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Nairobi,
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INTRODUCTION

Kenya has opted for the free enterprise economy. At present there are no laws limiting the amount of property a person can own, But may it be agricultural ~~land~~; commercial, industrial ^{or} and any *other* type of property. Since the society is one of private ownership, much of the law is taken up with the protection of property rights. This protection is the core of the present work.

Individualised property in the free enterprise concept is a recent phenomenon in Kenya. The traditional African societies did not conceive of property as being capable of ownership as such. The European imperialists came with the concept of private property; introduced it with all other aspects of colonialism and bequeathed it to post-colonial society.

Therefore to understand what we mean by the term 'ownership' we have to borrow ideas from English jurisprudence. Unlike Roman law which makes a distinction between 'dominion' (absolute right to a thing) and possession (mere physical control), English Jurisprudence read the conception of ownership as an absolute right through the development of possession. The emphasis is ownership through "Seisium" (the right to possess). English Jurisprudence will thus identify ownership where a person has a power of enjoyment; a right to exclude others, power to alienate intervivos, or charge as security, and the power to leave a thing by a will. This, however, does not claim to be a clear definition of ownership. Indeed even the most refined legal analysis cannot yield clear criteria by which ownership may be identified, for ownership is an abstract term which brings together into one bundle all the rights and interests a person has on a given subject matter of ownership, may it be tangible or intangible.

The writer does not intend to dwell into the various definitions of ownership, and being the controversy that follows each, for that m

may not be rewarding in the context of our present work. Suffice it to say that the terms 'ownership' and 'property' will be used interchangeably and synonymously throughout the discussion. But in each case the reference will be to that bundle of rights or interests a person 'possesses' or 'holds' on a given subject matter which are capable of getting legal recognition and protection.

Section 75 of the Kenya constitution (Act No.5 of 1969) talks of property of any description and interests in or right over property of any description as the subject of protection. This is a

wide reference and includes not only tangible but also intangible properties, though mention will be made on intangible properties when and if the occasion demands. But in the main, the range of legal regimes to be analysed are those laws which facilitates protection on tangible properties.

The attempt in this analysis is to answer the following questions in the order stated; whence and where did the idea to own property individually at the virtual exclusion of all, the others originate? How did the idea come into Kenya, or, is it a phenomenal feature of African Ownership pattern? (Chapter II). Is the concept of private property and the protection accorded to it compatible with the aspirations and socio-economic factors of an Independent Kenya? (Chapter 3)

In attempting to answer these questions the writer will try to follow the traditional discipline in legal writing. However the paper will not suffer extreme compartmentalisation of academic disciplines which is the hallmark of traditional writing. The dynamics of an underdeveloped country like Kenya forbids such strict compartmentalisation. Secondly, for a rational analysis of any institution, it is necessary to see it as an integral part of the whole - the whole in our present case being the socio-economic order on which the concept of private property rests - and not as a separate independent

However our analysis will be confined to rights over tangible properties, for sake of expediency.

However our analysis will

12

entity. The truth is the whole. The truth about social order in an underdeveloped country like Kenya must be pursued by probing how it got to be what it is, and what it does to the people who live under it. The institution of private property will be subject to this scrutiny in our work. The legal forms will be analysed to reveal the substance and the substance here means the exploitative socio-economic and political relationships that underly the legal theories of bourgeois legal systems. This ties well with the constitutional theory which is the subject of the present analysis. This then means that the analysis will not be a purely formal analysis of law in the sense Hans Kelsen presented his 'Pure theory of Law'. The *dialectical* connection between law and political order will be honoured and be accepted as a living reality.

Chapter I deals with the origin of the idea as presented to us by the philosophers from the citadel of free enterprise system. Reference will be particularly concentrated on socialist and legal thinkers. But attention will be drawn to thinkers elsewhere (particular Marxian writers) when their explanations seem illuminating, either by way of contrast, or as pointers towards the possible solution of questions as yet unsolved in Western Writings.

Kenya's pre-colonial economics *relations* will be examined to show the attitude of Kenya towards property holding. This will too help to show how the imperialists managed to impose their jurisprudence in order to introduce their ownership conception which would help to further their economic objectives. Once they have succeeded to do this, we will examine how the colonial political economy worked to produce the ownership pattern bequeathed to post-colonial society.

Chapter II will aim to answer the question of how private property is protected within the political and legal order. The period under examination is the first decade of independence

(1963-1972). We will examine the attitude of those leaders behind policy formulation and the judicial interpretations of legal provision which guarantee the sanctity of private property. At the end of this chapter, it will be clear how far the principle has been respected.

Chapter III is the concluding chapter and seeks to answer the question whether the concept of private property and its protection reflects the aspirations of Kenyans, or not, and how appropriate it was to have incorporated the principle in ^{the} constitution at the time of independence and continued to maintain it after independence. This will be viewed in the light of the majority of Kenyans' expectation and the socio-economic factors existing in Kenya by then. For an objective analysis of any social order, one has to go beyond the premises of the social order under investigation. One has to take a standpoint which is intellectually outside that social order because the premises of that social order are encumbered by its values. This way one can have a critical insight into that social order's contradictions and hidden potentialities. In this paper, and in particular this chapter, it is from the standpoint of socialist society that it has been attempted to examine the institution of private property. Hence the socialist bias that might be encountered.

So the argument here goes that man's freedom, especially that of action, determines what the economic relations are to be. This is the thinking of 19th Century when the idea of liberty was reigning in its extremity (2). Before 19th century western philosophers who based their argument on natural law said that since the institution of property emanated from man's reason then any institution which does not epitomise it is unnatural. By 19th century jurists are agreed that right to own property should be protected by state and law. Jeremy Bentham in "Principles of Civil Code" wrote,

CHAPTER ONE

"Secure to the cultivator the fruits of his labour
ly have done enough (3)

(i) THE PRIVATE - PROPERTY - IDEA

The pertinent questions in the history of the concept have been, what is the origin of the right to claim exclusive ownership on a thing, tangible or intangible; what prompts man to call a thing 'mine' or where did man derive authority to own property and refuse the whole world access to it? It is trite knowledge that whichever society we examine private ownership is allowed to a certain extent. However, privatisation of property as we know it today is a phenomenon of Western Societies and their periphery satellites. Therefore answers to the above questions can only be furnished by western thinkers. Unfortunately no illuminating answers have come from those philosophers. (1) The questions are simply simplistically dismissed by the arguments that the desire to own property is as old as mankind and therefore a natural one. The right to own property in an individual the capacity is conceptualised as an expression of man's autonomy. Man is nobody's property. His intellect and ability are his and when he uses them to acquire something that thing becomes his. So the argument here goes that man's freedom, especially that of action, determines what the economic relations are to be. This is the thinking of 19th Century when the idea of liberty was reigning in its extremity (2). Before 19th century western philosophers who based their argument on natural law said that since the institution of property emanated from man's reason then any institution which does not epitomise it is unnatural. By 19th century jurists are agreed that right to own property should be protected by state and law. Jeremy Bentham in "Principles of Civil Code" wrote, period in which knowledge of the further working of natural products, of industry proper, and of art was acquired. Before this stage Engels says that society was structured and patterned into smaller units he calls 'gentile

"Secure to the cultivator the fruits of his labour and you most probably have done enough" (3)

The Political economy of this time in Europe especially England is underlined by the laissez-faire doctrine - a person should be left to conduct his economic affairs without state interference. The state's role is seen as only according protection to the gains accruing from the natural warfare in which the strong devour the weak. In England it is difficult to pinpoint with any certainty at what time the idea was incorporated in her economic, political and social institutions. Suffice it to say that by the time common law was systemised the concept had already permeated English jurisprudence.

The writer faced with this bankruptcy in western philosophy to cogently explain whence and where the idea originated, has found the marxian philosophy attractive. Generally the marxians explain the origin of the concept as a part of corruption the western institutions have undergone in the general development of western society. This finds acceptance, albeit reluctantly, in the writer's reasoning because humanity is based on equality in all life aspects and equal worth of all beings. Therefore, any institution that reflects contrary aspirations must be a

corrupted one. Fredrick Engels in his work (4) explains that ownership of property individually, as we witness it in free enterprise economy, started in the stage, during society's development, generally represented as civilisation. This is the stage immediately after Barbarism (when things produced by man were in the main instrument that facilitated appropriation) and just before the advent of commodity production. (5) As we shall see later this is the period in which knowledge of the further working of natural products, of industry proper, and of art was acquired. Before this stage Engels says that society was structured and patterned into smaller units he calls 'gentile Order' which gave way to 'tribal' organisations. During this

During this time the only seeming political power was for smoothing out internal conflicts.

The gradeur of gentile order was that it found no room for rulers and ruled. (6)

The division of labour during this time was that which is only a pure and simple outgrowth of nature.

The household was communistic whatever was produced and used in common was common property (7)

But during the threshold of civilisation the old gentile order was destroyed by the new division of labour. The family life became narrower and where no pairing of sexes existed was now seen a new monogamistic institution of marriage. This gave certainty to the lineage and ones offspring and a desire to accumulate for their benefit was irresistible. However the desire was to produce for subsistence only and relatively low barter exchange. But as a part of the developmental corruption, and the advanced technology brought differences in wealth of various heads of families became distinct as some were enabled by the specialised division of labour to acquire better tools and more means of production. The old communistic-household-communities broke up and this put to an end the common production.

Thus Engels' argument says that private property ownership was an institution rose at the threshold of civilisation and together with the institution of monogamian family. Western philosophers as we have seen agreed that state must protect property of the individual because as a functional social institution its duty is to see to it that there is 'law and Order'. Law and order includes protecting natural rights of man and right to own that property is one of the few fundamental rights. However a salient weakness in this natural right argument is that it does not cogently show cause why in a free enterprise economy

workers in factories and plantations do not have a right of claim over the product of their labour which is very much under compensated by the wages they get.

Marxian thinkers⁽⁸⁾ have articulated a convincing interrelation between private property ownership concept and that of state and therefore why the latter should protect the former. However like all analysis of human functions the explanation is subject to limitations. Their argument goes thus. Since state and the institution of private ownership have the same ancestral background the former must necessarily protect the latter. If either one of the two institutions is put out of function, as we know it today in free enterprise economy, the other must inevitably face its own demise. We have seen that the idea of privatisation in ownership is a phenomenon of society during the stage of development generally presented as threshold of civilisation. At this stage the division of labour and commodity production reached their complete unfoldment, and revolutionised the hitherto existing society⁽⁹⁾. The hitherto collective and common production (as well as consumption) ceased. Distinction in family wealth surfaced in the same localities. Eventually as the technology improved instruments of appropriation, and specialised division of labour passed these instruments into the hands of one section, the society was split into a section of those with means of appropriation into one group and those with no such means into a group of their own. The former became the exploiting rich and the latter exploited poor. The instinct that had earlier led man to exercise his tyranny and supremacy over woman during the pairing of sexes, now prompted the exploiting rich to subjugate the increasingly impoverished masses into their rule. (increase of free enterprise). There always is a .../5

Since the subjugated have always been the majority an ensuing struggle was imminent. Because of their similar interests the various heads of rich families joined together and marshalled their forces to wage a concerted subjugation on the exploited poor. This plunged society into an inseluble contradictions and consequently into irreconcilable antagonism which it was powerless to dispel. So in order that this antagonism may not consume the society ultimately, it became necessarily to have a power, seemingly, above, standing above society so that this power can maintain 'law and order'. This power is the STATE. However because the state arose from a need to hold class antagonism in check and rose in the midst of conflict of 'classes', it became, as a rule, the STATE of the most economically and then politically dominant class. Thus according to Marxist - Leninist scholars the state was a creation of economic power and regulated the direction politics was to take. Politics became a tool in the hands of the owners of means production and ultimately of property. Thus as a rule of logic the state has a duty to protect private property because without it, it would not have evolved, and especially as powerful, as we know it today. Thus STATE is the term we give to a conceptual abstraction about the pervasive governance in a society whereby the economically dominant class use it as an instrument of policy. Like all other superstructures it is a 'simple' dominance of economic and political class. It is therefore to expect too much to hope that state will be impartial. Since it is pregnant with class interests it is partial to the class that dominates it and for that reason must vigorously protect private property. However this is not to say there was no government in the pre-capitalist society or in a society with 'regulated' economy (convesse of free enterprise). There always is a

There are States also in Socialist & Communist economy

private in a free enterprise society

society or in a

ii)

PRE-COLONIAL (CAPITALIST) SOCIETIES' ECONOMIC RELATIONS

The indigenous people of Africa whether they were pastoralists, mixed cultivators, hunters, or food gatherers had great similarities in their attitudes towards life. This commonness applied to property ownership. Land and its produce was the chief item in their wealth. We are therefore going to rely heavily on it as our main example in property ownership.

In describing the relations of production in pre-colonial (pre-capitalist) African societies we shall rely on examples drawn from legal historians which clearly reveal the non-privatization of the means of production (mainly land) to the individuals. We will also resort to juridical data which the writer thinks have depicted a nearer-the-truth picture of pre-colonial ownership. We must keep in mind that these judicial pronouncements were made by people who perhaps had their views tainted by English jurisprudence but their worth remains in that they employed the evidence of people whose memories were fresh in relation to the pre-colonial life.

It must be understood at the onset that when we talk of community property we do not necessarily imply lack of social differentiations, which we shall not discuss, but it indicates the fact that the direct workers were not separated from their means of labour and wherever any accumulation surfaces it was In Kenya it was juridically established that the traditional accumulation for social reproduction purposes and not accruing to individual exploiters. This then means that pre-colonial ownership was typically different from ownership in free enterprise economy. In the latter there is a distinction between legal ownership and economic ownership (or control) of the means of production. Under modern capitalism the separation between legal economic ownership (or control) of the means of production.

Under modern capitalism the separation between legal and economic ownership is clear in some cases. For example at

The chief or (family head) is a custodian of the land, but not its owner (19)

Jibana tribe over the soil, and system of land tenure said,

'The Wanyika believe that the land belongs to God and cannot be sold either by an individual or by the elders of a tribe, and the right to use the land is common to all members of the tribe the individual ownership is recognized in the results of an individual's labour on land He can sell trees planted but in neither case can he convey any title to the ground. "

This means that there was no class of land or property owners.

All were workers and owned only the produce of their sweat, and only that which they needed for consumption. In another

case from Kikuyuland KIMAN WA KABATA -v- KIOI WAN'AGA (14)

Maxwell J, in his judgement says that,

The theory of individual ownership of land is absolutely foreign to the mind of an African until he has begun to absorb the ideas of an alien civilisation such expressions as 'he bought the land, he owns the land, that is his etc, mean nothing more than that a man has according to native custom paid for, inherited or otherwise acquired the rights of occupation and cultivation over a piece of a certain area of land which are his to use until he abandons them either directly or indirectly:

These cases were decided by colonial judges in the course of expropriation of African lands. As much as we suspect the policy behind the pronouncements we are however left in no doubt that the African land tenure (15) was stated. There was near unity

in legal ownership and economic ownership of land as the primary means of production.

Legal historians (15 a) like Marx Gluckman (16) observed the same in their researches.

Indeed the African social/economic system can be likened with Ownership cannot be absolute, for the critical thing about property is the role that it plays in a nexus of specific relationships. Hence in Africa there is no clear definition of ownership... Property law in a society defines not so much rights of persons over things, as obligations owned between persons in respect of things... (17)

And C.K. Meek (18) in summing up the ^{main} meaning characteristics of indigenous land holding said;

...Land is held (a) on Kinship, and/or (b) on local group basis. Individuals have definite rights but these are qualified by membership of family kindred and ward (or small village). Similarly the individual claims of families exist concurrently with the wider claims of the clan or local group...

The chief or (family head) is a custodian of land, but not its owner (19)

E. Cotran (20) notes that in nearly all tribes with partilineal lineage general principles of inheritance and devolution was on equal ^{distribution} of a man's property among his houses (or sons).

This ownership relation though being mainly on land was the same in general property. It was guided by a people's attitude towards life and cannot be expected to have been much different in the rest of property. Indeed besides land, there was relatively little in the way of goods except chattels viz. Livestock. The conclusion reached here is that there was little individualised non-personal-effects-property among Africans. Unfortunately it is by use of this non-^{individual ownership} ~~permanency~~ which played an important justification role for the expropriation of African property by the imposed colonial system.

As is clear by now, the production relations in pre-colonial, pre-capitalist, african society was not on class basis. Everyone was a worker and there ^{was} ~~was~~ no room for parasitism. There was ^{no} privileged or unprivileged as is apperent in Bourgeoisie Society. The form of government that operated ensured that the economic relations remained and operated smoothly. As we have seen, it was by no means like capitalist state's government.

Class structure, central political role and specialised bodies were virtually absent(21)

Indeed the African social/economic system can be likened with a socialist one. The family was seen as the institution that can enable individual to live a good life. The Basic means of production were in the ^hands of the direct worker, and everyone was a worker. There was no bureaucracy as we know it today and in fact everyone was of equal worth in his role. The inform and the helpless were catered for by the society. Most of these

THE POLITICAL ECONOMY OF COLONIALISM IN KENYA - 1890² - 1963

are attributes we find, though in different magnitude, in a modern socialist economy.

When the 19th century Empire builders came to Kenya this is the system they met and since it could not accommodate their designs of plunder and exploitation they destroyed it. Let us now underline the nature of legal process and some key legal regimes by which this was accomplished and made self-perpetuating even in an independent Kenya.

property by the virtue of sovereignty. The controversy over this legal position had been solved by the SETTLEMENT ACT 1887 and the FOREIGN JURISDICTION ACTS (of 1890² and 1893).

Under these two acts the Protectorate and later colonial administration promulgated laws and rules to 'legalise' the otherwise illegally expropriated African land which had been acquired without any material compensation. The first of the legal regimes to 'legalise' the land so acquired was the 1902 CROWN LANDS ORDINANCE which was followed by 1915 CROWN LAND ORDINANCE. These two allowed for land to be expropriated from Africans and reallocation of it to the surplus white population from the metropolis who paid the crown, nominal fees, for the grants. These legal moves altered the legal relations to property as defined earlier (in pre-colonial society) and had deep direct economic and political impacts on the African people. At law the decrees (ordinances) according to the colonial chief Justice had the following implications:-

.... the effect of the crown Lands Ordinance, 1915 and the Kenya (Annexation) order-in-Council, 1920, by which the native private rights were reserved, and the Kenya colony order-in-council 1921 as I have already stated is clearly, inter alia, to vest land reserved for

(iii) THE POLITICAL ECONOMY OF COLONIALISM IN KENYA - 1890^s - 1963

The imposition of colonial rule with its primitive apartheid capitalism in Kenya at the close of the 19th century was completed through conquest and fraud (22). At the coastal strip British got 'public' land from ^{the} Sultan by 1895 agreement. However in ~~the~~ ^{the} interior there was no such 'recognized' 'sovereignty' and they used conquest and fraud with the assistance of English Jurisprudence. The English constitutional theory at the time was that Her Majesty had power over all people and property by the virtue of sovereignty. The controversy over this legal position had been solved by the SETTLEMENT ACT 1887 and the FOREIGN JURISDICTION ACTS ^(of 1890^s and 1843).

Under these two acts the Protectorate and later colonial administration promulgated laws and rules to 'legalise' the otherwise illegally expropriated African land which had been acquired without any material compensation. The first of the legal regimes to 'legalise' the land so acquired was the 1902 CROWN LANDS ORDINANCE which was followed by 1915 CROWN LAND ORDINANCE. These two allowed for land to be expropriated from Africans and reallocation of it to the surplus white population from the metropolis who paid the crown, nominal fees, for the grants. These legal moves altered the legal relations to property as defined earlier (in pre-colonial society) and had deep direct economic and political impacts on the African people. At law the decrees (ordinances) according to the colonial chief Justice had the following implications:-

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the use of a native tribe in the crown ... all native rights in such reserved land, whatever they were, disappeared and natives in occupation of such crown land became tenants at will of the Crown of land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier - such land would include fallow. Sec. 54 of the Crown lands Ordinance, 1915 puts a specific embargo on any alienation by such tenant (23)

The administration's policy destroyed all the African tenurial rules existing up to that time. This remained the position 'de jure' up to the eve of independence.

Secondly jurisprudentially the pre-colonial communal property relations were turned into mere rights of a tenant at will of the Crown. The colonial state became the dominant political authority and feudal owner of African land in accordance with capitalist property relations in the metropolis but short of it because the African could not alienate the land. This

limitation applied to even production of cash crops. In a political economy that was being transformed into a capitalist economy the African did not 'own' land nor could he grow cash crop. This was institutionalised discrimination against the Africans and the courts accepted it. (24)

No grants similar to these given to settlers could be given to Africans. (25) And White settlers were not allowed to alienate their grant lands to Africans. In 1929 the 'apartheid' was fully expressed in Kenya (Highlands) Order-in-council which prohibited Africans owning land in the "Scheduled Areas" (White Highlands). These constraints and restraints and demands for tax money forced the Africans to seek employment in the Whiteman's farms and homes. Thus the colonial political economy up to the time of the second world war was one of the monopoly of means of production by the Europeans (and impoverished wage-labourers on the part of Africans.)

After the second world war the process of expropriation on the masses still continued when in the 1950s under two ordinances (26) land was expropriated without compensation from nationalist resisters. The Africans were by now completely depropertied. They were either tenants of the state or the white-settlers, They did subsistence tilling as well as wage-labour. This was way of life for majority of Africans during the colonisation.

Asians were too excluded from agricultural land on the pretext that land belonged to the Africans and was inalienable except to the whites (27). However, unlike the Africans and since they had money gained from railway labour and labour from other colonies they were able to engage in small scale commercial enterprises. In time they became dominant in commercial and Industrial activities. Indians occupied the middle rungs of pay and status hierarchy even in state administration. As Colon Leys (28) puts it,

In 1961 over 70% of all the locally owned industrial enterprises with 50 or more employees were Asian owned.... they probably owned three quarters of non-agricultural assets of the country (29)

They formed a local commercial and Industrial petty - bourgeoisie.

The other aspect of colonial political economy was that after the second world war, and as the majority of propertless Kenyan masses started showing their dissatisfaction through open hostilities, a class of landed and educated Africans had emerged. These two categories (even a person would be educated and landed) obtained their wealth in the years immediately preceding Independence transition. The group consisted generally of chiefs' families and anybody else with secondary education or above. And most of them acquired wealth as a direct response to emergency. As the Mau-Mau war dragged on the colonial government recognized the need to accommodate the 'obedient' Africans and eventually use them to protect their interests. However, they had to be bribed by property

THE POLITICS OF CONSCIOUS DECOLONIZATION

expropriated from their fellow but militant Africans. Therefore
In 1950s both internal and external forces led to the
most of the land expropriated from the Mau Mau fighters and supporters
strategy of conscious decolonization. The Africans in lower
by the two above mentioned legal regimes were given to these
ranks consisting of squatters (already repatriated back to the
collaborator Africans. As the 1950s wore on these and the educated
reserve classes leaving being stripped off whatever livestock they
elite constituted the petty peasant bourgeoisie. They were
had), the urban wage-labour force, the Nairobi jobless crowd and
allowed to grow cash ~~some cash~~ crops (30) in the late 1950s and
the state servants-at-will in the Reserves, led by largely
employed cheap labour from their poor local mates. Later after
uneducated but talented and experienced town-dwellers had already
individual registration of land they were able to accumulate most
crystallized into a militant group resisting colonial rule by
land by buying out their poorer family and clan members. This
force. These certainly played the largest part in the Mau-Mau
was the way they increased their gain in business and agricultural
fighting and supported the radical mass movement calling for
industry. Thus on the eve of Independence ~~to~~ transition a group
total economic and political independence. The settler govern-
of Africans had emerged very much propertied.
ment tried to meet their demands by initiating individualization
programme in the reserves in the hope that by holding to titles
of small land patches, this group of impoverished Africans
would feel they have got their property back and stop hostile
activities. This plan found juridical expression in the 1956 Native
Land Tenure Rules (32) which called for land consolidation,
adjudication and registration within central Province (33). The
leaders (chiefs etc) applauded the plan (34). The African elites
who stood ^{to} gain the most were ready to get into the oppressors'
shoes or join them. This was indeed a ^{welcome} well come move to the
Africans who had been previously denied land certificates, and for
the prospect of getting loans from the financial institutions
on the strength of title deeds. Although this had to benefit
the 'better' farmers-cum-salaried employees, the privatization
of land worked a lot in dulling the peasant's political con-
sciousness especially after independence. However the cry for
total independence economically and politically did not cease by
this privatization. The reserves had been overcrowded due to
rising population and the squatters expatriated back from white
Highlands under emergency regulations. So instead of seeing

THE POLITICS OF CONSENSUS DECOLONIZATION

In 1950s both Internal and external forces led to the strategy of consensus decolonization. The Africans in lower ranks, consisting of squatters, (already repatriated back to the reserve enmass ^{after} leaving being stripped off whatever livestock they had), the urban wage-labour force, the Nairobi jobless crowd and the state tenants-at-will in the Reserves, led by largely uneducated but talented and experienced town-dwellers had already crystallized into a militant group resisting colonial rule by force. These certainly played the largest part in the Mau-Mau fighting and supported the radical mass movement calling for total economic and political independence. The settler government tried to meet their demands by initiating individualization programme in the reserves in the hope that by holding to titles of small land patches, this group of impoverished Africans would feel they have got their property back and stop hostile activities. This plan found juridical expression in the 1956 Native Land Tenure Rules (32) which called for land consolidation, adjudication and registration within central Province (33). The leaders (chiefs etc) applauded the plan (34). The African elites who stood ^{to} gain the most were ready to get into the oppressors' shoes or join them. This was indeed a well ^{welcome} come move to the Africans who had been previously denied land certificate, ^{besides} and for the prospect of getting loans from the financial institutions on the strength of title deeds. Although this had to benefit the 'better' framers-cum-salarised employees, the 'privatisation' of land worked a lot in dulling the peasant's political consciousness especially after independence. However the cry for total independence economically and politically did not cease by this privatisation. The reserves had been overcrowded due to rising population and the squatters expatriated back from white Highlands under emergency regulations. So instead of easing

the problem the programme increased ^{it} because landlessness rose steeply and fast. Meanwhile the external pressure was building up on British Colonisers to grant formal independence to the nationalists. This was the price the European powers in general had to pay for American intervention on their behalf during world War II. They had opened up the door in the colonies for American capital and consumer goods. The competition of international capital led to the extension of the capitalist sphere into other peasant areas. This also required a non-hostile environment which meant granting of political reins to non-radical 'nationalists'. To achieve this a plan was needed to overcome the radical and co-opt the non-radical 'nationalists' in a programme for independence ^{These} ~~who~~ would allow the continuity of colonial economy and at the same time bring to an end the state of anarchy which had occasioned the declaration of emergency. ^{esp} The newer commercial and industrial interests (mostly American) plus the less conservative settlers started lobbying for alliance with African leaders who were prepared to accept private enterprise system and the continuity of colonial economy after independence. These two groups moved under the leadership of New Kenya group party. Its fundamental philosophies included rights of private property and sanctity of contracts to ^{be} ~~the~~ respected - simply free enterprise economy. Its political strategy was the production of African leaders with interests and ideals similar to those of colonialists. And this became the basis of collaboration between them, the Asians and later the group of propertied and elite Africans. When in 1960 the Kenya (White Highlands) order-in-council was revoked by the Kenya (land) order in council the African and propertied petty bourgeoisie joined the New Kenya Group Party and henceforth in the subsequent Independence bargains, fostered the same interests and this pre-empted any radical reforms in

Independence era. After 1960 and 1962 Constitutional conferences the sanctity of private property was agreed upon as one of the safeguards of Minority rights.

1. PRIVATE PROPERTY: THE HISTORY OF AN IDEA. SCHLATTER RICHARD B.

2. *Ibid.* Chapter 8 Independence constitution Sec. 19 (35) put stringent conditions

3. *Ibid.* Quoted in Chapter 238

on compulsory acquisition of property and even when it is permissible to take over private property full compensation must be promptly paid. Any property or Interest in property, can only

4. "The Origin of family, Private Property and the State." Karl Marx & F. Engels - Selected Works Vol. 3

5. 'Commodity' is here used throughout the discussion used to mean an item produced not solely for its consumption purpose to the producer but also for its exchange-value - for sale country planning or the development or utilisation of any in such

6. "The Origin of family Private Property & State" (36) says.

pg. 316

these are fairly wide exceptions but would nevertheless exclude

7. *Ibid.* pg. 318

arbitrary acquisition of private property. Acquisition by force

8. Frederick Engels - *Supra*

without compensation is what the economically superior races

9. *Ibid.* page 330

feared a radical government might do. Yet they themselves

10. See especially United Nations (C.A.) Permanent Sovereignty especially the Europeans had done exactly that - they paid only nominal fees to the grants of land they get from the colonial administration. This section is now incorporated in Sec. 75 of

over natural Resources, Res. 1803 (XVII) of 14 Dec. 1962 and Res. 3281 (XXIX) of Dec. 12 1974.

11. What the Friends (37) Peasant are and How they pass the the Kenya Constitution and is one of the few sections that have never been tampered with since independence. Besides the section

question of Peasantry: A Reply to Mukuru-Ng'ang'a, Dept. of Govt. Staff Seminar No. 1, 1978/79, January, 1979

puts a condition in favour of the owner of property which says

12. For religious attitudes see: J.S. MBIEMI - AFRICAN RELIGION AND PHILOSOPHY

that the public necessity prompting compulsory acquisition must

13. (1913-1914) K.L.R. Vol. 1, 31 be such that it affords justification for the causing of hardship to the owner. Acquisition is also subject to the rule that

Also see: MUDORO BIN MWAMBA - V - A.G. (1953) T.L.R. 327

the law authorising it must provide provisions for prompt and just

14. Vol. 8 K.L.R. 1913 - 1921 145 payment of full compensation. The person being deprived of his

15. Land Tenure is used to mean ideas concerning landholding wealth has a constitutional right of access to the High Court for both determination of compensation and legality of acquisition and

and a people's relationship with land.

15(a) Also See E. Cotran in Restatement (2) Succession (Sweet's)

compensation. [He has a right to take the money to a country of his choice.] This was repealed by Act No 13 of 1977

and M. G. Cluckson, B.L. T. I. S. A. V. I. N. I. T. I. A. L. in

Trials Society (London, D.U.P., 1967.

FOOTNOTES
I N D E X

17. Ibid. at page 45-46
1. PRIVATE PROPERTY: THE HISTORY OF AN IDEA. SCHLATTER RICHARD B.
2. Ibid. Chapter 8
3. Ibid. Quoted in Chapter 238
4. "The Origin of family, Private Property and the State."
Karl Marx & F. Engels - Selected Works Vol.3 ✓ Publisher?
5. 'Commodity' is here and throughout the discussion used to mean an item produced not solely for its consumption purpose to the producer but also for its exchange-value - for sale
6. "The Origin of Family Private Property & State" (Supra) pg.316
7. Ibid. pg. 318
8. Fredrick Engels - Supra
9. Ibid. page 330
10. See generally United Nations (G.A.) Permanent Sovereignty over natural Resources, Res. 1803 (XVII) of 14 Dec. 1962 and Res. 3281 (XXIX) of Dec. 12 1974.
11. What, The Friends of Peasant are and How they pose the question of Peasantry; A Reply to Mukaru-Ng'ang'a. Dept. of Govt. Staff Seminar No.1, 1978/79. January, 1979 *(A quoted item)*
12. For religious attitudes see: J.S. MBITHI - AFRICAN RELIGION AND PHILOSOPHY
13. (1913-1914) K.L.R. Vol. 1, 31
Also see; MTORO BIN MWAMBA-V-A.G.(1953)T.L.R. 327
14. Vol. 8 K.L.R. 1915- 1921 145
15. Land Tenure is used to mean ideas concerning landholding and a people's relationship with land.
- 15(a) Also See: E. Cotran in Restatement (2) Succession (Sweet & Maxwell) and Maxwell; M. Gluckman, POLITICS, LAW AND RITAL in Tribal Society (London, O.U.P., 1967.

(16)

17. *Ibid.* at page 45-46
18. "Land law and Custom in the colonies" London:O.U.P. 1946)
19. *Ibid.* pages 26-27
20. *Supra* Footnote (4- 15(a))
21. "Family Estate in Africa" Ed. Gray & Gulliver "Gusii Family" by Robert A. 63-64
22. The case of Olle Jogo-V-Attorney General (1914)5F.A.L.R. 70 reveals the fraud perpetrated on the Maasais.
23. GATHOMO -V- INDAGARA (1922-1923) K.L.R. Vol.9 102 at pg. 104
24. *Ibid.* - for the case of land and *BBIU -V- R.* (1951) K.L.R. Vol.24(2) 130. African Green Coffee Rules, 1949, Govt. Notice No. 1172 of 1949
25. Secs. 71 and 73 of 1915 Crown Lands Ordinance
26. (1) Forfeiture of lands Ordinance, No. ii of 1954 amended in 1955 by Ordinance No.4 and then repealed by Ordinance No. 27 of 1959.
27. *Gwanombi -V- Alidina Visram* (*Supra*) suggests this
28. (Underdevelopment in Kenya - Colin Leys - London Heinemann (1975)
29. *Ibid.* page 45
30. *Supra* - footnote 26
31. Colin leys - *supra* - page 53
32. Legal Notice No.454 of 1956
33. This was as intended to be a punishment to the Mau-Mau fighters and their supporters during the process their land was confiscated and given to collaborators.
34. See Legislative Debate 1957, for Tom Mboya's Speech.
35. (1963) L.N. No. 718 of 1963
36. Independence & safeguards in Kenya, 3 E.A.L.J. 1967
37. Act No. 5 of 1969.

CHAPTER TWO

This chapter will examine the behaviour of the Kenya Government and its legal regime during the first decade of independence in relation to the sanctity of private property. At the end of the chapter it will be clear whether private property has been protected or not.

2:1 The Transition

It is a historic fact that Kenya's political Independence was a culmination of both external and internal forces. External because, as we have noted elsewhere, the price the European powers had to pay for American intervention on their behalf during the second world war was to open the doors in their colonies for American capital and consumer goods. As a result a new form of capital, the international capital in form of industrial capital, intervened and encouraged peasant bourgeois agriculture in Kenya immediately after 1945.

Hitherto Kenya's legislature was subject to the two major marks of dependency of a colony: According to the imperial parliament had which meant, at least for the Americans, granting of political power to the non-radical group of African nationalists. This and the admission of socialist states into the UN body prompted unprecedented cry in the international forums for speedy decolonisation.

This obviously helped much in the attainment of Kenya's independence by 1963. Besides the crown had a power of veto and disallowance, according to be done in conformity with royal instructions. Because of this it has been suggested that, legally "to give, than erasing the marks of colonial dependency"(3). On the night of 12th Dec. 1963 the hitherto

The internal forces as the previous chapter has shown, were the protracted struggles by the peoples of Kenya - the struggle was both violent and through the constitutional means available. This and the realisation by the less conservative white community that a new form of political alliance with the elite class among the Africans was necessary for their continued dominance in Kenya, led to the 1960 and 1962 constitutional conferences. The result of the two

conferences was the formation of a constitution based on the Westminster model⁽¹⁾ but with provisions for the protection of minorities.² The protection of private property was one such provision. This constitution was the basis upon which Kenya was to enter the independence era. Internal self-government was granted on 1st June 1963 and the self government constitution after minor modifications, became the independence constitution at the attainment of full independence on the night of 12th Dec. 1963.

The two important instruments in this transfer of power were the independence constitution and the independence Act (1963). The independence constitution contained the layout of internal government and individual rights. The Kenya independence Act was an Act of British Parliament which renounced Britain's right to legislate for and govern, Kenya. It removed all limitations on the Kenya's legislature and the effectiveness of the Royal instructions. Hitherto Kenya's legislature was subject to the two major marks of dependency of a colony, According to the *imperial constitutional theory, a?* imperial parliament had power to legislate directly for Kenya. Kenya's legislature could not pass laws inconsistent with the imperial legislations. Besides the crown had a power of veto and disallowance, *Everything had* according to be done in conformity with royal instructions. Because of this it has been suggested that legally "to give *independence means no more or less,* colonial dependency"⁽³⁾. On the night of 12th Dec. 1963 the hitherto Kenya colony and Protectorate became an independent sovereign state with full powers to regulate her internal and external affairs. It was so recognized by, and became a member of, international community with rights and duties that go with such a recognition. She acquired a voice in the decision making process on the international matters. She had henceforth to abide with international law and shoulder the international responsibility. Because of this it is deemed helpful to briefly comment on international law and international responsibility. v

However when the Africans got independence a new relationship between International law is that branch of law consisting of rules which the state, individuals and international law arise. The inter-govern sovereign states in their relations and conduct towards each national responsibility which goes with the sovereignty has the other in relation to adherence of certain agreed objectives. They question of human rights as a major ingredient. The right to own are a kind of conventional rules having their source in international property individually, and the duty of the state to protect this agreements. Lord Russel in 1896 defined it as:

"the aggregate of the rules to which nations have agreed to conform in their conduct toward one another" (4).

Lord Cockburn had earlier in R-V-KEYN (5) said that for international law to be binding it "must have received the assent of the nations who are bound by it". What this means is that international law derives its force ^{from} in treaties (6). For a treaty to be effective there must be free consent, good faith and respect for its observance (7).

In 19th century international law principles were rarely applied to the African colonies. Although the Europeans entered into 'treaties', with African kings, chiefs and other heads of various communities, and indeed regarded them as sovereigns for the purposes of those treaties, the reality is that during almost the whole period of colonialism, Colonial powers rejected any suggestions that international law applied to the colonial territories. The treaties were therefore without effect except when used to further colonial interests (8).

The economic interests of the colonisers were paramount in all dealings with the colonised. International law principles were invoked only when such interests were threatened by either the colonised or fellow colonial powers. It never at all protected the colonised.

Explaining this phenomenon, Professor Muskat wrote, such as "In an age when the tendency was to exalt Machiavellian type of statecraft, it was difficult enough for Christians (Europeans) to observe restraints advocated by the early writers of international law, towards infidels and heathen people" (9)

The free enterprise economy has designated the individual ownership. Thus in general, international law in Africa only intervened to avoid war between the colonising powers. The people living in the colonies could not avail themselves of the safeguards of that branch of law.

However when the Africans got independence a new relationship between the state, individuals and international law arose. The international responsibility which goes with the sovereignty has the question of human rights as a major ingredient. The right to own property individually, and the duty of the state to protect this right, has been pegged to the human rights question.

not be in direct conflict with the nation's socio-economic system. A focus on the question of human rights shows that it has been given *much attention since world war II.* Since then the global organisations, (and nations all over the world, be they peoples Republics, liberal democracies or non-aligned states, have come to accept the importance of such organisations), have given much prominence to the question. Therefore much as each nation, which is a member, would loath the global scrutiny of its internal affairs they are however obligated to abide by some general regulations laid down by the organisations. The question of human rights is such a fundamental one in these organisations that its respect is prerequisite to participation in almost virtually every aspect. Thus preservation of human rights has become a responsibility every member must shoulder as an international obligation. Generally it is difficult to define human rights exhaustively. Nevertheless it is possible to identify some set of principles that constitute its core and which are given direct and meaningful link with international law. Such rights are those deemed to be inherent in human beings. Such rights are the right to live, freedom of speech and expression, etc. Others are those deemed to be facilitative i.e. those which help to give meaning to the inherent human rights such as the right not to be discriminated against on grounds of sex, colour and etc. Discrimination hinders enjoyment of other rights. The free enterprise economy has designated the individual ownership of property as a fundamental right inhering in man. Its protection is therefore *fundamental*. Notwithstanding the pertinent questions and *doubts* as to how far the right to own something at the virtual exclusion of other is inherent in man, the political economy

of capitalism has given it the prominence demanded by other rights. To the free enterprise world, it is an international responsibility each nation must shoulder. Fullest realisation in the implementation of such a responsibility finds meaningful effect under national laws and institutions of the state. Therefore, if the municipal government of independent Kenya will not be a gangster government. The law is to recognize such a responsibility, the responsibility must not be in direct conflict with the nation's socio-economic system. It must express the aspirations of the country so that it can find accommodation in the country's legal framework. We cannot say that the aspirations of the Kenyan masses was enhancement of the colonial structures of ownership. However, as we said in chapter one, the state is an expression of the economically and politically dominant class not of the masses. This is true even under modern 'representative' governments. We have also shown that due to external and internal forces, the people who took over the state management had already been coopted into the colonial system. They had acquired material interest in the colonial economy. They therefore, did not want to fundamentally disturb it. Furthermore they had developed capitalist tastes through the educational process, and the climate in which they had lived in since school. They were from the elite class of Africans. They, too, were people with secondary education or above with salaried jobs and property. They would therefore dislike anything which would purport to disturb this 'status quo'. Their aspirations were a back-led country with the patterns found in socio-economic institutions of colonial capitalist Kenya.

The significance of this is to show that the international obligation to protect private property was in line with the system these people wanted to build.

referred to in over 2:2 THE PROTECTION DURING THE FIRST titled 'African
socialism' but a close DECADE (1963 - 1972):THE PLITICAL ASPECT

socialism in it. It equates free enterprise system with
Kenyatta, the first President of Kenya who ruled for fifteen years,
socialism although supports to reject capitalism, communism
was completely clear and consistent on this issue since his release
from detention in 1961. Soon after his release he said "the govern-
ment of independent Kenya will not be a gangster government. The
time has come to for-get the past." (10) In other words there was
to be no radical change. The socio-economic structures to be preserved
were those accepted to the international bourgeois community. That
is why Ghai and McAuslan have rightly observed that "... there is a
heavy emphasis on protection of Private property which inevitably
benefits those, mainly non-citizens, who had large amounts of property
at independence"(11)

The political willingness to continue this protection after independence
is indeed striking. It is amply demonstrated by Kenyatta's speeches
after formal handover of government machinery. At a meeting in
Nakuru he told the audience that : "those who have been panicky about
their property ... can now rest assured that the African
government will not deprive them of their ownership ..."(12)

Late 1963 he addressed the settlers at a Nakuru meeting and told them,

"We want you to stay and farm our country You must also
learn to forgive one another. Kenyatta has no intention of
retaliation or looking backwards (13)"

This was Kenyatta's opinion on protection of private property. It
epitomises the official thinking because Kenyatta patronised the ruling
party KANU and the government. KANU dominated the government and
Kenyatta dominated KANU which was a loose party of patrons. Therefore
his thinking ^{used} was to influence the policy. Indeed those who did
not agree ^{with} on this moderate approach were soon isolated from the party
and consequently ^{left} out of the government(14). The leadership was entirely
left into the hands of the capitalists. This indicates that private
property was to be vigorously protected. This is reflected in the
government's blue print on development. It has been repeatedly

referred to in every development plan. The paper is entitled 'African socialism' but a close analysis reveals that there is very little socialism in it. It equates free enterprise system with African socialism although purports to reject capitalism, communism and marxism (16). Its capitalist bias is indicated by the paper's advocacy of 'mixed economy' which if put to strict scrutiny is capitalism. It seeks to encourage private investors indiscriminately. It severely restricts public ownership of the major means of production which is contrary to any known socialism(17)." The constitution and the KANU manifesto make it clear that African Socialism in Kenya does not imply a commitment to indiscriminate nationalisation"(18)

This coupled by the fact that there has been virtually no instance of nationalisation shows that the government does not favour public ownership. The only incident of complete nationalisation during the first decade of independence is the 1964 Kenya Broadcasting Corporation nationalisation. Under KBC, (Nationalisation) Act (cap.221). Adequate compensation was paid, mostly for profitable benefits under contracts which has ten to twelve years to run. In all other cases the government was entered into partnership with the owners though mostly acquiring more than half the shares thereby making the undertaking look like a government organisation (19).

The primary means of production in Kenya is land. Therefore to understand the government's attitude towards private property, we must examine briefly how it has dealt with the question of land ownership since independence. Before independence the colonial government emphasized an individualisation of land. At first the emphasis was on European private ownership. However, by 1950s, the external and internal forces which led to attainment of independence also led to the famous 'Swynnerton' Plan (20) This plan envisaged a reproduction of land capitalisation which took place in Europe, starting in 15th century (21). The plan as we saw in chapter one, found juridical expression in the Native land Tenure Rules (22)

process began by colonial government has been continued. This which called for land adjudication, consolidation and registration within the African areas, mostly central Province. The African elite, who later took over the state management, applauded the plan (23). This they ^{did} while their counterparts in other areas were rejecting the plan (24). The reason is that in Kenya the elite did not want state ownership of land. This is understandable because they stood to gain in the process. The 1956 Rules and the superceding legislations soon extended the 'privatisation' of land to other areas outside central province. After independence the government simply continued the process, and reforms which were, initiated by their predecessors. This merely sought to enhance the land ownership pattern as has been dictated by colonial forces. The independent government did not concern itself with redistribution before taking further the process of individualisation. Instead it sought to protect land tenure relations as per 1963. Clear examples is section 143 (1) of the Registered Land Act (Cap.300) of 1963 which protects the first person to be registered irrespective of how he acquired the land and section 95(5) which states that no particular race was to be denied ownership. Although this ^{Section, 95(5)} might seem advantageous to Africans its real effect is to give the settlers protection over the lands they had 'illegally' acquired from the Africans. ^{How?}

The 1960 Kenya Land Order in Council abolished the White Highlands. Consequently the African elite penetrated into the area on a willing-buyer - willing seller basis. To date, a number of landless people have also been resettled on settlement schemes created out of land loans given by British government to Kenya but deposited abroad for buying out British farmers. This has made the government strict on the question of private land ownership.

The above data indicate that after independence the individualisation and its protection be transgressed. Sections 114 - 120 of the same

process began by colonial government has been continued. This continuity further indicates that the philosophy of the independent government towards ownership in general is similar to that of colonial government except in the racial character of the former.

2:3 The Protection during the first decade:

The legal Aspect.

The fundamental principles of Kenya's legal framework are to be found in the constitution (26). The constitution is the supreme law (27). It has been stated that "The constitution lies at the roots of our present day political institutions and, if a constitutional (writer) ^{write} ~~at~~ lawyer were to ~~wirte~~ ^{write} about Kenya in the same strain as Dicey did about England he would ... have to emphasise the supremacy of the constitution. ⁽²⁸⁾ The supremacy stressed here requires that all laws should be made in conformity with the constitution otherwise they will be null and void to the extent of inconsistency. The constitution enhances the sanctity of the individual property. Section 75 reproduces section 19 of independence constitution ^{from} (29). In summary, sec.75 states that no property of any description shall be compulsorily taken except where conditions specified in paragraphs (a-c) of subsection one are fulfilled. Subsection two gives the deprived person an express access to the High court of Kenya for the determination of his interests or right: the legality of acquisition, the adequacy of compensation money and for the purpose of obtaining prompt compensation. Under subsection four he has a right to remit the compensation money to a country of his choice at any time.

The section (75) is an entrenched one. Section 83 of the same constitution (30) allows any Act of Parliament to derogate from most of the rights in Part (V) of the constitution at a time of war. But it states that under no circumstances would the right to property and its protection be transgressed. Sections 114 - 120 of the same

in the Trust Lands ~~be~~ unadjudicated areas. Admitting that the constitution is supreme law and the foundation of Kenya's legal order ^{than} it is a good and valid contention to say that private property is adequately protected through the legal framework. And this alone is enough to pre-empt any contrary contention. The Linch-pin of such a contention would be the exceptions that accompany (Section 75 (and section 118)). These look fairly wide exceptions to the extent of almost rendering the sections meaningless. The conditions ^{exceptions} allow 'compulsory acquisition' and taking possession' of property if fulfilled. Under these conditions (which are wide heads) any unscrupulous government can deprive people of their property on flimsy and at times frivolous grounds. So, for the section to afford protection to owners, two states of affairs must be present. Firstly, the political willingness and good will to uphold the sanctity of property. This we have shown in the preceding discussion that it is more than enough. Secondly, the judiciary must be willing to give the section juridical interpretation in a manner likely to offer adequate protection. This is what we are going to examine presently. But before we do that a number of general observations will be made to give a clue to how the judiciary behaves. Firstly, for the judiciary to give meaning to the 'government' policy there must be 'ideological parity' between the two i.e. Executive and Judiciary. Admittedly, in this area, this ideological parity is not lacking in Kenya. We will see a striking dialectical connection between the Judiciary and the Executive. There will also emerge evidence of continuity of the colonial philosophy in independent Kenya. However, we are limited in our

because there is a dearth of the same in other areas of ownership. But it is ^a safe - assumption that the trend would be no different especially in view of what we have seen in the area of 'nationalisation' i.e. government's willingness to pay very adequate compensation^a(31)

Before compulsory acquisition is made the conditions that are to be satisfied are:-

(1) The acquisition must be 'necessary' in the interests of defence public safety, public order, public morality,¹² public health, town and country planning or the development or utilisation of the property in such manner as to promote public benefit.

(ii) The 'necessity' must be such as to justify any hardship to the owner.

(iii) Provision must be made by law applicable to that ... acquisition for the prompt payment of full compensation. The constitution must have envisaged a special law applicable to a takeover under section 75. In 1968 Parliament passed the Land Acquisition Act which now seems to cover the situation.

Before the present land Acquisition Act (1968), the Indian Land Acquisition Act 1894 presumably applied, which, although it does not provide for prompt payment of full compensation provides for compensation. The grounds listed in (i) above, are very wide and give the government the defence ^{excuse} of any prevailing circumstances. ?

IN NEW MUNYU SISAL ESTATES - V THE A.G. OF KENYA (32) The Plaintiff sued the A.G. for compensation and for several other reliefs in connection with a sisal estate taken over by the government of Kenya for the purpose of settling squatters on it. During the hearing the conditions (i) and (ii) above were not argued but the judge in his pronouncements showed that he would have accepted the 'purposes' given by the defence as valid within the context of section 75.

"... there is no evidence on this from either side but the necessity is not challenged". (35)

.../

In reference to (i) above, he said,

....." there was no suggestions that the acquisition is necessary in the interest of defence, public safety morality, or utilisation of the property in such a manner as to promote the public benefit"(33)

While the writer agrees with the learned judge, the late channan Sigh, that this was a trully good public purpose, he hastens to add that it is not always a 'public purpose' in a capitalist society will be for the common public. In a capitalist society public purpose often means public purpose in a class context. It does not

always mean public purpose for the public at large. Often it is used as a slogan or a cloak to increase or perpetuate the wealth of those who control the means of production. Indeed the writer recognizes that public purpose relities may at times accrue benefits to those of the economically and politically weak class, but this comes to them indirectly. For example a road built to boost mining in an

areas will often benefit the general public in that area indirectly but in the direct sense it is to boost the wealth of the few who control the mining industry. Indeed the use of public purpose doctrine under section 117 of the constitution has revealed that the doctrine in Kenya has been applied to deprive the indigenious people their customary land rights in order to establish industries which would largely benefit the few individuals who will own them.

The section has been used to set apart land in Diani area of Coast Provinee for the purpose of building a tourist resort complex and under the pretext that the persons resident in Diani area will benefit

by reason of revenue to be derived from the rent reaped thereof (34) In reality this will benefit the few monied tycoons who will acquire the plots and build hotels. They may not even have come from the area of Kenya

In regard to condition (ii) above, the learned judged noted that the necessity must be such as to justify any hardship caused to the deprived owner but pre-empted any ruling by saying that,

"... there is no evidence on this from either side but the necessity is not challeged".(35)

Handwritten notes on the right margin, including "1/11" and "1/13".

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However the writer is of the opinion that the formula would not be any different from that of public purpose doctrine as stated above. The judge, however, dealt at length with condition (iii), above - that 'provision must be made by law applicable to that ... acquisition for the prompt payment of full compensation.' In regard to the law applicable he commented that, "There are difficulties. First the constitutional provision apply to property in general whereas land Acquisition Act applies to 'land'" This presupposes that if any acquisition is to be made on 'general' ^{property} then an Act must be passed by Parliament for that particular purpose. This caters for any circumstances that might arise in future. The only case of nationalisation we have already mentioned renders support to this proposition. A ~~law~~ law, the K.B. C. (nationalisation) Act (Cap.221), was passed specially for the acquisition of that organisations. Once a law for the acquisition and acceptance of liability, ^{is made} the judge saw the problem to be the question of the amount payable. Section 75(I)(c) envisages the payment of full compensation. The constitution does not define the term. Neither does the Land Acquisition Act of 1968, for it says, in section 8 that

"where land is acquired compulsorily under this part, full compensation shall be paid promptly to all persons interested in the land."

The judge was of the opinion that "the similarity between this language and the language of the constitution affords some indication of Parliament's intention as ^{to} the measure of payment"(36) He saw his duty then as to lay down a principle of that intended measure. He said, "Damages would be recoverable. These would be equal to the market value of the assets taken over plus 15% for immovable assets under the land Acquisition Act. Market value only recoverable for moveables in either case."(37)

It is not clear why he deemed fit to make this distinction. Perhaps the hardship caused by loss of immovable ^{is} severe than that of moveables. However, this is only ^a mere speculation.

Chanan Singh's formula had been earlier applied in the case of MANNY-V- THE COLLECTOR (1957) E.A. 125 (38)

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It was held in that case that 'the market value of land is the basis on which compensation must be assessed and market value is the price which a willing vendor might be expected to obtain from a willing purchaser and a willing purchaser is one who although he may be a speculator is not a wild or unreasonable speculator. He must be of good ability and well qualified to put the land acquired to best advantage'.

This is a stringent formula and if followed the 'owner' ends up getting slightly more than, or, the value of his property. In both of these cases the court awarded plaintiff more than he had been offered as compensation in the first instance. The court's formula is the same as the one recommended by a report of a committee on acquisition of land (39). Here we see a concurrence on the ideological principles between the judiciary and the executive. The Manny Case was decided during colonial period and the New Munyu case after Independence. This is an obvious case of continuity of colonial principles. It is a further indication that ^{the} executive is committed to complete protection of private property and the Judiciary perceives its role as one of implementing that policy and interpreting it as strictly as is possible. This is cleared further by the decision of SULEIMAN DHAMJI -V- COMMISSIONER OF LANDS (40). The plaintiff had been taxed on the compensation money which was regarded as income from transfer of property. The court held that compensation money is not taxable. The reasoning was that since there is no provision in the land Acquisition Act (1968) which authorises the deduction of income tax, then it is not taxable.

Given the above executive policy and this judicial approach one is then justified to conclude that property in Kenya is adequately protected as demanded by capitalist principles. Such provisions as section 75 should not ^{be} seen in isolation for one might get a misleading conclusion. Section 75 of the Kenya Constitution is a source of eminent domain (41) and is also protective. It is in line also with the functions of a modern capitalist state. As

Winston Churchill commented,

2:4 - CONCLUSION

"..... the vital process of civilisation and the combined interests of millions gurarantee the security of property. A society in which property is not protected would degenerate into barbarism; a society in which property is absolutely protected (secure) irrespective of all conceptions of justice in regard to the manner of acquisitions would degenerate not into barbarism but death" (42)

It is for this same reason that the writer is not prepared to have accept such laws as Income Tax Act (1973), the Estate Duties Act ^{as} are a derogation from the tenets of capitalism. They obviously take away most of an individual's wealth without his consent but nonetheless they are vital for the continued existence of the system. Such funds are needed by a 'welfare' capitalist state like Kenya (43) if the system is to survive the pressures from socialists, marxists and communists.

state's commitment to individual ownership of property and option to participate in partnership with other investors rather than initiate public ownership underscores its commitment.

The Juridical interpretation of this commitment has been to even take the protection further, as we have seen from the only illuminati cases we have.

Finally the form of capitalism in Kenya is a transitional one - from 'primitive' to 'welfare'. Hoever in either form the protection of private property is a prominent principle. It would therefore be superflous to argue that private sproperty has not been well protected in a country where capitalist economic relations dominate.

2:4 - CONCLUSION

1. De Smith, S.A. The New Commonwealth and its Constitutions:
 From our analysis it becomes clear that capitalism has been the dominant mode of production ^{during} the first decade of independence. This is by the virtue of its overwhelming dominance in non-agricultural sector and to a lesser degree in agricultural sector. We have also seen that at the eve of independence the Kenyan society had evolved a class of African elite who took over the state management from the colonial rulers. This ruling elite formed a class of local African capitalists ~~to~~ to perpetuate the pattern of colonial ownership and institutional structures, stripped-off racial overtones. After independence this local capitalism has operated on the sidelines with foreign capital, and ^{the} state as the agent. Hence the state's commitment to individual ownership of property and ^{its} option to participate in partnership with other investors rather than initiate public ownership underscores its commitment. ?
2. The term Minorities here refer to the various tribes who made up KAPF and APP and the White and Asian Communities.
3. The term 'Public Programs' refers to the various public programs.
4. (1976) 2 E.A.L.J. 123
5. The Juridical interpretation of this commitment has been to even take the protection further, as we have seen from the only illuminating cases we have.
6. A treaty is an agreement between entities having international personality i.e. between sovereignties. See E.A. L.J. Vol. 10 No. 1974 - International Responsibility and its Implementation. Dr H.W.O. Okoth Orendo. Also See: Olle Jogo -v- The A.G. of E.A. Protectorate (1914) S.E.A. L.R. 70
7. Vienna Convention on the Law of Treaties (1969). This was a reaffirmation of the already existing principles.
8. This is exemplified by Olle Jogo -v- The A.G. for East Africa Protectorate (Supra) and Nyali Bridge -v- A.G. for Kenya Colony (1959) E.A.L.J.
9. The Process of African Decolonisation: India Journal of International Law, (1966) page 405 as quoted in E.A. L.J. vol. 3 (1971) at page 284.
10. Jomo Kenyatta: Suffering without Bitterness: E.A.P.H. Nairobi

containing Kenyatta's speeches.

11. Y.P. Ghai and J.P.W. McAuslan: Public Law and Political change in Kenya (Supra) at page 429.
12. Jome Kenyatta: Suffering without Bitterness (Supra) at page 147
13. Ibid at page 153
14. By 1966 the then Vice-President Mr. Oginga Odinga and a Leader of the radical KANU wing had been forced to resign. He formed the short lived opposition party - KPU.
15. African socialism and its Application in Kenya. Nairobi. Government Printers (1965) Sessional paper No.10.
16. Ibid, - clauses 18 - 22
17. See: chapter one of present work for the writer's definition of socialism. Chapter I: (ii) Pre-colonial (capitalist) Societies' economic Relations 1.9) of this chapter.
18. African socialism and its application in Kenya (Supra) - pages (26 - 27) clauses 73-77
19. In April 1970 the government purchased 51% of E.A.P and Lighting Co. Ltd., In 1971 it acquired 60% of National and Grindlays Bank Ltd. In the same year it acquired 50% shares in Oil Refinery. In all these cases the owners talked of having been satisfactorily compensated. See Colin Leys: Underdevelopment in Kenya. The Political Economy of Neo-Colonialism: 1964 - 1971) London, Heineman (1975).
20. R.J.M. Swynerton: A Plan to Intensify the Development of African Agriculture in Kenya. Nairobi. Gvt. Printers (1954)
21. See: "The European experience" In I Wallarstern: The modern world Economy in the Sixteenth Century New York. Academic Press, 1974) particulary pages 236-261.
22. Legal Notice. No. 454 of 1956.
23. See. Legislative Debates (1957) for Tom Mboya's voice.

- 24. See: P. Raikes: The Development of a commodity Producing Peasantry in Tanzania. D.C.R. Project Papers: A.78.4; centre for Development Research in Compenhagen. Nov' 78.
- 25. The Native Land Registration Ordinance (1959) legal Notice No. 27/1959: The Land Registered Act 1963 (cap.300) and the Land registration (Special Areas) Act (1961)
- 26. Act No. 5. of 1969.
- 27. Ibid. Section 3
- 28. OKUNDA -V- Rep (1970) E.A. 453 per C.J. Mwenda at page 457.
- 29. The content of section is reproduced at the last page - chapter I of the Present work.
- 20. Act No. 5 of 1969.
- 31. See. Kenya Broadcasting Corporation nationalisation discussed in this chapter and the footnote 119) of this chapter.
- 32. Civil case no.320 of 1969 (K.H.C.)
- 33. Ibid. at page I of the typed copy.
- 34. This information was obtained as a result of personal conversation between the writer and one of the senior Administrators in the area and who wishes to remain anonymous.
- 35. See: footnote 32 (supra) page
- 36. Ibid. page 4 of the typed copy | ?
- 37. ibid on the same page.
- 38. This case was not brought under section 75 of the Kenya constitution It was under the Indian Land Acquisition Act (1894) which contained land acquisition law before independence and up to 1968) when the present land acquisition Act was passed.
- 39. The Report on compulsory Acquisition of Land and Direct Control of urban and Rural Land by the Government not published. chaired by Mungai Mbugua who later compiled it. 1/2/73.
- 40. Case No. 8/77: The law Society Digest (1977) Part (I)

CHAPTER THREE

41. Eminent Domain means "the power of the state to take or authorise the taking of Private property of an individual without his consent, and for public use. This is conditional upon payment of a just compensation.

See: Ballentines Law Dictionary: 3rd Edition, Rochester. New York, Lawyers Co-operative Publication Co. (1969)

42. As quoted in Nzerereko's article: 'The Tanzanian Nationalisation' E.A.L.J. Vol.3 (1970) page.1 modern capitalist state. In this chapter, the writer will examine whether it was proper for the constitutional drafters and the independence legal and political systems, to have included the protection at the time of independence, respectively. This will be done in the light of the socio-economic factors existing at the time of independence and after independence. The principle of the sanctity of private property will be juxtaposed with what the majority of Kenyan people hoped independence would bring. In this endeavour, Kenya's societal development will be made and the historical phase it had reached at the time this sanctity of private property was incorporated in the Kenya constitution. The socio-economic relations, present by then, will expose what role the concept of strict protection of private property was to play. The socio-economic relations to be highlighted here will include the economic position of the Kenyan masses vi-avis that of the remnants of colonial settlers, industrial and business undertakers and the African elite in charge of Kenya political affairs - after independence.

The role, the law played, and should have played, in the light of the above issues will be examined also.

3:1 advent of colonialism up to the time of Independence:-

3:1 The Scope of the Chapter

The writer hopes that the preceding chapter has succeeded in showing that there has been enough legal and political protection of private property in Kenya during the first decade of independence. This protection has been effected in accordance with the principles and functioning of a modern capitalist state. In this chapter, the writer will examine whether it was proper for the constitutional drafters and the independence legal and political systems, to have included the protection at the time of independence, ^{and continued to maintain it} respectively. This will be done in the light of the socio-economic factors existing at the time of independence and after independence. The principle of the sanctity of private property will be juxtaposed with what the majority of Kenyan people hoped independence would bring. In this endeavour, Kenya's ~~societal~~ development will be made and the historical phase it had reached at the time this sanctity of private property was incorporated in the Kenya constitution. The socio-economic relations, present by then, will expose what role the concept of strict protection of private property was to play. The socio-economic relations to be highlighted here will include the economic position of the Kenyan masses vi-avis that of the remnants of colonial settlers, industrial and business undertakers and the African elite in charge of Kenya political affairs - after independence. The role, the law played, and should have played, in the light of the above ^{socio-economic relations} issues will be examined also.

3:2 The Socio-economic relations found in the Kenyan Society since the advent of colonialism up to the time of Independence:-

Modern societies are a result of concrete historical development that have helped to shape, and continue to influence, them. Kenyan society is no exception. We must therefore probe its development historically if we are to completely make a sound judgement on whether it was, or was not, proper to constitutionally protect private property in an independent Kenya. Such a judgement is best informed by a good understanding of the history of a society for this tells us how the socio-economic relations sought to be protected came about.

In European societies, Marx discerned various stages of development. These are communalism, slavery, feudalism and capitalism and scientifically predicted the next stage of socialism as transitory to communism(1). Kenyan society has not strictly undergone these stages strictly during the period of our discussion here. However, Marx's observation of European societal development, and its appreciation, is important to our discussion because it throws light at the nature of developmental stage in which European imperialism came into contact with the African society in Kenya and produced the new society we find in Kenya at the time of Independence.

Kenya as we know it today was born in 1886, a year after the European powers had divided East Africa among themselves in the Berlin conference of 1885. That is the time when colonialism proper dawned on Kenya. During this period (19th Century) the European societies had attained the stage of monopoly capitalism (2). The African societies were self-sufficient units at a pre-capitalist stage of development akin to the beginning of 1960s have already been indicated in the previous chapters. However a more explicit structure of classes shows that at the top of the society lays a tiny group of repre-

to communalism (3). Therefore ~~the~~ European capitalism was superior though not necessarily better. When it met these self-sufficient African units, it led to a transformational process that still reverberates today in Kenya. Colonialism as a system succeeded in instituting continuing transformation of the African economic and social patterns into those of underdeveloped capitalist society. Thus by the time of decolonisation one would be justified to talk of Kenya's socio-economic patterns as one who sees overwhelming and dominant features are capitalist. Colonialism had managed to subjugate earlier African tribal modes of production and social patterns greatly. It had modified, and at some areas replaced, it to resemble capitalism more than any other mode of known production. As we have noted in the previous two chapters, decolonisation process left the colonial patterns of society and its production intact. The radical revolutionary movement that had sprang up during 1940s and 1950s, was diverted by cooption at the time of active transition. After independence what had remained, as a radical wing of KANU was soon manouvred out of office in early and mid 1960s. The social economic patterns of society since the imposition of colonialism up to the time of independence, though resembling those of a capitalist society except for the racial overtones, had not reached the distinct stratification found in older capitalist metropolises. The clean theoretical distinction between the bourgeoisie and proletariates was not easy to discern in Kenya. This paper cannot afford an in-depth class analysis of Kenyan society. But since an analysis we must give, a highly generalised model of class structures will be attempted.

Some of the main elements of the Kenyan society as it appeared towards the beginning of 1960s have already been indicated in the previous chapters. However a more explicit structure of classes shows that at the top of the society lays a tiny group of representatives of international bourgeoisie who represented the

international capital pervading all spheres of Kenyan economy.

Second in the hierarchy lay the petty-bourgeoisie stratum consisting of immigrant communities and those Africans in the higher ranks of the civil service, the commercial and the industrial sector.

The African ruling class rightly belongs here through their role puts them slightly outside the general petty-bourgeoisie^{class}. Thirdly,

in the last stratum we find the largest section of the people;

the peasants - cum - proletariat^{proletariate} proper, lumpen proletariat⁽⁴⁾,
~~proletariate proper, lumpen proletariat.~~

and the jobless rural and urban crowds, in that descending order.

This structure was the product of colonial practises and neo-colonialism only helped it to consolidate. These characteristics

had already been formed during colonial period. The Kenyan

society as it entered independence era was already one subject

to institutionalised exploitation with distinct contradictions

in the main patterns of ownership. Given this, it becomes clear

the role an entrenched constitutional provision stressing the

protection of private property at such a point in the history of

Kenya would play. It would serve to enhance national wealth in

the hands of those who at the time of independence had already

acquired a material benefit from the colonial economy and those

few others who could 'make it to the top' in an independent

Kenya. For the majority, who bore the brunt of colonial exploi-

tation, and who had no hope of 'climbing up the ^(economic?) social ladder', it

would continue to deprive them of their share in the national

cake and enhance exploitation.

of their original communal mode of production and social organisations. They adopted the new ideas of a free enterprise economy. The Europeans were during colonial rule the pace setters in all aspects of life because of their total control of both the economy and political organisation. Their lifestyles because of

3:3 The expectation of the masses: what did they expect in
relation to the Property Institution?

Writing on adjudication, consolidation and registration of land, S.B.O. Gutton(5) implicitly suggests that the peasants hoped independence would extend the settler benefits to them.

"..... To the peasant mind, which had hitherto been denied land certificates that were given to the 'progressive' white settlers, the registration was indeed a welcome move"(6)

True to the form, this might have been so. After all in land cases this, besides promising loans on the strength of the title-deeds removed the tenancy at - will status from the African peasants. Furthermore registrations of land to most was viewed as a recapture of their last possession. Even if this was so it cannot be taken on its face value to warrant a conclusion that the masses did not anticipate a change except removing the Europeans and replacing them with 'black masters'. The masses also hoped that the pattern of ownership identified with the whiteman would be dismantled to give way to the re-establishment of a just African society.

However what form the new society should take was not clear to ordinary people and even to most leaders. This led to the thinking Gutton is talking about. This is explainable. In the first place, we have seen that colonialism worked on the pre-colonial African tribal modes of productions and their social patterns and transformed them greatly. The free enterprise economy brought by colonialism forced different communities to abandon their original societies and consequently lost the ideas of their original communal mode of production and social organisations. They adopted the new ideas of a free enterprise economy. The Europeans were during colonial rule the pace setters in all aspects of life because of their total control of both the economy and political organisation. Their lifestyles because of their privileges were aspired to not necessarily because in the

almost every colonial institution. The people were therefore eyes of the masses they were inherently good, but because they appealed to a basic instinct of man ^{the instinct to want} would over. This is to live in luxury even if this involves subordinating another person's needs to one's own. To many a man would over, the good life is the one led by the privileged class. The temptation to accept as good what appears good and the human frailty that leads many to abandon ideals and get what appears to ^{be} good explains why many Kenyan masses would have aspired to step into the shoes of their former oppressors. Because of this, it has been observed that in "Africa there are more bourgeois minded people than bourgeois" (7) This is true in a place like Kenya where, as we have seen, the clean distinction between classes is hard to make. It is further explained by the fact that in contemporary capitalism a social class may well take a class position which is not in its own interests (8). In Kenya this is true because the free enterprise economy introduced by colonialism has made people assume ~~made~~ ~~people assume~~ bourgeois tastes. Peasants and other members of the lower class are victims of this in their own limited ways. The mode of production that has existed since the advent of colonialism has informed them wrongly. The masses' attitude towards life, without being paternalistic, has been one which is not in their class interest.

During colonialism and up to the time of independence the modern education system, ideas and social life had not penetrated the masses much enough to make them well informed. They could not therefore see through the mystified colonial institutions ~~in order~~ to expose the 'evils' behind them. A good example is the institution of chieftainship. Local chiefs were always blamed by the local people for policies which did not emanate from them but came from colonial rulers as directives. They became 'shock absorbers' and 'buffer zones' between the brutal colonial administrators and the local people. This was true of almo

almost every colonial institution. The people were therefore subject to Barrington Moore's observation that :

"..... large masses of people, especially peasants simply accept the social systems under which they live without any balance of benefit and pains; certainly without the thought of whether a better one might be possible....." (9)

Here we are not saying that the African people did not see the colonial injustices. The writer's proposition is that they saw the injustices in racial terms and not from the ideological perspective. So without keen observation and analysis, a student of colonial history is likely to conclude that the people of Kenya saw the origin of their sufferings ^{as} from racialism rather than racialism plus capitalist exploitation. Thus, ^{come to the conclusion that} all what they aspired for ~~was~~ the removal of the whiteman. While the writer admits that this was indeed an overriding demand, he goes further to assert that the people of Kenya also hoped that the institutions brought by colonialism would 'die' with it. Unfortunately the nature of independence struggle did not evolve a clear vision of what the independence would be all about. No clear picture of the new society was clearly articulated. This is a human phenomenon world over. When ~~w~~ people are faced by and external enemy, the debate regarding what they want is obscured by the urge to first fight the common enemy. This was the case in Kenya. All the above factors put together tell us that independence created different expectations in different Kenyan individuals. Obviously history did not provide them with a sociologically homogenous society to fall back ~~at~~ and see what a vision of a good united society would be like. However, whatever different views of the new society they had, the majority of kenyans had one common vision of an independent Kenya. To the masses, Kenya was to be a place where their dignity, which had been ^{denied} them by racism and free enterprise economy, would be restored (10).

This was to be done by the removal of colonial establishment.

Prof. Ghai and McAuslan while speaking of the legal system indicate that Kenyans wanted a dismantling of colonial institutions.

They write, "It was to be expected that an African government would wish to abolish the system The important question was what specific modern values and ideas would an African government try and introduce via its refined (system)"(11)

The writer's view is that the specific modern values and ideas expected by the masses of Kenya are those which portray human equal worth and dignity. Such values and ideas would remove the injustices of colonial system and institute just institutions given effect by just laws. The writer submits that the institutions that go with a bourgeois society cannot impart the justice demanded by Kenyans effectively. Whatever contrary opinion may exist, the writer's contention is that Kenyan masses hoped and expected independence would bring an egalitarian society. Such egalitarianism can only find its meaningful realisation in a socialist society. A socialist society is what the masses envisaged. But because of the factors we have analysed above, the masses thought a just society would mean extension of settler benefits to them as S. Guttor has observed (12). This is what academics have called 'politics of mystifications' among the masses' (13). This brand of politics makes the masses hold a class position which is and can never be in their interest. Their consciousness of what is good is informed by the existing mode of production and they tend to think that a good life is the one lived by the members of the upper class.

It is therefore a safe assumption to say that by accepting the free enterprise concept of sanctity of private property, the independent Kenya's constitution like the colonial one, rejected the view that men are all of equal worth.

The differences created by the colonial socio-economic structures would continue in an independent Kenya except the racial discrimination. This would only benefit the members of the bourgeoisie

3:4 The Constitutional Property juxtaposed with the People's expectations

At the time of independence, the majority of the Kenyan masses We have seen that the majority of Kenyans hoped that Independence did not need a constitutional theory protecting private property would destroy the colonial establishments which were based on the acquired during colonialism. Indeed most of them did not have view that Africans were of an inferior nature. The institution property to be protected. The only people who owned what can be of property ownership was not different from the rest. It called property were the members of the immigrant races and a few favoured the members of white community, Asian community and African collaborators and educated elite. Before such a provision African collaborators in that descending order. The rest of the the Kenyan masses needed a readjustment of the colonial ownership Kenyan masses bore the brunt of institutionalised exploitation. pattern. The writer's view is that a form of reverse discrimi- This resulted into a glaring contradiction in the pattern of nation was actually needed if the concept of equality was to be ownership where a few members of the society held the entire meaningful. The excessive colonial gains should have been means of production while the rest of the multitude toiled for redistributed at the time of independence so as to ensure that their (the few) comfortable living. This implies that the no one race, or group of persons, was so economically dominant as Africans hoped that the property ownership pattern would be to be able to employ what it owned as a basis for further exploi- dismantled with the rest of colonial institutions in the quest for- tion. Land which was inappropriately expropriated from Africans a just society. Before a socialist egalitarianism was possible should have been redistributed first before strict protection was it was imperative that the pattern of ownership be adjusted to decided on. correspond with the notions of a fair society outside the After independence, the majority of ordinary Kenyans needed a con- capitalist set-up. However as we have seen in the previous two constitutional theory which would bring development and economic chapters, the constitutional theory of an independent Kenya self-determination to them within the boundaries of a just accepted the sanctity of private property. This meant that the society. cap; concept which allows the strong to devour the weak colonial capitalist economic system would continue without any under the pretext of liberty like laissez-faire policy was not major adjustments. Egalitarianism does not go with institutions appropriate for Kenyans and the development they envisaged. like the colonial ones based on institutionalised exploitation. On what development they expected, the writer will not delve into It is therefore a safe assumption to say that by accepting the unrewarding discussion. Suffice it to say that the masses free enterprise concept of sanctity of private property, the expected development which would return their lost dignity and independent Kenya's constitution like the colonial one, rejected human worth. Such a development, economic or social must touch the view that men are all of equal worth.

The differences created by the colonial socio-economic structures would continue in an independent Kenya except the racial discrimination. This would only benefit the members of the bourgeoisie

group. But then the group was only a handful of the Kenyans. At the time of independence, the majority of the Kenyan masses did not need a constitutional theory protecting private property acquired during colonialism. Indeed most of them did not have property to be protected. The only people who owned what can be called property were the members of the immigrant races and a few African collaborators and educated elite. Before such a provision the Kenyan masses needed a readjustment of the colonial ownership pattern. The writer's view is that a form of reverse discrimination was actually needed if the concept of equality was to be meaningful. The excessive colonial gains should have been redistributed at the time of independence so as to ensure that no one race, or group of persons, was so economically dominant as to be able to employ what it owned as a basis for further exploitation. Land which was inappropriately expropriated from Africans should have been redistributed first before strict protection was decided on.

After independence, the majority of ordinary Kenyans needed a constitutional theory which would bring development and economic self-determination to them within the boundaries of a just society. A concept which allows the strong to devour the weak under the pretext of liberty like laissez-faire policy was not appropriate for Kenyans and the development they envisaged. On what development they expected, the writer will not delve into unrewarding discussion. Suffice it to say that the masses expected development which would return their lost dignity and human worth. Such a development, economic or social must touch all people.

...../11 That wa
a just society would have been achieved.

1. Rodney Walter: *The Empire underdeveloped Africa: Imperialism*
As the matters are now, the protection of private property under
section 75 helped to perpetuate the basic inequalities and social
injustices for whose removal many people in Kenya sacrificed their
lives.

See: generally Rodney Walter: *The political economy of
Imperialism* p. 10. Dar es Salaam. Mimeo. It is during imperial
capitalism that the search for colonies intensified.

3. See chapter one of this present work at page 7.
4. This term refers to those who have no fixed wage employment
and the informally employed.
5. S.B.C. Gutta. I.D.S. Nairobi, "some legal aspects of the
Peasantry and social classes in Kenya". Staff seminar paper
No. 3 1978/79 Dept. of Govt.
6. *Ibid* at page 25.
7. R. Gensoult: *Nationalism and Economic Development in Ghana*.
Praeger, New York (1969) at page 53.
8. N. Poulantzas. *Classes in Contemporary capitalism*. London,
versos (1974)
9. Barrington Moore: *Social origins of Dictatorship and Democracy*
Beacon Press, Boston (1966) page 204.
10. G.K. Kazuu: *Trends in Marriage and Succession Laws in Kenya*
1886-1977. Nairobi Mimeo
11. Y.P. Chai and J.P.W. McAuslan, *Public law and Political
change in Kenya*. Nairobi. C.U.P. (1970) p. 359.
12. Footnote 1 above.
13. ~~above~~ ^{above} Chai and McAuslan. M. Ngethe: I.D.S. Nairobi. *Incomes - Distribu-
tion in Kenya: "Politics of Mystification and Possessive
Individualism"*. Working paper No. 284 (1970)

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FOOTNOTES

1. Rodney, Walter: ~~How~~ Europe underdeveloped "Africa: Tanzania Publishing House (1971) at pages 12 - 14.
2. Since the Industrial Revolution capitalism has undergone various phases, viz. competitive, monopoly, and modern imperialism. See: generally, Wadada Nabudere: The political economy of Imperialism, p.p. Dar es Salaam. Mimeo. It is during monopoly capitalism that the search for colonies intensified.
3. See chapter one of this present work at page 7.
4. This term refers to those who have no fixed wage employment and the informally employed.
5. S.B.O. Gutto. I.D.S., Nairobi, "some legal aspects of the Peasantry and social classes in Kenya." Staff seminar paper No.3 1978/79 Dept. of Govt.
6. Ibid at page 26
7. R. Genould: Nationalism and Economic Development in Ghana. Praeger, New York (1969) at page 53.
8. N. Poulantzas: classes in Contemporary capitalism. London, verso (1974)
9. Barrington Moore: Social origins of Dictatorship and Democracy, Beacon Press, Boston (1966) page 204.
0. G.K. Kamau: Trends in Marriage and Succession Laws in Kenya 1886-1977. Nairobi. Mimeo
1. Y!P. Ghai and J.P.W. McAuslan, Public law and Political change in Kenya. Nairobi. O.U.P. (1970) p.g 359.
2. Footnote 5 above.
3. ~~Among~~ ^{Among} them is N. Ngethe: I.D.S. Nairobi. Incomes - Distribution in Kenya: "Politics of Mystification and Possessive Individualism". Working paper No.284 (1970)

14. For a fuller discussion on this type of development See:
generally J.K. Nyerere: Man and Development. O.U.P.
(1974) especially from page 82.
15. Hazard., J.N. "Inheritance as an anachronistic
stimulant" - communist and their law, university of chicago
press. A photocopy at the Reserve section. Nairobi
University.