

PARLIMENTARY RECRUITMENT IN KENYA: MASS
PARTICIPATION AND IMPLICATIONS.
(1974 and 1979 Elections)

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PREFACE AND ACKNOWLEDGEMENTS

The latter parts of this dissertation were written at a time of rapid change, at least legally, in Kenya's constitutional framework. At time of going to print Kenya was already a de jure one party state. The author feels that this formal change will not have practical impact of enormous proportions. Historically Kenya has remained a one party state for a long time and the legal change was just a reflection and manifestation of the status quo ante. The recent detentions are my predictions in the summary come true.

In an endeavour like this one, the author brings to print all his ingrained inclinations, sentiments, environmental influence, education and as the biologist would have us believe his genetical abilities. This makes the task of thanking all those who assisted me in one way or another impossible. However to all those who offered immediate aid, this work is dedicated to them. These include:-

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LIST OF CASES

1. Bullock v. Carter (1972) 405 U.S. 134
2. Fennandes v. Kericho Liquor Licensing Council
3. Fray v. Blackburn (1975)1 Q.B. 118
4. Liyanage v. R. (1965) A.C. 172
5. Lubin v. Panish (1974)15 U.S. 709
6. Madhwa v. City Council of Nairobi (1968) E.A. 406
7. New Munyu Sisal Estate
8. Reynolds v. Sims' (1964) U.S. 533
9. Schweitzer v. Derk of the city of plymouth (1969)
38 Mich. 485.
10. Sirrows v. Moore (1863)3 B & S 576

INTRODUCTION:

Man has at many times attempted to evolved^a social theory,¹ through which a vational and fair society could be achieved. Elections in Western Jurisprudence have been lauded as an exercise whereby a measure of this vationality has been achieved, for man through elections is seen as participating in the realization of his aspirations and goals in life. Yet some quaters dispute this², consider te the two differing views on elections.

Jean suretcanale in his essay Problems of Democracy in Tropical Africa³ states:

"Universal suffrage in the capitalist states gives only illusion of government by the people: at the most, the people can place pressure on the government; but the essence of the latter always prevails."

Yet Ross referring to the same process would assert that it is:

"An integrating principle the firm belief that elections are of fundamental importance in any democratic society. The conviction that the political health and efficiency of the whole community are closely bound up with the way in which its electoral system is organized and operated.⁴"

It will appear then that the theoretical problematic is the whole question of why elections are operationalised. It will be the attempt of the thesis to give an analysis of the various reasons given for the institutionalization of elections, then to examine which of those theories was adopted as a justification for the introduction and continuance of the electoral process in Kenya and lastly to examine whether those justifications are achieved in practice and whether they are really meant to be achieved.

Hence the thesis will be subdivided into three broad areas of study:

Chapter I - will be a review of the theoretical foundations of the electoral process. Considering the limited nature of this exercise, attempt will be made to traverse various derivative concepts without a great deal of detail. The approach will appear abstract, tending to wards a philosophical appraisal of the electoral process.

Chapter II: This chapter and the next will serve as a critique of their forerunner. However the critique here will be limited only to the formal characteristics of elections in the first past the post system. It will be evident that the appraisal here will not be limited to the Kenyan milieu but rather the system of elections itself wherever applied.

Chapter III: This will be an attempt to concretise the previous assertions. The assertions will be taken from their theoretical level and illustrated by practical examples. Through the chapter we will be able to examine, which of the theories analysed in chapter I has been used by Kenyan leadership to institutionalise elections in the country and then to decloak the theory and show to what purpose elections are directed to. As a whole the chapter will indicate the writer's views.

Conclusion: A summary appraisal of the whole thesis highlighting the major incidents sought to be improved.

Perhaps at this juncture, I should indicate the meaning I attach to some of the central themes which are recurrent in the dissertation:

1: Masses in this context is used to denote the people who occupy a country's civil boundaries in their generality. There is no ideological meaning sought to be conveyed.

2: Participation here means the people being involved in the process of law making through the traditional concept of creating the government and the laws which govern them.

3: Law making in this thesis, will be limited in the earlier chapters, for what we are analysing is the masses involvement in law making through the process of parliament. In the last chapter, law will be shown to be an expression larger than that which emanates from parliament.

It is hoped that at the end of the dissertation, the opinion will have been formed as to whether the system of election, as a mechanism of allowing the masses to participate in the making of the law and the government that rules over them is sacrosanct due to its veracity or it is a myth, the ultimate deception and should consequently be relegated to the gutters.

CHAPTER ONETHEORETICAL FOUNDATIONS OF REPRESENTATIVE OR PARTICIPATORY
GOVERNMENT
Preliminary Statement.

The fervour with which the electoral process has taken up in the 20th century, is so astounding that its hard to believe that its operationalisation as it is today is in main a 20th century innovation. Its is even more astonishing to learn that even those countries that boast of the competitive electoral process, did not fully institute them until this century. Britain, as an example did not adopt the rule of "one man, one vote" until 1949, when an Act of paliament abolished the extra vote for University graduates and some businessmen.¹ The United states too did not effectively enforce the rights of blacks to vote in the American south until civil rights demonstrations in the 1960s were proving to be quite difficult to contain.

However even more interesting is a discovery of the objectives, for which the elections are purportedly directed to. The reader might hasten to blame me of limiting the definition of representative government.² It should however be understood that no such purpose is intended. The whole purport as to give a platform, from which the issues can be analysed. In fact do these terms have any definite meaning anyway? Doesn't the meaning depend from the context one views them? For mere guidance of the reader the terms may be tentatively defined as:

"A mode of government whereby the governed have relinquished the direct participation of making laws which govern them, but through indirect means, like either electing the rulers to office or removing them from office by same process are able to achieve or have an influence in the law making."³

The reader may again hasten to blame me for abstraction. This I admit will be experienced in this chapter. It is my aim to give a theoretical foundation of such government before embark on empirical proof. This does not mean the chapter will be devoid of actual examples, what it means is that the emphasis will be mainly to give a theoretical rationalisation of the process.

What then makes the masses renege their direct participation in the government and opt for the more passive roles of selecting those among them who will actually be involved and subsequently censuring those they have selected through the electoral process. I have grouped the schools which attempt to give an answer to this question into three, the organic school, the Economic or Utilitarian philosophers and lastly the critics.

THE ORGANIC SCHOOL.

The idea of participatory government is rooted in society. However predating this process is society itself. The process and purpose for which the society was formed is important in explaining or criticising the participatory process.

This school stipulates that man entered into a social contract with other men in order to be protected in his person and property. This process might have been instigated by fear of "war of all against all"⁴ aimed at achieving a measure of stability or might have been aroused by the realization by mankind that

communal effort would bring about greater fruition. This gave rise to the state.

The characteristics of a state are well documented by Garner when he says:

"The state as a concept of political science and public law, is a community of persons more or less numerous, permanently occupying a definite portion of territory independent or neatly so, of external control and possessing an organized government to which the great body of inhabitants renders habitual obedience."⁵

Once this was achieved it was clear that it was no longer possible for the individual persons to carry on their lives in whatever manner they wished irrespective of their fellow colleagues. It became necessary therefore that there should be some understanding, at least implicit as to how the lives of the members would be conducted. Areas of operation had to be defined, the allocation of rights and duties had to be specified. All this posed the big question: who was to be responsible for determining the above matters. According to this school, government arose to fulfill those functions.

This has been forcefully stated by Ross when he says:

"Government in the sense of making, carrying into effect and enforcement of laws is an absolutely vital and unavoidable concomitant of community life."⁶

This school is therefore agreed that the following are the objectives of government.

(i) The security of the people from arbitrary assault and annoyance of the citizens by others

(ii) The security of the goods of the people from damage and theft by other citizens.

(iii) The security of people and their goods from the hurtful actions by other states.

(iv) The settlement of disputes between citizens and

(v) The improvement of the general well being of the citizens.

answer
Introduct To them therefore the government was a benevolent organ hovering above its subjects to protect them from their destructive tendencies or similar tendencies of other persons. This idea of government presented a bottleneck. It was imprudent to assume that any leadership would be interested in the above purposes.

How then were the masses to ensure that government restricted itself to the stipulated objectives? The electoral process was one of these controlling mechanisms. The electorate would be able to indicate to the rulers their demands, and by the same process, instal the leaders who they felt would effectuate their demands, and following logically remove those who failed to meet their demands. This idea of restraint of government to avoid the arbitrariness inherent in it is called constitutionalism. One of the important elements of it being elections. De Smith while discussing this notion points out that:

".... Constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held

on a wide franchise at frequent intervals, where political groups are free to organise in opposition to government in office...."7

Similarly Ross asserts that:

"If we realize that the electoral system forms the greatest and most vital linkage between the nation and its rulers, it's the essential machinery by means of which the community selects and instructs the men and women to whom it must delegate the duties of government that it cannot for practical reasons perform for itself..."

Later in the analysis we shall be seeking to answer the questions whether the electoral process was introduced in Kenya for above reasons and whether if it was, then how far were the masses able, and continue to select and instruct such leadership.

THE UTILITARIAN THEORISTS.

This economic school, not to be confused with the Marxist school, since they reject any theory of collectivity which embodies the exploitation of a ruled by the ruling class, also reject the organic conception of society. What then is the theory that they expound?⁸

Their exposition, as the title suggests has an economic flavour and infact they call their approach an "Economic approach to political choice". It involves seeing the collectivity which is the society on a purely individualistic sense. It contends in main that the question of political choice is dependent upon the cost - profit relationship. It is as a situation whereby two or more individuals find it symbiotically advantageous to pool their forces to achieve certain common goals.

They view man as a profit maximizer, whereby the political activity is a form of exchange whereby all the contributants expect returns. In the words of Buchanan and Tullock.

"In a very real sense the exchange of inputs in the securing of the commonly shared output."9

The schools argument advances from two standpoints. First it has a pessimistic and skeptical view of human nature, in that it sees man as strongly motivated by self interest and the only reason that makes him join the collectivity is to realise his self interest. Secondly they give the empirical proof that man will choose "more" rather than "less" when confronted with the opportunity of choice.

This view is well exemplified in Buchanan's book when he states:

"The market and the state are both devices through which co-operation is organized and made possible. Men co-operate through exchange of goals and services in organized markets and such co-operation implies mutual gain. The individual enters into exchange relationship in which he furthers his own interests by providing some product or service that is of direct benefit to to individual on the other side of the transaction".

To them government is only a mechanism through which the collective activity is attainable. It is a human creation, which is therefore capable of human manipulation. This manipulation may be negative or positive hence the need for the individual to be involved in its running. Each individual acts as a check on the others to avoid self perpetuation at the expense of the others. On way of individual participation is through the electoral process.

Many criticisms of this school come to mind. One would in fact be exonerated if he dismissed the school as a mere apologia for the exploitative capitalist tendencies. The theorists in fact concede that throughout the ages the profit seeker has never found friends among the moral and political philosophers. The school assumes the institutions of state and market. Perhaps it would be trite to point out to them that these two social institutions have not always existed or ^{neither} must they exist in any type of society.

There is the fallacious assumption in their theory that the separate individuals are assumed to have separate goals both in their private and public lives and that everyone of them is free to pursue them. Anybody grounded on the elementary aspects of government knows this is not so. The modern government is involved in almost every aspect of a person's life.

What emerges from their analysis is the clear fact that, unlike in the market relationship whereby there might be a direct relationship of input and output, in cases of political choice there can never be such a precise relationship between the individualistic action and the end result. This has been limited in two ways in modern times:

- There is no longer the one to one correspondence between the individual choice and final action.
- The Individual has no way of knowing the final outcome at the time he makes his choice.

Underlying their theory is the constant analogy between the similarity of private and public choices. The falsity of this is indicated in the following analysis. While it might be admitted that when an individual is faced with private choices he might rank them in order of preference and choose the one that suits him best, it is clear that the same can not be said of public choices. Secondly the responsibility of private choices are more immediate than in public choices, hence in the former the chooser faced with immediate benefits and costs tends to choose more wisely.

This school had great influence in the introduction of elections in Kenya as will be shown later, that the theories never came to the forefront is attributable to the imprudence of stating the sinister private greed in such stark form. To state that they were using the government for their own political gain would be to incite discontent of revolutionary proportions. This was a thing clearly the ruling class would avoid at all costs.

THE CRITICS:

I should mention that there is no specific school called The Critics. I have only used the term to embrace the various philosophers who do not agree with the previous two schools already considered. They can however be classified into two major groups, those who query the propriety of every person participating in elections and the others who wish to undoak the duplicity of the electoral process, that there is no such participation.

The former feel that the organ of government being so complex, they argue should not be left to every person to tamper with least of which some are, outright ignorant. The government, they contend should be ran by few who are well grounded in the mechanics of governmental process. Platoan early exponent of this view, he asserted that:

"Men must be philosophic and the philosophers must rule in the state."¹⁰

Modern platonic disciples do not restrict the running of the government to philosophers only rather they state that not everybody should be involved in the governing exercise. G.C. Field a contermprorary disciple of Plato states the point very clearly when he observes;

"It is generally recognised that efficiency in any kind of work depends on the principle of division of labour.... Now is there any reason why the same principle should not apply to the work of the government? It would be hard to maintain that this work is either so easy that anyone could make the right decisions or so unimportant that it does not matter what decisions are made. How then can this justify leaving any of these difficult and important decisions to be taken by taking a vote of the whole people, in which everyone intelligent or stupid, well informed or ignorant public spirited or selfish counts exactly the same."¹¹

The other subgroup of criticism, is not much based on who should be involved in the governmental process but rather they see elections as a means of manipulating the masses will, to achieve their own ends. The very existence of the state is seen as a manifestation of the dominance of one class by another.

Marxist dialecticians stress this points. Engels in his celebrated works: The Origin of the family, Private Property and the state had this to say of the state:

"As the state arose from the need to keep class antagonisms in check, but also arose in the thick of the fight between the classes, it is normally the state of the most powerful economically dominant class...."¹²

This being so, why should the ruling class allow the other classes to participate in the running of the state through elections. An historical analysis reveals the answer to this. With the growth of the Industrial revolution and production reaching unprecedented heights, the importance of labour began to be felt. The concurrent event of enclosures in Britain had many people driven out of the countryside to satisfy the labour needs of the urban areas. Obviously with such concentrations, the labour began gradually to appreciate the raw deal they were getting and started demanding, at first better working terms and later political representation. As Mopher¹³ aptly contends elections were necessitated by the sheer need of the government to allay the discontent of the working class through the institution of elections they provided constitutional channels through which pressure could be exerted. In short elections were a safety valve. All the workers could analogize their situation with what the government called free competitive market system and therefore saw no reason why they could not throw their bargaining muscle in the political market.

The same author therefore concludes that elections were no more than:

"An attempt by the lower classes to take their fully and fairly competitive place within those institutions and that system of society."¹⁴

However as these down trodden classes struggled for participation, the ruling class itself was struggling to retain its position. They were quick to realise that impregnable status differentials which they had hitherto enjoyed were not compatible with the maintenance of their priveleged system. Further they realised that an appurtenance was required to maintain their position at the same time legitimize it. Elections provided a suitable answer. Through them they could maintain the patterns of ownership and at the same time defuse social dissent.

Hermet has summarised this technique of manipulation very vividly he observes:

"At worst, it may be argued that elections are inevitably undemocratic allowing the cleverest and most powerful people to make the sovereign people yield power to them in an acceptable way."¹⁵

The reader will notice that in the rest of the dissertation the writer is relating elections in Kenya to these broad schools, and assessing how far each school can be used to show the purpose of elections in our Kenyan context.

THE THEORETICAL BASIS OF ELECTIONS IN KENYA.

In this subtitle an attempt is made to examine the basic assumptions that prevailed in the introduction of elections in Kenya. It is by no way a critique but a

presentation of the formal reasons given for the introduction and continuance of the electoral process in Kenya.

There is an interplay of the first and second schools of psephology, as the basis of elections in Kenya. Throughout Kenya's history, the electoral process was presented as a necessary mouth piece of each sociological groups articulation.¹⁵ It is shown as a process that all the groups strived to attain. No attempt is made to show whether when these various sociological groups managed to participate in the elections, they were able to articulate their demands to any efficacy and whether such participation really changed the power relations on the ground.¹⁶

The whites were the first to get the vote in 1919 through the Legislative Council Ordinance of the year. Franchise was extended to both women and men. Settlers felt better poised to articulate their demands, which → included the provision of land on easy terms, labour supply, credit facility and the development of the country as a "White man country."¹⁷

The Indians, not ready to remain indolent observers, made concerted efforts to achieve equal rights. The main thrust of their pressure was for an equality of elective representation and common roll for the two races. They felt that through equal participation in parliament, they could pressurize for the opening of the white highlands especially now that pressure through the Judiciary had failed when the courts

in Kaderbhai v. Commissioner of Local Government Lands¹⁸ held that under section 27(a) of Crown lands ordinance the Commissioner whom it took to be an agent of a private holder of land could by similar freedom as that of contract choose who to enter into contracts of sale of land with and therefore the Commissioner had acted properly in refusing to enter into contracts with Asians.

The Africans were not complacent either. They rejected representation by any members of other sociological groups. They indicated their hatred for the assumption that they were still incapable of representing themselves. The presence of Europeans created acute social and economic grievances which led Africans to demand the sharing of political power as early as 1920s. K.A.U. and later K.C.A. made strong cases for the extension of the vote to the Africans. However it was not until 1944 that Africans pressure found some fruition in the nomination of Eliud Mathu into the legislative council. Still more pressure was exerted, and in March 1957 the first direct African elections were held, this election although on a qualitative franchise was a significant step forward. Odinga has captured this vividly when he says:

"We had gone into the legislative council with a clear set of aims. These were to make the council a platform from which the settlers and the governments of Kenya and Britain could hear African opinion above all we could use the legislative as a national forum to build national Unity."¹⁹

Hence throughout the struggle against colonialism African participation in the government was seen as one of the major objectives of an Independent government. Through the process, the masses would be able to elect their leaders (not imposed), influence them to effectuate their demands, and if need be remove the incompetent ones. In reciprocity the government would institute development in all sectors of social life, always at the threat of being removed by the ultimate mandate, the electorate. In fact this relationship, whereby every member was expected to participate in the act of governance was not new, in African societies.²⁰

On these assumptions the electoral process was enshrined in the supreme law of the land the constitution, meaning its importance was phenomenal Section 5 of the Constitution provides for the election of the President, the rest of the section goes on to provide that the qualifications for a presidential candidate are that he must be a registered voter in a constituency in the National Assembly. Section 30 of the same vests the legislative power in parliament, while section 31 provides for elected members of that parliament.

So far we have seen the incorporation of the organic and Utilitarian theories in the adoption of elections to Kenya. Government is seen as elected by the masses, and exists to ensure the happiness of the masses by providing for social and economic development. The relationship is seen as one of exchange of values, obedience on part of the masses, and development on part of the government, with the masses as the final arbiters in case government fails in that duty.

The next two chapters will serve as a critique of that standpoint. In summary we shall be answering the questions: Is there such participation in real terms, is there such an exchange of duties, are elections an effective way of implementing these duties, are they meant to be, and if not, what role do they play then?

CHAPTER TWOTECHNICAL INIQUITIESIntroduction:

Contemporary feeling among the academia has been to disparage, the electoral process as illusory and mystical. However one needs to be cautious in such a discourse, to understand at what level he is castigating the process. There are two views:

- That the weaknesses inherent in the mode of franchise are as a result of inefficient and corrupt officials and structures and that the process can be refined to facilitate greater participation by the masses. This is a disfunctional criticism.
- That the very existence of the institution of parliament is ideological, intended by the dominant economic class to act as a cloak to real power relations. That so long as class society exists the institution of elections will always be for the benefit of the economically powerful class. This is a normative criticism.

This chapter adopts the former approach. (Its purpose is to examine to what extent the technical rules of procedure of elections irrespective of any particular social milieu enhance or impede such participation by the masses. It is clear that the criteria that distinguishes this chapter from the subsequent one is that loopholes to be indicated -

here are not of Kenyan parentage but rather are intrinsic in the "First Past the Post system." There is a tendency within western jurists to see them as purely the modus operandi of the electoral process.

What we are saying here and in the next chapter is that even granting that there can be no elections without some manoeuvring, for that is a fundamental aspect of elections, can we place a normative or moral standard which we feel to the excess of it, the "choice"¹ the masses have within the limited meaning is impaired for example

- Canvassing for votes, use of oratorical rhetoric to garner more votes, considered to be within the standard and hence legitimate
- Abducting of opposition candidates, excessive use of finance, considered to be in excess of standard and hence illegitimate.

Throughout the chapter, an attempt is made to indicate that these adjectival rules are not value-neutral as some would have us believe but import definite class bias.

FIRST PAST THE POST SYSTEM IN KENYA.

The "first past the post system" that Kenya has adopted and an acceptance of wide franchise for all races and sexes of the age of eighteen and over involves a lot of procedural and administrative activity. It is the aim of this chapter to analyse these procedures and find out how they are expressed in the laws of Kenya.

There are three major legislations that govern the whole electoral process in Kenya. These are:

1. The Kenya Constitution.
2. The National Assembly and Presidential Elections Act.²
3. The Election offences Act³

The constitution adopts the system^{of} election and clearly indicates that the manner of ascendancy to leadership in Kenya shall be through the electoral process.⁴ Section 5(1) provides for presidential elections in the following terms:

"The President shall be elected in accordance with this chapter and subject thereto, with any Act of Parliament regulating the election of a President".

Section 5(3) of the same adopts the idea of simple majority, since it provides that a presidential candidate who having been elected as a member of the National Assembly receives a greater number of valid votes in the Presidential elections than other candidates shall be declared elected as President.

Section 31 of the constitution imports the election of members as a way of filling Vacancies in the National Assembly.

When does such filling in occur? This may be whenever the President wishes. If they are Presidential elections, the President or anybody else at that time acting as President shall within ninety days direct the speaker to cause notice of the election to be published

in the gazette.⁵ Some authors⁶ feel that this is the privilege given to the chief government officer to choose the best moment to be elected. It sounds more like bias in favour of incumbents.⁹ That the President can use the power to dissolve Parliament, as a threat to members cannot be overemphasised.⁷

Secondly elections can be held, if a vote of no confidence is passed against the government National Assembly standing orders places ^{stringent restrictions} to such an attempt. The motion of no confidence requires a majority of all members of parliament except ex-officio members, after notice to table the motion has been given fourteen days before hand.⁸ This partly explains why there has been no such attempts.

Thirdly, Parliament is automatically dissolved after five years although the time can be extended by twelve months to five years if the country is at war.

In any of these instances the speaker then issues a writ under his hand in the prescribed form to the returning officer of each constituency in which an election is to be held. At the same time he causes the notice to be published in the gazette. Such notice indicates the date of presentation of nomination papers to each returning officer and date of polls in case the elections are contested.

Individual seats may also fall vacant in case the election of a member is nullified by the High Court, death of an incumbent or resignation. The requirement that the period between the date of notice and the day of nomination should not be less than ten days, leans favourably to the incumbents. Although the section is expressed negatively, it is clear that the period should be extended to give candidates equal opportunities.

This is so since the incumbents might decide to hold the elections on the eleventh day after such notice which is too short a time to campaign effectively especially for presidential elections where support has to be whipped from every corner of the country.

The system of registration adopted is the one of a common register for all races. In fact it is an offence for a person to be registered in more than one constituency or more than once in any register.⁹ It is the Minister concerned, in this case the Minister of constitutional Affairs who after consultation with the electoral commission names the date of registration. Section 4(2) of the same Act directs that the Minister shall on every second year direct that the register of elections be revised.

A person who has applied to be registered and whose name is not included in the appropriate register of electors may according to section 9(1) of Act, submit a claim to the registration officer in the prescribed form and manner and within the prescribed time. Where that arises the claim is to be determined by the registration officer and an appeal lies to the High Court.

The operation of these sections was well illustrated by the recent case of Wangari Mathai. The applicant was a prospective candidate in the Nyeri constituency by-election which fell vacant after the imprisonment of the Incumbent Waruru Kanja. However her papers were not accepted on nomination day, for she was not a registered voter and had no national identity card. She petitioned the deputy supervisor to have her name included in the register, a request which the deputy supervisor of elections declined.

She further applied to the High Court for an order of Mandamus to be issued to the supervisor requiring him to rectify the register of electors so as to include her name. Her counsel relying on section 4 of National Assembly and Presidential Elections Act, regulation 16 and Form J in the Schedule contended that Wangari Mathai's name having been on the register in 1974 should not have been removed on revision of the register in 1979. That electors already in the register were entitled to remain in the revised one. Further that the supervisor of elections had wide powers to rectify the register.

The court held that the application was misconceived, in that the referred to section enabled the Minister to direct at any time, the preparation of a new register of electors in respect of all or specified constituencies and the register which was sought to be rectified was not a revised one but a new one. As to the powers of the supervisor the court contended that the regulations gave certain limited powers to registration officers and not to the supervisor to amend the register of electors at any time. Section 17(3) of same Act provides that election will be by secret ballot and all ballot papers and ballot boxes used at such elections shall in respect of every political party be common for all candidates at each such party. The sanctity of this secrecy is to pre-empt any duress or any public pressure and emphasises the idea of a personal choice. It is reinforced by Part IV of the same Act that provides witnesses in a petition case will not be compelled to reveal who they voted for. Yet the same secrecy can

provide an opportunity for rigging by unscrupulous officials, especially in Kenya where the greater number of the masses are illiterate and the returning officer has to direct them on how to fill their choices.

Of great relevance are the two offices that oversee the electoral process. These are

- a) The Electoral commission
- b) The supervisor of Elections

Section 41 of the Constitution establishes the electoral commission. Its members are appointed by the President, the number of which must not fall below four. Again this indicates the strategic position an unscrupulous President may hold over such a commission. It provides a weapon for the threat of such members, if they do not tally with government or Presidents wishes. The gravity of loss of office need not be over emphasized, especially considering that such offices enable the office bearers to pay the huge loans they might have obtained.¹¹ However there is some degree of protection for appointments run for five year periods, and dismissal before then can only take place through a procedure similar to that of dismissal of judges.¹²

The commission has two important functions. The first is that of drawing up boundaries of the constituencies. In delimiting constituency boundaries the commission has total discretion. However there are few guidelines that direct them, these include looking at the population and not number of voters, population trends, the means of communication and other geographical features, community interests and a consideration of

administrative boundaries. However the commission no longer decides the number of constituencies since the number has been determined by the constitution to be not less than 158 and not more than 168.¹³ The commission however reviews the divisions at intervals of not less than eight years but not more than ten years or such time as parliament may prescribe.

There is the other role of supervision and direction of the registration of voters and conduct of constituency elections. Ghai and McAuslan¹⁴ have expressed the view that the constitution envisages a greater role for the commission, in this aspect than it is accorded in practice. It is their feeling that the term "direct" used in the constitution to bestow the duty upon the commission of overseeing the elections is rather narrowly interpreted in the National Assembly and Presidential Elections Act. This is true since although the commission orders the preparation or revision of the registration, it is the government which provides the machinery for such registration.

When elections are due the speaker issues writs to the returning officer. The appointment of returning officers and the designation of polling stations are done by the government. The practice has been to appoint civil servants. The vulnerability of these persons to governmental pressure cannot be underrated. They depend on the government for appointment, transfer, promotion and salary.

The supervisor of elections complements the commissions role. His role is supervisory and administrative.

After a candidate has met all qualification requirements, which range from proficiency in the English and swahili language, to those of residence, to non commital of election offences, to valid registration to the requirement that one should not be undischarged bankrupt, insane or under a sentence of death plus valid nomination by a political party, candidates go to the polls with the one obtaining the largest number of votes deemed as nominated¹⁵ such a candidate is declared elected after presenting his final nomination papers.¹⁶

The Act also requires that maximum election expenses to be 40,000/- for any candidate. The adherence of this in practise will form the subject matter of our discussion latter.

In conclusion, it would therefore seem that the procedures of election have been followed almost to the letter, however this does not mean they are impervious to manipulation. The ensuing part of this chapter, seeks to uncloak the loopholes and make some suggestions on reform.

A CRITIQUE

The procedure of elections in Kenya reflects some of the inadequacies inherent therein. It facilitates the

class interests. It is the intention of the writer to illustrate that in some instances, what seems as value-free adjectival rules are nothing but a simulacrum of the real class interests involved.

Perhaps it is trite to begin by asking whether elections have been seen throughout history as the legitimate mechanism of providing a ruler. Greek democracy was not based on representation, but rather competent parties appeared directly in the presentation of their demands. Jean Jaque Rousseau¹⁷ coherently articulated the vestage of ultimate power in the people. However he was opposed to the idea of representation for he felt that once people agreed to be represented, they were no longer free, for they had given away their authority.

The most tenacious exponent of this view in contemporary times is the Libyan head of state Muammar al Qadhafi. In his words:

"Parliaments have become a means of plundering and usurping the peoples authority..... Under parliamentary systems the people are victims, fooled and exploited by political bodies. The people stand silently in long queues to cast their votes in the ballot boxes in the same way as they would throw papers into the dust bin."

The idea that parliament cannot be totally representative of all interests has been recognised in Kenya. For the constitution provides for other ways in which the representatives may be recruited, section 33 of the same provides for the nomination of twelve members

to parliament by the President as representative of minority interests. Yet it is not true to say Parliamentary representatives alone rule. Equally important are the civil servants, trade Unionists and local government. The importance of the former is such that their place in the system is enshrined in the constitution.

This is not a feature peculiar to Kenya. As Hogan observes:

".... It is evident that a democratic community does not rely wholly on the method of election in choosing its representatives but as a matter of course freely and widely supplements election to methods of selection which may be based on professional competence or public status or even hereditary privilege."19

The effect of these bodies is to ^{whittle} ~~waste~~ the efficacy of the "peoples" representatives. The impartiality of such civil service which is normally used for the administration and supervision of the elections is doubtful. Therein lurks the danger of governmental pressure. This is a very important consideration, for the inability of the supervisors to alienate themselves from the process leads to the loss of confidence of the electorate in the process. Yet is it possible for such supervisors to be impartial? T.E. Smith states clearly what is true of most instances.²⁰

"The Election commissioners are selected and appointed by the provincial governments ... Evidently they are at the beck and call of those who made their selection and appointment;

they are liable to be lured or brow beaten to do things which they would ordinarily not do if they felt free and secure."20

Such governmental pressure may be also directed towards the electoral commission. It is possible that by skilful gerry mandering the government may get an edge for particular candidates. Such delimitation may be in disfavour of minorities too. A minority may include any racial, tribal, linguistic, religious caste or nationality group within a nation state and which is not in control of the political machinery of that state.²¹ It may also include a class minority, in the sense that the class welds very little of the governance power.

Taking the general proposition as posited in Schweitzer v. Clerk of City of Plymouth

"A minority cannot have equal¹ right to govern. Rather it must be afforded an opportunity to compete to make its appeals of new Voices heard."22

ways then can be devised to cater for such minorities. Group divisions may be recognised by either establishing separate voters qualifications and communal voters rolls for each group or by establishing specially designatedⁱ seats for each group whether or not proportionate to the size of the group in relation to other groups.

This too is fraught with disadvantages, it may encourage political patterns reflective of ethnic allegiances and cuts down the occasions for communal interaction among the ordinary voting members of the community.

Closely allied to this is the question as to whether delimitation of constituencies should predominantly be influenced by numbers of people or geographical vastness. Similarly should such delimitation aim at achieving a congruency of numbers in each constituency? Courts have grappled with this dilemma, and although there is no legal case in point in Kenya, in systems where similar electoral process has been used, courts have come out in support of the populace being the dominant determinant factor.

In Reynolds v. Sims,²³ the state of Alabama had opposed state reapportionment for it was strictly based on population as the criteria. The court emphatically asserted that the "legislators represent people, not trees or acres". The court went on to ask:

"How then can one person be given twice or ten times the voting power of another person in a state election merely because he lives in a rural area or because he lives in the smallest rural country?"

It would be interesting to note how the Kenyan courts would resolve such conflict if it come up, considering some of the districts and provinces are very sparsely populated and the ever increasing rural urban movement. It is clear congruency in numbers in each constituency cannot be achieved considering the population is armophous. Courts have in fact ruled that such congruency is indeed not necessary. In the Irish case of Re article 26 and the Electoral (Amendment) Bill²⁴ it was held:

"..... exact parity in the ratio between members and the population of each constituency is unlikely to be obtained and is not required."

Qualification for candidacy also show class leanings. Consider the literacy requirement. It shows a bias to the elite. Odinga has pinpointed the effects of such a requirement on the candidature;

"Those who were launched on a parliamentary career were an elite of the educated, for only those proficient in English could qualify for the legislative council. This group was easily seduced to the trappings of power, overwhelmed by parliamentary traditions."

This had effect of excluding some people had eminent potentialities for leadership. My feeling is that insofar as such parliamentary system is accepted then such qualifications are necessary since parliamentary practice involves a degree of sophistication. Of greater interest is the recent presidential directive that in the next elections only the candidates names will appear on ballot papers. The effect of this will not only be to restrict the number of candidates as earlier but also the electorate, to only the literate people.

For the candidates, there is the requirement of residence. Such a person ought to have been resident in Kenya for a period of not less than one year immediately preceding the date of application or for a period or periods amounting in the aggregate to not less than four years in the eight years immediately after that date. He must also have resided for five months in previous twelve months in the constituency in which he applies to be registered. The rationale behind this it would seem

is to ensure that a committed M.P. learns to live with his electorate to enable him to have a clear diagnosis of the needs of the people there. It is illustrative of this that Odero Jowi failed to recapture his seat in the 1979 elections, after he had earlier resigned for greener pastures in Canada. The Weekly Review correctly assessed the ouster as attributable to the monumental strategic error made by Odero-Jowi when he quit the seat. Coming back after four years the electorate were awaiting to indicate that they felt he had lost touch with them.

There has been instances when these requirements have not been a hindrance. Henry Mulli in the Kangundo constituency elections has been able to shuttle between West Germany and the constituency. It is this that led Musyoka to observe:

"Those seeking election have not found the residential qualification as a bar section 43(26) envisaged a situation whereby the major consideration is in regard to the voters and not essentially the candidate."²⁷

The presence of external observers in order to obviate any internal allegiances which might be manifested by internal election supervisors would be a helpful step. This might however be seen as denigrating a countries sovereignty and an admission that an autonomous country cannot conduct its affairs maturely. The presence of observers usually occurs in cases of a country recuperating from a serious crisis, where there are deeply entrenched cleavages.²⁸ This would also be assumptive of the fact that at international level there are no alignments. My contention is that to see the various bodies concerned with overseeing elections as only doing

supervisory and administrative duties and nothing more is to fail to unveil the ideological role they play. It is evident they play complementary roles. The idea of separation of power both at the formal and power relations level is illusory.²⁹ The executive has become so powerful compared to the other governmental organs.

This indeed manifested itself when the President vociferously campaigned for some incumbents before the 1979 elections. The Weekly Review commenting on one of the parties had this to say of the electorate:

"They showed their dissatisfaction with his leadership by voting him out despite the fact that President Moi himself had described Amayo himself as a true Nyayo man."³⁰

The qualities which the electorate seek in a prospective candidate are linked with the above exposition, with its corollary of the proper role of a member of parliament. This is not a mere academic query, but is very problematic to the M.P. for he is not only concerned with the needs of his constituents but also with legislation and administration as they affect the whole nation. Such a member is faced with the dilemma of a continuous equitable adjusting of competing claims and interests and at times the grave decision of what should override what.³¹

A further ancillary question is, how far the institution of parliament can be an adequate forum for the member to fuel and fulfill the needs of the constituents? The feeling among many is that writers is that this is not possible. In perhaps one of the fiercest attacks on the

institution Woodroff Wyatt in an article, whose entitlement was indicative of the writers ^{law} opinion of the Institution concisely indicated the inability of any active role in the House. Of question time he said:

"But question time has long been a charade. It is a fake instrument of democracy. It is inefficient at eliciting information which can be obtained more readily in other ways, and by journalists far more successfully than by M.P.s. It can rarely be used to expose injustice despite a lingering assumption that civil servants thrash themselves into a frenzy to rectify any inefficiency to avoid or counter a question on a constituency case."³²

This vicious attack is lent support by the nature in which the Minister so questioned can desist from giving a satisfactory answer, or to answer at all.³³ Ideally within Western Jurisprudence, the role of parliament would be three fold: One, to make legislation however this is one area that the members have exuded extreme dormancy. In a research carried out recently³⁴ it was found out that in the entire post Independence history of the institution only two private member bills had been passed. The J.M. Kariuki Hire Purchase Act 1968 and seroneys^{34(a)} which has been shelved ever since for lack of Presidential consent. This means the bills have been governmental and needless to say, they have expressed governmental will.

Secondly Parliament would be concerned with financial control. No public money should be expended without the same parliamentary authority. The legislature does not have a strangle hold over the executive as one would imagine from the above. The standing orders provide that financial business has priority over other business, and

if the estimates have not been approved by the allotted time, they shall be immediately put to a vote, without further delay. The Provisional Collection of Taxes and Duties Act, weakens parliamentary control in this sphere even further, since it provides that once a Bill is published in the gazette providing for new taxes, the Minister can order their collection and the bill comes to an end only if it is not introduced in parliament within eight weeks or it is replaced or withdrawn.

The estimates are usually long and couched in complex language. It is doubtful whether many members understand their implications, even assuming that they read them in the first place. The estimates are yearly, and year after year the controller and auditor-general has continued to report overspending.³⁵ Most of governmental policy tends to be carried out through Parastatal bodies and the National Assembly has little opportunity to control them.

Lastly Parliament is supposed to control the executive. This is through the threat of a vote of no confidence. However this has seldom posed itself as a threat to the executive. The presence of some members of the executive in parliament is a serious handicap not to mention that any members attempt to get support for such a motion, is met by opposition by the official majority which is inclusive of the nominated members. It can also be deflected by verbal dexterity, through extra legal means not to mention strong arm politics. The Preservation of Public Security Act, is always at hand to deal with such malcontents.

It is myopic indeed to see the three institutions as checking one another. They play complementary roles. Even in the industrialized nations of the west where governments may change with the frequency of Italy, the real power relations remain intact and the changes reflect squabbles within the ruling class. In conclusion such loopholes as exist are like the electoral process itself an ideological weapon in the armoury of the ruling class to facilitate their governance to condition the masses to subservience, in their belief that they "participated" in the government and therefore whatever emanates from their government is their own.

CHAPTER IIIPRELIMINARY STATEMENT.

In 1979, the Kenyan populace went to the polls to "choose" their representatives for the eighth time since the British government instituted the process in 1957. It is the intention of this chapter to analyse the growth implications and peculiarities of the electoral process in Kenya.

The chapter will serve as a critique of the basic assumptions that underlie the electoral process. The law will continually be shown as an expression of the real wielders of power and their wishes. Laws made by the state will be shown to import definite class bias, whether the laws are substantive, procedural or enforcement mechanisms. This will obviously necessitate analysing the class situation in Kenya in order to unravel the real power wielders viz a vis the producers.¹

Electoral law will be shown to be a reinforcement of the economic relations existing in the country. This means that for one to understand the proper reason why elections have been institutionalised, one will have to posit them against the economic relations, that is who produces the surplus value, who distributes and appropriates it.²

Depending from what class one views the electoral process, it will be easier to understand whether the electoral process has been successful or not. Since the approach here will be from the disadvantaged class (appropriated), the contention will be that, elections have been very successfully in instilling this feeling of participation in this expropriated class. The author will differ with writers³ who adopt a disfunctional approach and assert that institutions like elections and

parliament have failed in discharging their obligations of giving a "fair" deal to the populace, due to the manipulations by the powers that be. They give comparative studies insinuating that such institutions have worked elsewhere. Attempt will be made to show that such a "fair deal" is merely illusory and the writers have like the masses fallen victim of the illusion that through elections in a class differentiated society, the populace can get a fair deal.

Such an exercise will require a multidisciplinary approach. The following format will be used:

- (i) Place elections in their proper political Economy.
- (ii) Analyse how the elections serve these definite class interests. Show that the electoral peculiarities in Kenya are not mere incidences but symptoms of such class bias.
- (iii) Indicate the propriety of electoral process.

THE POLITICAL ECONOMY OF ELECTIONS IN KENYA.

Attempt will be made here, to show that law (electoral law inclusive) are just expressions of economic relations between persons or group of persons. Hence these classes will be identified and the relations demystified.

Kenya has adopted a capitalist mode of production. This means in Marxist analysis that there is generalised commodity production whereby the direct producers have been dispossessed of their means of production and must

sell their labour power to the owners of the means of production.⁴ This structure is rapidly replacing the communalistic modes of production.

However Kenya is in the unfortunate situation where by unlike the industrialised nations of the west, where capitalism grew in the scientific progression of society,⁵ it has been imposed in Kenya through colonization. This has meant that even with the granting of Independence the metropole - peripheral nexus has remained, with the interest of the metropole (Industrialized western countries) superseding that of the periphery (Kenya). It has also meant the internationalisation of the Kenyan economy,, which has implied strangulation of traditional economic structures and their replacement with transnational structures. There is a plethora of documentation on this process.⁶

This has resulted in the situation whereby the class which appropriates most of the economic surplus is not resident in Kenya, but in the metropole. This Metropolis - peripheral structuralism graphically described by Baran in his book The Political Economy of Growth where he states:

"Periphery capitalism also led to the growth of large metropolis legal monopolies which had their tentacles in the purchase and export of primary products, collection of savings and provision of credit and use of labour."

These monopolies gained their hold in Kenya during the period of colonialism and continue to be the major economic force in the country. They have caused the

external orientation of the economy. This fact is admitted by the local powers, who play an agent role to the might of the finance capital of the metropole. The Economic Survey 1981, which is a government release declared:

"As we have very little control over the import prices we must pay, these higher costs must be reflected in higher prices for the goods we produce. It is in this way that inflation abroad is imported into Kenya."7

Of course the government was being apologetic for the existing situation. What they were not ready to admit, was the reason for their helplessness. The situation is presented in such a manner as to give a glimmer of hope that the situation would improve. This external flow of surplus, produced locally will not diminish so that as the external orientation of the economy subsists. In fact the figures are expressive of escalation with the passing of years. The table below illustrates this

BALANCE OF TRADE 1976-1980 K&M

<u>Imports</u>	Place	1976	1977	1978	1979	1980
	From outside E.A.	398.8	529.2	658.8	619.3	934.6
	Commercial	364.1	493.3	628.8	581.8	860.3
	Government	29.7	35.9	30.0	37.5	74.3
	From Uganda and Tanzania	13.1	2.2	2.3	0.9	1.5
	Total	407.0	531.4	666.1	620.2	936.1
<u>Exports</u>	To Markets outside E.A.	268.8	428.9	336.6	351.9	426.3
	Re exports	9.7	11.0	17.9	19.1	15.8
	To Uganda and Tanzania	66.6	61.9	41.2	41.8	71.6
	Total	345.1	501.8	395.7	412.8	513.8
<u>Balance of Trade</u>	With Mkts. outside E.A.	-115.3	-89.3	-304.3	-248.3	-492.5
	With Mkts. in Uganda and Tanzania	+53.5	+59.7	+38.9	+40.9	+70.1
	Total	-61.8	-29.6	-265.4	-207.4	-422.3

Source Economic survey central bureau of Statistics.

This external orientation has had far reaching effect on the peripheral country. First it has continually resulted in underdevelopment. This may seem as an odd assertion at first, but a closer view shows it is not. With the metropole appropriating the economic surplus from the periphery, the latter is denied the opportunity for internal accumulation. This is in contrast with the bourgeoisie class in the metropolis which was able to appropriate such surplus there and hence generated investments causing additional demand and further reinvestment.

However, in the peripheral country, the local demands are satisfied by imports from the metropolitan country and hence fail to stimulate any substantial secondary investment. Hence no selfcentred economy has emerged, that is an economy which has its own capital goods sector and consumer goods sector and a mass market to support such production.⁸

This has not meant complete stagnation, but rather the emergence of a sector producing primary commodities only. This to the metropolis has ensured the external orientation of the economy of the peripheral country. Baran saw it this way:

"The economies of the periphery, acquired their well known 'external orientation' with very weak links between the domestic sectors, and very strong links between the domestic sectors, and very strong links between the primary producing sectors and overseas markets and suppliers."

Dependency on the metropolis has weakened the internal economies and led to property stratification of the Kenyan populace. The external nexus was however not only restricted to the economy, but meant that even the political interests of the peripheral country Kenya, had to be subordinated to those of the metropolis. The reason for this is not hard to understand. If the peripheral political interests were allowed to be supreme, it was at the risk of severing the umbilical cord with the mother country. It was imperative then that the state in the peripheral acquire its "commission agent" role.

The rise of indigeneous capital is well documented.⁹ I cannot go to more detail than mention that such African leaders as took over at Independence were not of different economic clime. The K.A.N.U. manifestos did not advocate anything radical, in for example land reorganization, nationalisation of Industrial sector. This would be going too far in probing the raison detat for such recatrricence. Such leaders had been groomed by the colonial masters for the takeover. Their very positions and finance depended on those foreign forces. It was not strange then that the economic status quo persisted. The new state was ushered in, for exactly that purpose.

The state was therefore to harmonise between foreign capital, the local auxilliary interests and any politically powerful petty-bourgeoisie. It found it very easy to do this. The nationalist fervour that swept across the country, hoodwinked many in believing that the leaders taking over were for a change of the status quo. Maina wa Kenyatti and Ngugi wa Thiongo, have

indicated that adoration was mistakenly given to some freedom fighters merely because they were in the fight.

Secondly the state adopted the existing structures, which had been gradually developed by the colonial masters for the eventual takeover by the African and which would ensure existing property relations would be maintained. Such were the civil service, the provincial administration and the constitution, not to mention the whole pervasive education and cultural subordination of indigeneous education and cultures to their western counterparts.¹⁰

The nature of organisation of people in small-holding property farms well suited an all powerful bureaucracy.¹¹ This is because, the organisation creates a uniform mode of relationship throughout the country and permits Uniform action from the centre to all other points. This will help explain the clientelist linkages later in the chapter. If, through all these means the state could maintain the status quo, but continue to appear as a benevolent organ that always hovered above the earthly contradictions and interfered to enforce justice where it was deserving then the wish of the metropolitan countries would have been achieved.

It is in this respect that the electoral process becomes important. Through it, the relations between the governed and governors were veiled as juridical relations. The economic power relations could be masked and the illusion created in the minds of the general populace that the government was their own creation and hence subject to their interest and whatever it did was in their

interests. Anybody who questioned the property relations could henceforth be told that parliament being the "law giver" had ordained such property relations. Inequitable distribution could be explained away by their legal validity.¹² Hence taking the Hobbesian view that parliament being the will of the people could not auto legislate against itself, that is the will of the people.¹³

The ensuing illustrations of peculiarities in the 1974 and 1979 elections help to show how fallacious the above argument is. They go to argument the fact that elections are mere reinforcements of the existing economic relations. We can only mention in passing how the Kenyan law is an expression of these relations. Paramount is the constitution which through Kelsenite interpretation is deemed to be supreme. However what it entrenches are property relations of the capitalist nature. Section 75 embodies this and provides for full and prompt payment in case of compulsory acquisition of ones property. The constitution also establishes the judiciary for protection of such interests.¹⁴

Under the Companies Act¹⁵ foreign firms in the nature of multinationals are incorporated in Kenya. The same act, through the doctrine of ultra vires prohibits the companies from showing even token benevolence by donating charity unless it is for the benefit of the companies. The Foreign Investments Act reinforces the former Act. It is necessary to note that there is no specific Investment Act governing the code of ethics to be followed when investing. Kenya is also a signatory to the international Union for the protection of Industrial democracy which is nothing than protection of foreign property. Above all the illusory freedom of contracts still pervades our legal regime.¹⁷

THE POLITICAL LACUNA

In Kenya's political experience after the banning of K.P.U. in 1967, perhaps the lack of political debate stands out as the most prominent of the peculiarities existing in the electoral system. This has meant that the protagonists of the process have in their political discourse rarely evoked ideological considerations, rather, it has centred on territorial, ethnic and personal interests.¹⁸ This has not however been always so. Just before independence the two dominant parties had policy differences. On the one hand the K.A.N.U. On land, the leftists in K.A.N.U. were for compulsory acquisition and non compensation of former white highlands owners by the government. On the other hand K.A.D.U. demanded a quasi-omnipotent government than the colonial predecessor. On land K.A.D.U. which was more aligned to the white populace wanted acquisition through compensation.

In 1965 K.A.N.U. issued Sessional Paper number 10, which contained its perceptions on African Socialism. It was stated therein that its philosophy was the rejection of western capitalism and Eastern communism. However this document read vaguely and seen in context of the economic situation, it was a blueprint for capitalism and alignment to the west. Its great attempts to provoke African sentiments by depicting a nostalgic cultural inclination to politics of the "Nazi" type¹⁸, served as a great tool in organizational ideology. At the end of the day the external forces won and the existing economic structuralism subsisted.

The only other serious challenge to the K.A.N.U. governments political stance was in 1966 April 14 with the formation of K.P.U. party. The new parties manifesto was infact set as an alternative to K.A.N.U. policies. On socialism, it felt that the interpretation given to it by the K.A.N.U. party was meaningless and a cloak for capitalism. It promised that:

"It is opposed to the creation of a small class of rich while the masses live in poverty. It will pursue truly socialist policies to benefit the wananchi. It will share out the nations wealth equitably among the people. Extend national control over foreigner's grip on the economy."19

It strongly advocated for a land ownership cieling.

With the demise of K.P.U. a void was created in the political arena. Debate centred on personalities.²⁰ This struggle was always at the deputational level. This meant that such persons as were clashing only represented different sectors of capital. This is because of the heterogeniety of such capital, though none was for a change of system. However they exalted the presidency and fought their battles while at the same time acknowledging their loyalty to the Presidency. Frantz Fanon has described this progression, thus:

"The institution of the state are progressively reduced to those of the President and his circle. The party becomes a mere shell, and actually an implement of coercion. Parliament becomes little more than an adjunct of the presidency where a legislative veneer is filled over the wishes of the autocracy in return for high salaries and some licence to ventilate popular

sentiments (though not of course, sentiments critical of the President). Parliamentary elections are reduced to merely a choice between individuals all of whom have pledged to support the President and his government....."

The other dominant issue in election campaigns have been the harambee projects. They have become the indicia through which a prospective candidate is gauged for his capability. In his work: Some Political Aspects of Kenya's Harambee Institutes of Technology,²¹ Professor Mutiso points out how suicidal it would be for a politician to oppose such harambee projects. Yet the same projects accentuate regional imbalances and ethnic reunification. Perhaps the pooling of such funds and their use to pull up areas neglected by the colonial government would be more appreciated. Yet what is better than these imbalances and disunity to the external forces. They take advantage of them and pity one against the other. Perhaps this comes out more clearly when it is realised that most of the funds that politicians give in such projects are either externally funded, from very specific quarters of the world, whose finance capital is represented in the country, as in the case of Kiambu Institute of technology which received thirteen million from Netherlands, while 760,000/- came from the Quaker organisations of the United States to Kaimosi²¹ or the funds could be from internal finance sectors which through this subtle self advertising are able to stabilize their position in the country by relying on such powerful politicians as they give contributions to.

The above, has led quite logically to the clientelist linkages in the political system. Indeed this has become the single most important role of the elected member. The ability of such members to relate to the "centre"²²,

his ability to get funds from the same for the improvement of his constituency are the criteria for the chances of his re-election. Hence elections have taken the nature of referendums on the adequacy of constituency service by incumbent M.P.'s. It also determines the Vertical elevation of such members, such that, the ones able to organise the linkage at regional level are nearest to the centre and become Ministers, while the status of such a leader falls with the lesser the size of the area he organises. This means that a member is not elected to Parliament to formulate public policy but is given an opportunity to join the national hierarchy.

In a thorough research Joel Baykan and John Okumu,²³ found out that 85% of the people they interviewed, tended to see the appropriate role of an M.P. as continuing the linkage activities and only 5% of the sample, felt that the debating of national policy in the National Assembly should be the activity on which M.Ps. should spend most of their time. The following chart illustrates this.

MOST IMPORTANT ACTIVITY WHICH KENYAN MPS. SHOULD PERFORM

A. Linkage activities

1. Tell government what people in district want	29%
2. Obtain projects and benefits for the district	25%
3. Visit district frequently	11%
4. Explain government policies to constituents	7%
Total Linkage	72%

B. Non-Linkage activities

1. Help constituents with their personal problems	6%
2. Take active part in debates and pass bills	5%
3. Help solve conflicts in the community	2%
Total Non-Linkage	13%

No. of answer - I don't know 16

(No. in sample 3828)

Source Quoted from Guy Hernet

Elections without choice p. 104

It remains to show how such linkage structures give expression to the political - Economy. We have already seen where some of the funds used to initiate these projects come from. The linkage structure helps to place the centre above the political fray such that it is seen as the giver and controller of the individual politicians success and the benevolent purveyor of alms. This legitimises its functions. Yet earlier we indicated that the centre plays the role of a commission agent, with the Principal at the metropolis.

CLEARANCE

Simply put this means that any aspiring candidate has to get the necessary endorsement of the party which is sponsoring him. However in Kenya, the term is increasingly becoming a sinister one, for it has added a weapon in the armoury of the ruling class to forestal any "dissident" in getting a place in the electoral process. The process was an imheritance from Malawi, where it was used in 1964.

It is embodied in section 40(1) of the constitution which states:

"A member of the National Assembly who having stood at his election as an elected member with the support of or as a supporter of a political party or having accepted appointment as a nominated member or as a supporter of a political party, either resigns from the party at a time when that party is a parliamentary party shall vacate his seat at the expiration of the session."

It is interesting to note that this fifth Amendment to the constitution was published, tabled and passed through all stages and then given Presidential assent in less than 48 hours, yet parliamentary procedure requires fourteen days notice before a constitutional amendment bill can be tabled.

The trauma that the clearance issue places on an opponent candidate of K.A.N.U. are enormous, such candidate is left with no alternative. This is especially so, since 1966 Kenya has remained a defacto one party state.²⁴ That such a candidate has the alternative of forming another party is no alternative at all. He will need the capital, organisational manpower, not to mention the political climate that must exist before such a party can be allowed registration.²⁵ illustrations of the clearance Process

The Odinga Experience - Oginga Odinga, a prominent nationalist and constitutional freedom fighter become the country's Vice-President when the K.A.N.U. government ascended to the helm, after the passing away of the colonial era. During all this time he exhibited a more

leftist leaning than some of his colleagues. The situation worsened especially when the former nationalist sloganeers changed their tones, and adopted the colonial government tendencies. To add insult to injury the new K.A.D.U. members who had recently joined K.A.N.U. members/²⁶ recieved more favourable treatment. This led to a split in K.A.N.U. to the A and B groups. This conflict can be summarised as one in the question of land policy and economic ideology as a whole. Fed up with all that was happening with the party Odinga decided to quit, together with some colleagues to form a party.

This called for an urgent method of solving the crisis. The constitutional Amendment was bulldozed through parliament. The constitution also required that any aspiring candidate had to be validly nominated by a political party²⁷ K.A.N.U. strengthened the legal position by enacting article 20(b) of its constitution which read:

"Any member of K.A.N.U. wishing to stand as a candidate for the national Elections must make an application on a prescribed K.A.N.U. form of application to the President of the Party provided that a member may not present himself for nomination as a candidate if he..... has been a member of the defunct K.P.U. who has been detained for subversive activities against the government of Kenya."

It is this provision read with the constitutional one that has prevented Jaramogi Odinga's return to Kenya's political process though the electoral machinery. Every time he tried to do so both in 1974 and 1979, a finger was pointed to the sections. The proviso to the section

which exonerated those persons affected by the section but who had identified with K.A.N.U. policies, For the last three years prior to the application never applied to him. Manifestly it was because of the subjective nature of the test. However more sinister was the fact that clearance begun to be effected by individuals. This is depicted in the next illustration.

2nd illustration: The Busia seat.

The forerunner to the events in this episode which has come to be referred to as the "Rungu Politics" were as follows: After the 1979 elections Mr. Osogo won the seat by a narrow margin. However he was to be unseated by a voter in a subsequent election petition. This left the seat vacant and various prospective candidates submitted their names to the K.A.N.U. party for clearance as required by both the law and the K.A.N.U. constitution. It would then appear that the party's secretary general wanted both Okondo Habenga and William Diffu cleared. The Party's national treasurer however wanted Habenga cleared only. A dispute arose, leading to a fight between the two, the eventual result which was the hospitalisation of the secretary-general.

The fight raised doubts on various issues. Although the procedure of clearance is supposedly to be taken by the parties executive committee, here two individuals were fighting over the issue, showing it was their decisions that mattered. It is not clear how many aspiring candidates in Kenya may have been the victims of the personal whims of the party bosses. The fight posed doubts on the validity of the party decisions - such a decision is supposed to be supreme and unchallengeable yet the fight indicated it was contestable.

Clearance, best illustrates use of electoral law to discard such persons as oppose the economic policies pursued by the government. Such rules passed mainly to deal with the K.P.U. crisis, was an effort to forestall opposition, radicalisation of land and economic direction. It is my feeling that the practise will be resorted to more and more in the future, as aspirant candidate start feeling the financial pinch of an election campaign.

FINANCIAL LEVERAGE IN ELECTIONS.

It is clear that in every election campaign today, financial backing is essential to ensure a chance of winning. Indeed this monetarization of the electoral process has been so extensive that Lovis Maisel is prompted to say "In today's America, money is the lifeblood of electoral process."²⁸ The same could be said with equal veracity of the Kenyan position. It is also true that such financial muscle power could be used purely for legally valid purposes. What is being asked however, is whether these financial disparities do not negate the principle of equal participation envisaged by orthodox psephological theory as expressed by James Madison:

"Who are to be the electors of the federal representatives? Not the rich more than the poor; not the learned more than the ignorant; nor the haughty heirs of distinguished names more than the humble sons of obscure and upropitious fortune. The electors are to be the great body of the people of the United States."

Can it be said with certainty in the context of the financial disparity that exists among the people of Kenya that the whole body of the populace equally participate in such elections?

Funds are obviously necessary, for various legally valid reasons, for example, such money could be used to communicate the candidates policies to the populace, this could be way of the news media the convening of meetings in the various constituencies use of posters, employment of agents not to mention their food lodging and transport expenses. Finance is required even after the electoral process since a deposit of 50,000/- is required to be made by any petitioner before his claims can be heard.³⁰

The role of finance takes an ominous turn when it is sought to forestall the chances of the ill-possessed or the ones with little financial backing. The Law seems to have recognised this, since under the Election Offences Act³¹, it is an offence to manufacture ballot papers or to buy or sell such ballot papers or to bribe voters³² The National Assembly and Presidential Elections Act also has sections dealing with election offences. Section 18(b), of the same puts maximum amount of election expenses at 40,000/- for any individual candidate. Section 18 (1), provides for return of election expenses account within sixty days after the day on which the result of the parliamentary election is declared. Such expenses return must declare all election expenses which have been paid, all disputed claims any election expenses which are unpaid and all contributions that were recieved.

My contention which is a deduction from the foregoing is two fold. First, that the laws attempt to curtail financial disparity is at best superficial at worst illusory. It is clearly futile for a legal system to try and create equality where such equality does not exist in the economic position of the various persons.

There are persons who by virtue of such financial necessity knocked out of the running. This is indeed ordained in the law. The constitutional sections which require that for a candidate to be properly nominated he must be a nominee of a particular party has been reinforced by the K.A.N.U. stipulation that a candidate must be a life member of K.A.N.U. which means having bought a thousand shilling K.A.N.U. certificate. The sections dealing with election expenses mentioned earlier are ridden with exceptions. For example such returns need not include the personal expenses of a candidate or expenses of a person appearing on the platform of the candidate and his reasonable expenses of living at a hotel, or any expenses incurred in purchase of copies of register of electors or on telephone calls. Yet use of money on such activities give an edge to some candidates over others. The court has also held itself ready to forgive some members who fail to make such returns.³³

Secondly, there is great difference between what the law ordains and what actually happens in such election campaigns. That election petitions have exposed the ~~exposed~~ use of funds to appease the electorate through provision of token donations of sugar, flour or even money shows the practise is widespread. The mere delimitation by the National Assembly and Presidential Elections Act, to forty thousand shillings shows a conservative appraisal of what was required to give the candidates a fair opportunity. Obviously for someone to set aside forty thousand on elections, alone means he has more than that for his other activities. This limits candidates to a very small group indeed.

It is interesting to analogize these money requirements with the united states cases of Bullock v. Carter³⁴ and

Lubin v. Panish³⁵ which held that an exclusively monetary criterion of eligibility for candidacy is void constitutionally.

The effect of these practices has been to shake Orthodox theories on elections. It has threatened to undermine the main democratic values of equality of participation in gained in the theories. Their net effect has been ^{to} whittle down "Democracy" deter able candidates from seeking office, encourage bribery, extortion, office buying and erode public confidence in government.³⁶

There are of course other alternatives that would mitigate the situation. The American experience has been effectuated through the Federal Election Campaign Act and Revenue Act of 1971 these two require.

- a) disclosing indentities of contributors to campaigns
- b) imposed cielings on the amounts that donors might legally contribute to candidates
- c) they limited the overall amounts which such candidates might legally spend on their campaign
- d) provided for public financing of Presidential elections.
- e) they created a means of policing all federal election campaigns, through the creation of the federal election commission.

These measures could be adopted for the Kenya situation, however this would be with various adjustments to suit the different Kenyan situation. While this might be a step foward, it must not be seen as the ultimate one. Equality cannot be achieved, in one institution to the

exclusion of all others. What is required is the creation of an egalitarian society which will create equality of opportunity. To wait however for the propertied class to auto legislate itself out of power and give equality of opportunity is fanciful thinking.

THE ROLE OF THE JUDICIARY IN THE ELECTORAL PROCESS AND THE MYTH OF JUDICIAL INDEPENDENCE.

In orthodox, montesqieu theory, the Judiciary is seen as a separate organ of the three organs of the government. The influence of this system imported to Kenya, in the shadow of the westminister model has been tremendous, especially as regards the Judiciary. The Judiciary is therefore seen as an independent and equal partner of the other two organs of the government, namely the executive and the legislature. This relationship is deemed to be an indispensible requisite of a free society and the rule of law.³⁷

For those who attended the constitutional conferences in 1960s a major issue was the sanctification of fundamental rights in general and property rights in particular both under the superintendency of the courts. When the Independence constitution was ~~initially~~ ^{initially} adopted it enshrined this doctrine of separation of powers.³⁸

However there has been great diversionary trend in this century when the ruling class in all western jurisprudence countries have looked more and more to the judiciary for the protection of their status quo. This has been completed by the emergence of a fourth body, the administration.³⁹ This influence has engulfed the Kenyan situation.

Even orthodox theorists have begun to doubt the validity of the separation of powers. They point at the presence of the executive in parliament. The judiciary is seen no longer as an uninterested arbiter between the individual and state. This is in view of its inaccessibility to the former, not to mention the litigation time, court fees, engagement of lawyers and the technical language involved. This is further marred by problems in the Kenya context. Dr. Okoth-Ogendo in the paper Development and the Legal Process in Kenya: An Approach to the Analysis of Law and Rural Development administration,³⁹ emphatically stresses that legal knowledge should not be assumed but should be actively transmitted to the people. This is especially so, as in view of the high illiteracy rate in Kenya.

The Kenyan courts have not freed themselves from their besmirched name during the colonial times when they were seen as organs of the state, directly involved in maintenance of the colonial status quo. Even to day the layman looks at the courts with trepidation.

The Kenyan constitution has provided for security of tenure for such people as serve in the judiciary. Its section 62(3) provides that a judge of the High Court may be removed from office only for inability to perform functions of his office due to infirmity of body or mind or other cause or for misbehaviour and even then it will only be after the President has referred the question of his removal to a tribunal appointed for that purpose. The case of Fraw v. Blackburn⁴⁰ and Sirrows v. Moore⁴¹ have affirmed that no action against a judge would lie, for alleged malicious and corrupt practices.

In a nutshell, what we are asking is whether such impartiality is attainable by their mere enshrinement in the laws. Such an assertion would be devoid of a class analysis and very a historical. Marxist-Leninist conceptualization of law is that it has a class nature and its indivisibility with political dictates.⁴² From the following analysis it will be shown that the judiciary both unconsciously and consciously, more often than not responds for the benefit of the ruling class.

This is inevitable within the existing structures. The doctrine of separation of powers and security of tenure are mere ritualistic charades. There is great difference between what the law ordains and real ^opolitik. The same judiciary has to rely on the executive for its appointment, promotion, transfer and removal. This is a real threat to them. Mr. Briggs discussing the issue had this to say;

"It is bound to induce in the mind of the person expecting that promotion, some kind of fear and respect for the authority which he considers will have to promote him."⁴³

The orthodox theory also assumes that persons so appointed to the judiciary are value-neutral and are ready to expend justice without any class bias. Yet such appointees have definite class biases which are reflected in their judgements. Lord Scrutton on a rare admission of this class nature of the system observed;

"The habits you are trained in, the people with whom you mix, lead to you having a certain class of ideas of such a nature that when you have to deal with other ideas you do not give a sound and accurate decision as you would wish."⁴⁴

Due to these class biases the courts have again and again forestalled even those governmental policies that were fanned by momentary gushes of nationalistic fervour to have emergence of a national bourgeoisie. These were put by the government as policies to achieve equilibrium between emerging national capital and international capital with the former prevailing⁴⁵ G.K. Kamau, feels that the interpretation of "rights" in the constitution should be an attempt by the court to level out the inequalities that were created by the colonial experience.⁴⁶

In that context, the Kenya courts have not taken the lead from their American counterparts where the latter, albeit from a reformist view spent much of the - 1950s and 1960s setting valuable precedents for reconciling constitutional rights with widespread inequalities in the populace. This was in the nature of affirmative action. The stance taken by the Kenyan courts however is not surprising, it reflects the milieu in which it has been nurtured and the entire philosophic setting of the constitution - making process, that is the maintenance of the existing property relations and hence the external orientation of the economy.

Two examples from the electoral arena serve to illustrate how the courts have^{been} used to dispense with "unpalatable" members of parliament.

Waruru Kanja's case - Waruru Kanja, the former M.P. for the Nyeri constituency, was very vocal in Parliament. His nationalistic stances knew no bounds and he never minced his words. This was indicated in 1980 when he was

relieved his assistant ministerial post following his scathing attack on two centrally placed Ministers.⁴⁷

Hon. Kanja was however later arrested and charged and sentenced on 24th September, 1981 by Senior resident Magistrate J.S. Patel,⁴⁸ for contravening sections 4(1) of the Exchange Control Act⁴⁹ read together with paragraph 1(3) of Part. II of the fifth schedule of the same Act. He was sentenced to 3 years imprisonment which was later reduced to one year on appeal. No one is suggesting that Hon. Kanja should be above the law. However there were certain ongoings in the case that raised eyebrows. For example the magistrate found it fit to say he, "was constrained to say that the custodial sentence is inevitable". Why this was inevitable is not clear since precedent showed fines were more common than custodial sentences for same offence.⁵⁰ Secondly the nature of office Kanja held would have merited some consideration on sentencing as shown by Fidalhussein when he observed:

"This mountain out of a mole hill was caused by Ngei, a responsible senior Minister..... I felt this may be a proper case for a custodial sentence but this court will not ignore the fact that he is fully sorry for what he did. A custodial sentence may deprive the country of the services of an important, able, and dedicated Minister"⁵¹

S. Gutto records⁵² that on appeal, the state lawyers conned the Hon. members lawyers through a plea bargain into believing that if they abandoned the grounds relating to the conviction, the state lawyers would not oppose the grounds based on appeal and that a custodial sentence would not be necessary. However the state lawyers failed on this point of honour and argued out their case.

Subsequent events also indicated the political nature of the case. In his plea for presidential clemency, Kanja expressed the view that it was impossible for him to obtain the fairest trial before those who did not like his politics. The speed with which the speaker of the National Assembly signed the notice declaring the Nyeri seat vacant is worth of note, since it was done before the decision of his excellency the President on the Petition, as if in anticipation of what decision he was going to make.

2nd illustration The Bondo seat 53

After Hezekiah Ougo, stepped down in favour of Jaramogi Oginga Odinga for the Bondo constituency seat, but subsequently the latter was barred by the K.A.N.U. party from standing various other candidates presented their papers to the returning officer to indicate that they were validly nominated two of these were William Odongo Omamo and Jalango Anyango. What surprised most people was well summarised by Hon. Grace Onyango, she wondered how Odongo Omamo who had earlier stated that Odinga should stand unopposed had so quickly resigned from his parastatal positions as is required by the law soon after hearing of Odinga's debarment.

However on nomination day, the returning officer accepted the papers of the two mentioned candidates. It is worthy of note that the feeling in Bondo and elsewhere was that this was an attempt by the K.A.N.U. government which had recently debarred Odinga to impose their nominee on them. There were fears in certain quarters that anybody who stood against Omamo would win. Odongo Omamo therefore filed a suit challenging the decision of the returning officer.

Grounds on which relief was sought were:

(i) The returning officer had no power to alter his decision already made. That the nomination papers of Anyango were invalid according to section 18(1) of National Assembly and Presidential Elections Act.

(ii) Anyango did not deliver papers on time .

(iii) Anyango was incorrectly proposed, since some of the proposers were not K.A.N.U. members.

The relief sought was

a) An order of certiorari that the decision of the returning officer, that the nomination paper of Anyango was valid be removed into the High Court and be quashed.

b) An order of Mandamus directed to the returning officer for the preliminary election to the supervisor of elections to certify that only the said William Odongo Omamo stands validly nominated.⁵⁴

The court held that the law authorised the returning officer to reject any nomination paper that he felt did not fulfill the provisions stipulated in the election laws, but once he had done so he had no jurisdiction to recall or vary the decision. So Odongo Omamo became the member for Bondo without opposition. Note that the returning officer was transferred during the currency of the suit.⁵⁵

ETHNICITY AND RACIALISM IN KENYA'S ELECTORAL PROCESS.

Kenya is both a plural and multi-racial society. In the wax and wane of society through the strong forces of capitalism the different groups were able to come into contact. This contact however has ^{not} been a very happy one. The metropolis were quick to realise that they could reap a lot from this disunity. It is the aim here to show that there was a conscious effort by the metropolis to retain these ethnic and racial differences as early as during the advent of colonization and that the strata has remained intact since then. This differentiation will be related to the electoral process.

This point becomes clear when we consider the imperial policy of who was to be settled in the newly acquired. Ruth Marjorie Dilley in her Ph.D. thesis entitled British Policy in Kenya Colony,⁵⁶ showed uncharacteristic foresight of the colonizers of the time in analysing this strategy. She emphasises that low class whites immigration was opposed for it would obviously lead to intermingling with the natives and hence disrupt the idea of racial supremacy.

This subjection initially was in the nature of primitive capitalism where crude methods were used to downgrade the Africans. The psychological role of labour was phenomenal, where the whites saw themselves as offering their civilization which was superior to the Africans⁵⁷ while various other techniques were used to subject the Africans to this position. The result of all this was the emergence of a three tier system in so far as the races were concerned. Classes coincided with race, with the whites being hierarchically in the apex benefitted

most from the gubernatorial exercise of power.⁵⁸ Next were the Asiatics who by virtue of their semi-skilled experiences were able to accumulate some capital and undertake both trade and distribution activities. Lastly came the Africans, who were either engaged as labourers or remained in the rural areas as peasant growers of cash and subsistence crops.

What bearing then does this background have on the Kenyan electoral process? Race relations have had great influence on the electoral process. From the earliest times, the three groups fought for the parliamentary process as distinct groups. True to the tier system the whites were first to win concession in 1918 followed by the Asians in 1923 and the Africans as late as 1944.⁵⁹ What was important in the relationship was that although the two groups; the whites and Asians, were minorities in terms of numbers were never so interms of power relations and financial muscle power. What then was to be done when African nationalist demands became too strong? The property relations had to be retained at all costs. The metropolis decided to use the constitutional machinery with its component of election, as the solution Gutto aptly points this, thus:

"Independence was a means of pre-emptying any further radicalisation of the oppressed Africans which would have resulted at a later date in a leadership oriented towards the smashing of the colonial (capitalist) state machinery and the social system it represented".⁶⁰

This is shown by the growth of the Legco. Initially it was settler dominated, and the settlers were the local propertied class and representatives of the metropolis. However the oppression of Africans were suffering under

colonial rule provoked them to enter into armed resistance against it. In order to mollify the Africans who in any case belonged to the oppressed class, the colonial power developed a system of co-optation where class was no longer going to be coincidental with race. Some Africans were encouraged to acquire property and property qualifications were introduced for those who wanted to contest elective posts.⁶¹

As some Africans continued to play the comprador role in post Independence Kenya, the property relations remained intact. Racism however continually surfaced. However the danger in it was that it was used to evoke strong emotional sentiments and its catharsis was always directed to what appeared as the problem and not the real problem. The Asiatics have been the most hard hit. A V.O.K. Commentary had this to say of them:

"Thought the colonial rule they were the middle men the in-betweens vacillating like versatile weather vanes between the Africans and Europeans. Communication depending on the gain involved."⁶²

Hon. Shikuku has also been a prolific attacker of the race.

In a very well thought and written article, the Viva Magazine⁶³ pointed out the operative issue was not the Asiatics race position but their place within the class strata. They conceded that the Asian influence in the economy was second only to the multinationals. Pragmatically this does not augur well for conducive relations between races in this country. From a reformist view, the following measures should be taken. Training Africans intensively and loan allocation. The Kenya courts should also take a more positive step in closing the gaps between the various social classes. In so doing, they could take the lead of United States Supreme Court, whose view was summarised by Judge Blackburn as follows:

"To get beyond racism, we must first take account of race; to treat some persons equally we must treat them differently. To rid race of handicaps, in other words we must advance some and restrain others."⁶⁴

This is not to say that Africans are unified as a group. They are stratified and fragmented on social classes and ethnic lines. Tribalism was actively encouraged by the colonial administration and is still encouraged. This is done through the consolidation and stabilization of boundaries. These boundaries give a sense of identity. Control of production and marketing of cash crops through co-operatives has also perpetuated these local loyalties. Even urbanization has not solved this problem. There has not emerged an Independent permanently settled urbanized community. This is due to the difficulties of accumulating capital and hence the urban people have to look to the reserves for security in old age, unemployment or sickness.⁶⁵

The different growth rates have also served to perpetuate this tribalism. For example the favouritism to central province, during most of the period after Independence, served to anger the other tribes. However even more important is when tribalism enters the political arena. George Bennet has pointed out and it is an open secret that the disunity that led to the formation of K.A.N.U. and K.A.D.U. were a reflection of this tribal parochialism.⁶⁶

When K.P.U. was formed in 1966 those who joined Odinga in the exercise were those either from the backward areas, those from Luoland and the radicals on issues of foreign and economic policy. The speaker of the National Assembly has in fact ruled that members are free to air

tribal grievances where they believe they are not receiving their fair share of land, public offices, or suffering any kind of discrimination.⁶⁷ The exposition would be incomplete without mentioning the recent tribal organisations that existed, some of which were so strong that they challenged the K.A.N.U. party.⁶⁸

The important factor in analysing these two aspects is to realise that it is not really a question of tribalism but one of class. It is true that to a large extent the races have coincided with class. However that the comprador African class should come out strongly in support of the minority races whenever they are blocked proves it is not a question of race, but routing out any opposition to the appropriators of surplus value.

CONCLUSION

THE PROPRIETY OF ELECTIONS.

The major question set to be answered here by way of conclusion to the dissertation is this; why should the ruling class which has the control of the state coercive machinery, the enormous financial backing, and could rule by other alternatives, for example direct dictatorship, choose to adopt the electoral process, a process through which they expend some of the surplus value they have appropriated?

The answer is many faceted. However the main thrust should be seen as a trend in western jurisprudence whereby capitalism in its growth has devised subtle ways of mystifying the real power relations. The elections give democratic legitimacy to the system by making the people feel as periodic arbiters of their rulers. The popularity of the concept derives from being linked with

democracy, liberty and justice. Practice has shown that elections have got nothing to do with those ideals at all. Its aim has been to cloak the relationship between the rulers and the ruled ^{as} juridical touch and hence are seen as legally binding and valid relations.

Many writers have been however able to see through these masks and have held out that elections in Kenya have been used in the evolution and routinisation of the procedural and structural mechanisms used to consolidate power.⁶⁹ In fact he contends that in this direction Kenya unlike most African countries have succeeded in institutionalising a semi - competitive electoral system and this explains why there has been no major upheavals in the country. In Agreement Frantz Fanon points out that elections help in circulating the elite, contributes to the mystification of voters and hence helps the elite to preserve their freedom to go enriching itself without interference from below.⁷⁰ Their ruling is made easier because the masses give what Gramsci⁷¹ would call spontaneous consent to be ruled.

This conclusion begs two questions. First, does it mean therefore the electorate should dispossess itself the electoral process and secondly what are the prospects of elections in Kenya. The first question is better answered by Lenin in his book The Proletarian Revolution and the Renegade Kautsky,⁷² as criticism to the German "left" communists who were opposed to any participation he said:

"This does not mean that we must not make use of bourgeoisie parliaments.....but it does mean that only a liberal can forget the historical limitations and conditional character of bourgeoisie parliamentarism" (emphasis his)

The point Lenin was stressing was that the populace should never make the mistake of believing that through the parliamentary struggle alone they would eventually gain control over the state and their production. However such an institution just like that of trade Unions was a good school for the politicisation of the workers.

As to the second question it is becoming clear that what is considered to be "rights" in western democracies are too advanced for the backward ruling classes of the third world who are unable to rationalise their positions and devise mechanisms which obliterate their real power relations, while at the same time portraying them as purveyors of society. Due to this we are likely to witness a proliferation of more crude methods of eliminating opposition. This may include detention, non-clearance by the party, financial frustration and as a last resort physical liquidation.

We set out to outline the various schools that analyse the role of elections. We demystified any participation by the masses that is alleged and indicated the proper role of elections. To this end, then elections have been a very successful exercise in Kenya.

INTRODUCTION

1. Works like those of Karl Marx The Communist Manifesto
John Rawls A Theory of Justice (Oxford U.P 1971)
are examples of such social theories.
2. What would be termed generally as eastern or
Marxist Jurisprudence.
3. Quoted from
Richard N. Hunt Marxism and totalitarian
Democracy P. 86 (London, MacMillan 1974)
4. James F Ross: Election and Electors (London
1955) p. 11

CHAPTER ONEFOOTNOTES

1. Hermet et al Elections without choice (London, MacMillan 1978) at the preface
2. This term is used interchangeably with the term participatory government.
3. This definition is my own.
4. Hobbes Leviathan (Oxford, Blackwell 1957 reprint of 165 ed.)
5. J.W. Garner Political science and Government pp.52
6. Supra pp. 21
7. De Smith The New Commonwealth and its constitutions (1964, London Sevens) p. 106
8. These scholars include:
 - James Buchanan The Calculus of consent Ann Arbor University of Michigan Paper back, 1965
 - Robert Dahl A Preface to Democratic Theory Chicago University Press 1956
 - William Riker A Test of the Adequacy of the Power Index
 - D. Robertson What does the Economist Economize (London, Staples 1956)
9. Supra p. 19
10. Plato The Republic (Cambridge U.P. 1966) The idea is all embracing in the Book
11. G.C. Field: Political Theory (Methuen) pp. 102-3
12. Engels The Origin of the Family Private Property and the State (New York International Publishers 1972) p.229

13. Mopherson The Real World of Democracy
(Oxford University Press 1966)
14. Supra p. 10
15. Supra p. 2.

CHAPTER TWOFOOTNOTES

1. The author believes that there is genuinely no choice. The use of the word here is purely in orthodox election sloganeering.
2. Cap. 7 Laws of Kenya.
3. Cap. 66 Laws of Kenya.
4. Whether this is true in practice is another matter.
5. The National Assembly and Presidential Elections Act Section 12.
6. Nwabueze Constitutionalism in the Emergent states (London, Hurst 1973)
7. Considering that few members are willing to face an election not only because of fear of being ousted but also the high campaign expenditure.
8. See section 98 National Assembly standing orders
9. Supra section 5
10. Daily Nation Friday January 15 1982 at p. 32.
11. This point was clearly put by Hon. Mati during the parliamentary debate on the Hire Purchase Act 1968.

he said:

"Mr. Speaker, Sir, our Present kind of life is such that we cannot do without the hire purchase system. Most of the members here perhaps unknown to most of the public outside live on almost nothing else ... We could not move without cars and yet I wonder who could claim here to have bought his car for cash."

Quoted from

Mutunga:, De mystification of the Law of Hire Purchase in Kenya p. 26.

12. Constitution section 62, regarding security of tenure of Judges.
13. S. 42 (2)

14. Ghai and MacAuslan - Public Law and Political change in Kenya (Oxford University Press 1970) p. 325.
15. Section 17(1) of National Assembly and Presidential Elections Act.
16. In 1979 this was done on November 22.
17. Jean Jaque Rousseau Social Contrat (OXFORD, CLARENDON
18. Muammar al Qadhafi Green Book Part one: The Solution of the Problem of Democracy
19. Hogan Election and Representation (Oxford Cork U.P. 1945) p. 121.
- See Also
- Nyerere's One Party Rule: Democracy and the Party
20. E. Smith Elections in Developing Countries
examples in Kenya (MacMillan 1960)
- In 1974 Petition for Angaine's election, found out that votes cast were in excess of the registered voters.
- In 1979 Ngei's Petition, a letter was revealed from the D.C. to the election officials prohibiting them from releasing certain documents to prospective candidates. This indicates such governmental control.
21. Proffesor Claire definition in "Minority Rights Group" Constitution Law and Minorities report No.36
22. (1969)38 Mich. 485.
23. (1964)377 U.S. 533.
24. (1961) I.R. 169.
25. Oginga Odinga Not Yet Uhuru (African writers) p.250
26. National Assembly and Presidential Elections Act

27. S.K. Musyoka: The Socio-Legal Aspects of the 1974 General Elections in Ukambani (Unpublished LL.B. Thesis July 1977)
28. E.g. the Uganda elections 1980 February elections.
29. The President is a member of Parliament. The Attorney-General is both a legal advisor of the government and ex-officio member of parliament.
30. Weekly Review November 9 page 29 - such further debate has been provoked by the Minister of Local government in branding Luos as anti-loyals. See Daily Nation b/n 22/2/82 to 29/2/82.
31. Orenge H.P. in a Public lecture organised by Kenya Law Students Society on 28/4/82 at University of Nairobi gave this aspect great emphasis.
32. Woodroff Wyatt: "Parliament the Waste Land." Sunday Times November 4 1973.
33. Humphrey Slade - has so ruled
34. Gikandi wa Ngibuini: The Kenya Parliament, its role and effectiveness - A critique (Unpublished LL.B. Thesis 1982)
- 34(a) National Assembly and Presidential Elections Act.
35. See Controller and Auditor General reports for any year between 1975- to 1981.
36. Marie Seroney 'have both suffered its fate, for Anyona their hard hitting criticism in the house.

CHAPTER THREEFOOTNOTES

1. S.B.O. Gutto: "Kenya's Petite bourgeois, state, the Rule/misrule of law and the Public."
- Engels. The origin of the Family private Property and the state. Supra
2. Ernest Mandel: "Introduction to Marxist Political Economy" for the definition of surplus value.
3. Nwabueze Constitutionalism in The Emergent Nations
Presidentialism in the Emergent Nations (London, Hurst 1975)
Judicialism in the Emergent Nations (Hurst 1977)
- Dr. Ojwang. Executive Power in Independent Kenya's constitutional context (unpublished LL.M. Thesis 1976)
4. Definition given by Nicola Swainson - Foreign Corporations and Economic Growth in Kenya (London 1980)
5. Marxist analysis identifies five stages of society's progression, communal, slavery, feudal, capitalism and socialism which is the initial stage of communism.
6. See: Nicola Swainson: Supra
Kaplinsky: Readings on the Multinational corporation in Kenya (Oxford U.P.1978)
Colin Leys The Political Economy of underdevelopment
Christopher Mulei The Multinational corporation and Government Control in Kenya - with (LL.M. Thesis) 1979.
special reference Manufacturing sector. LL.M. Thesis.

7. At page 1.
8. The definition of self-centred economy given by Nicola Swainson. opt. cit.
9. Maina wa Kenyatti: "Mau Mau: The Peak of African Political organization in colonial Kenya.
Ngugi wa Thiongo Detained (African writers series) 1980.
10. Kaplinsky: "Inappropriate Products and Techniques in U.D.C.'s: The case of Breakfast foods in Kenya."
Has indicated that such foods are used through marketing techniques to change a peoples culture and to ensure markets for technology from the metropolis.
11. Marx realised this in his analysis of the effect of colonization on peripheral countries.
Marx and Engels: Selected Works (foreign Languages publishing house Moscow 1962) Vol I
12. Presidential address - opening of new Parliamentary session. March 1982, that questioning the economic policies of the government was an abuse to parliamentary integrity which had ordained the same.
13. Hobbes
14. The case of New Munyu sisal Estate v. A.G. is a clear affirmation of this. 1972 E.A 88
15. Cap. 486
16. Cap.
17. See the Kenya government - Firestone agreement to show how this doctrine is mythical. The contract contained status quo passus clauses which freeze the legislative environment at the date on which the contract was signed and which therefore ousts the sovereignty of the host country. This indicates the inequality of bargaining power between the two countries.

See also
Mutunga W.

18. A term borrowed from G.C.M. Mutiso clearage and organisational base of politics in Kenya (Nairobi 19). It comotes rule by a small group of elders. Today it would mean rule by the "inner circle"
19. K.P.U. Manifesto
20. The current personality conflict between the Vice President and the Minister for home affairs is illustrative of this clash.
21. Both figures are quoted from Mutiso's "some Political Aspects of Kenya's Harambee Institutions."
22. Here used to refer to the national leadership and ultimately international capital.
23. An article entitled "Semi-competitive Elections, clientelism and Political recruitment in a no party state: The Kenya Experience". Quoted from Guy Hernet Elections without choice I would have undertaken a similar survey but for lack of funds.
24. At time of writing the K.A.N.U. executive council has already passed a resolution to turn Kenya into a de jure one party state
See Daily Nation 27/5/82.
25. Ngugi wa Thion'go in Detained has indicated that Adam Mathenge was detained for trying such registration.
26. G.C.M. Mutiso - supra - illustrates this crisis.
27. Section 5(3)a of Kenya constitution.
28. Changing campaign Techniques - Elections and Values in contemporary Democracies p. 19
29. The Federalist Number 57 quoted from (27) above.
30. Under National Assembly and Presidential Elections Act.
31. Cap. 66
32. It is worthy of note that petition after petition this election of alleged and sought to be proved.
33. Nyagah election petition 1982.

34. (1972) 405 U.S. 134
35. (1974) 15 U.S. 709
36. This is the way Louis Maisel sees it opt. cit.
37. This can be inferred by the arrangement of the constitution into Three major portions. The case of Liyanage v. R (1965) A.C. 172.
has, although of persuasive influence held that such separation is adopted in a constitution so held.
38. It is precisely at the end of last century and beginning of this century that the administrative law has been fully appreciated.
39. A paper presented on Law and Rural development at Sunset Hotel Kisumu 1977.
40. (1975)1 Q.B. 118
41. (1863)3 B & S 576
42. Quoted from Sheng Chuan Lao - Justice in Communist China - Preface
43. Biggs Hse of representatives debates column 1392
Nigeria
44. Quoted from Wedderburn - The Worker and the Law
45. Examples where the government has ruled governmental policy to achieve such levelling as unconstitutional
Madhwa v. City Council of Nairobi.
Fernandes v. Kericho Liquor Licensing Committee
46. With Dr. Ojwang - "Judges and the Rule of Law in the Framework of Politics. The Kenya case"
47. Specifically he had challenged the government to the assassins of Mboya and J.M. Kariuki and asserted that Mr. Charles Njonjo and G.G. Kariuki, Minister of constitutional Affairs and Minister of state (as they then were) respectively were being provided with body gaurds because of their crimes and sins.
48. He was immediately promoted to be judge of the High Court.
49. Cap. 113 of Laws of Kenya.

50. Yusuf's case - Former head of Housing Committee of Nairobi City Council was fined for a similar offence.
51. A case where Hon. Ngei was accused of threatening to shoot one Washington Muthomi
Quoted from Musyoka LL.B. Thesis (1977)
52. Some Legal Comments on Hon. Waruru Kanja's petition for executive clemency.
53. My intention is not to give a very extensive background to this case.
54. For a further appraisal of the case see Weekly Review April 24 1981
55. This smacks of governmental interference.
56. Thomas Nelson & Sons (New York 1937)
57. Use of words like "bwana" and "memsahib" to refer to the whites is very illustrative of racial arrogance while the blacks were referred to as "boi" and "Kijana".
58. Master and servants ordinance 1906
Resident Native (Squatters) ordinance 1918
Crown Lands ordinance 1915.
59. Assertion by Marjorie Dilley opt. cit.
60. Supra
61. A.K. Nyairo "Presidential directives, their status in Kenya's Legal System" (unpublished LL.B. Thesis 1981/82 asserts this point.)
62. Reported in Daily Nation 1966 August 16
63. See Viva Magazine July 1981.
64. Ibid.
65. Dissenting in Bakokes case
66. Point given by Colin Leys - East African Study Materials p. 2

67. The Kenyatta Election (O.U.P. 1961) p.627
68. Quoted from Gertzel Government and Politics in Kenya
(Nairobi E.A.P.H.1969) p.37
69. John Okumu - Semi Competitive Elections Clientelism
and Political Recruitment in a no party state:
The Kenya Experience
Supra. p. 88
70. Ibid.
71. The Wretched of the Earth (New York 1966) p. 133
72. Gramsci - Prison Notebook (London) Lawrence &
Wishart 1971)
73. Collected Works pp. 246.