chief Justice to request for interpreters and room for interaction between defence lawyers and accused persons as well as more time for its members to attend courts summonses. The secretary demanded that the summonses should be cognisant of travel distances when issued to lawyers and their clients. Apparently, courts issued summonses without providing adequate time for lawyers' response. The LSK felt that this was affecting its ability to dispense justice (KNA/AP/1/903: 1920).

A second response took place in March 1936, when the organisation picked up the issue of access to lawyers for accused persons. Through its Secretary Edward Barret, the organisation wrote to the Registrar of the Supreme Court of Kenya, demanding for provision of legal aid for poor defendants, a majority of whom were African. Besides asking for access to lawyers, the Secretary also repeated the earlier request to have government provide accused persons with interpreters and rooms as well as adequate time for consultations between the accused and their lawyers (KNA/AP/1/903: 1936).

Apart from these two cases, there are no other instances of LSK working to enhance either additional aspects of formal procedures of justice or demanding for substantive justice and respect for the rule of law from the colonial administration. Instead, the organisation remained conspicuously silent in the face of the excesses of the colonial administration. Perhaps a striking instance of this silence can be glimpsed in the correspondence on 26 November 1927 from the Chief Native Affairs Commissioner to the organisation. In the correspondence, the Commissioner wrote to the LSK requesting it to support the Commission stop the habit where Africans who had served jail sentences were again made to pay fines for the crimes for which they had already served. In his letter, the Commissioner demanded that the habit be expunged from the Criminal Procedure Ordinance to allow for either serving a sentence or payment of a fine, and not both. There was no indication, however, that the LSK enjoined itself in this matter (KNA/PC/NZA 3/17/1: 1927).

Reasons for LSK's silence in the face of Colonial Government excesses.

At the emergence of the legal profession in the country in the early 1900s, the colonial administration discouraged lawyers from organising themselves into a bar association. Nevertheless, the lawyers organised themselves informally into an early version of the LSK by at least 1919 (KNA/AP/1/903:1919). From 1935, the informal LSK grouping commenced sending delegations to the colonial administration, demanding to have the grouping recognised officially and elevated into a statutory body along the lines of the English Law Society. However, the administration only agreed to officially recognise the grouping after the Second World War in 1949 (Ghai and McAuslan, 1975: 86).

The colonial administration's official recognition of the LSK in 1949 came via two ordinances, namely the Advocates Ordinance and the Law Society of Kenya Ordinance (Ogot, 2000: 65). Provisions from the two ordinances covered various aspects, starting with the legal standing of the LSK, which they transformed into a statutory body. Perhaps the most important provision was to assign to the LSK the distinctive role of protecting the rule of law in the country. In addition, the two ordinances empowered the LSK to regulate entry into the legal profession and maintain its standards. In terms of governance, the two ordinances vested the organisation's self-governing powers in its council. The council consisted of a president and six other persons elected at an annual general meeting. (Ghai and McAuslan, 1975: 89).

The provisions would be enhanced further in subsequent amendments to the two 1949 ordinances. The amendments took place in 1952, 1957, 1961 and 1962. In 1952, the amendment increased the LSK's disciplinary powers over advocates. In 1957, the amendment improved LSK's focus on legal education for indigenous African students. The 1961 amendment strengthened further professional discipline, remuneration and entry into the profession. It also made membership of the organisation compulsory for all lawyers (Ibid, 90-91). The final amendments to the LSK laws during the colonial era took place in 1962. They elevated LSK into an advisory arm of government in legislative matters. The amendments also enhanced LSK's role in helping the public access legal services (Anonymous, 1986: 3). Collectively, the amendments had the effect of transforming the LSK into one of the most powerful rule of law entities in colonial Kenya.

Yet even with the legal and regulatory changes that greatly enhanced the LSK's influence on the country's rule of law terrain, the organisation remained silent in the face of excesses of the colonial administration. This was especially exhibited with regard to the rights of indigenous Africans. Even in cases where the colonial administration came up with specific laws favouring Africans, the organisation exhibited little interest in protecting the rule of law for the benefit of Africans. To this extent, two cases stood out.

The first case involved the Native Tribunals Ordinance, which had been in existence since 1907. The ordinance bifurcated the country's legal system into English and customary systems of law. It subjected indigenous groups to customary law, whereas settlers and non-indigenous foreigners were subjected to the English common law. The ordinance was amended in 1930, further widening the separation between the indigenous population and the English judicial system. The LSK did not contribute to either setting up or amending the ordinance in favour of African access to justice. It even ignored initiatives aimed at reforming the native tribunals, staying away from both the Bushe and Phillips Commissions of 1933 and 1944 respectively, both of which looked at reforming the tribunals (Ghai and McAuslan, 1975: 90-91; Mbondenyi, 2015: 328- 330; Cockar, 2012: 43 – 44).

The second case, involved the amendment of the Advocates Ordinance in 1957 by the colonial administration. The ordinance created a favourable environment for indigenous Kenyans to study law. It was further amended in 1960 following recommendations from the Denning Committee of that year, further relaxing restrictions on legal training for indigenous Kenyans. Yet even this positive change in colonial government attitude towards African access to the legal

profession did not encourage the LSK to advance African rights (Harvey, 1975: 61-65).

LSK's inability to speak out against colonial state excesses can be attributed to several reasons, which can be categorised into internal and external factors. Internally, the organisation remained dominated by non-indigenous groups to the exclusion of indigenous groups, even with the transformative changes which commenced in 1949. Without representation from indigenous groups, it failed to take seriously their plight in light of the excesses of the colonial government (Harvey, 1975: 61-65; Ghai and McAuslan, 1975: 87).

Externally, although the colonial government had initiated reforms which transformed the LSK into a powerful defender of the rule of law from 1949, the institution was constrained by the reality of being part of the colonial institutional architecture. Like the colonial judiciary and the LegCo, the LSK was fully involved in the agenda of the colonial administration, providing the administration with the legal resources it required to rule the country. Thus, the organisation could not speak against what it was contributing to.

CONCLUSION AND RECOMMENDATIONS

The LSK went silent in the face of colonial government excesses against the rule of law. This paper has examined both instances and dynamics of the silence. Although the colonial government had initially discouraged the formation of the organisation, this changed with LSK's official recognition in 1949. Nevertheless, the recognition did not transform the organisation into a robust defender of the rule of law, especially with regard to the rights of indigenous African populations. The paper has argued that there were two main reasons for the silence, namely the organisation's racial composition, and its co-optation into the colonial government's agenda. Whereas the racial composition allowed the organisation to be captured by white settler interests, its co-optation by government compelled it to supply the government with the basic legal resources which enabled the government to colonise African populations. In keeping silent in the face of excesses by the colonial administration, the LSK acquired the character of a bystander. This character would not only manifest itself in subsequent postcolonial administrations, but it would also challenge the assumption that the LSK was a consistent defender of the rule of law in Kenya.

To overcome the challenge of being captured by the white settler section of colonial society, LSK should have promoted inclusivity in its membership, embracing all racial groups in the country. This would have ensured that there was no dominant group which would have made the organisation serve its exclusive interests to the detriment of other groups. For the challenge of co-option by the colonial government, the organisation should have come up with a values-based and professional system of managing relations which the state. Such a system could have consisted of professional guidelines which indicated how the LSK would relate with the state, but with emphasis on justice for everyone, especially the most vulnerable.

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