THE POLITICAL ECONOMY OF THE MORTGAGE INSTITUTION:
THE CREATION OF APOLITICAL MIDDLE CLASS IN
POST INDEPENDENCE KENYA.

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BY

OKUTTA, WICKY OUMA

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DEDICATION

TO MY DEAR PARENTS, MR AND MRS DAN OKUTTA
BROTHERS AND SISTERS

(your constant source of motivation
has kept the life going)
Recognition of this dissertation as a scholarly work of necessity makes it a product of knowledge that already exists within and/or without the society in which the whole work was undertaken. We recognise that only people can possess knowledge that makes an otherwise abstract idea possible, and as such, any attempt at singling out individuals or group of persons to have been the main source of motivation would be something akin to what bourgeoisise academics often engage in: Intellectual emotionalism. Knowledge is an asset of the entire society but only individuals are oftenly approached on behalf of the rest. In this work therefore, in as much as I feel indebted to the members of Parklands Campus society in various and numerous ways in which they contributed towards this work, special attention however is given to the following members whose contributions were outstanding in one way or the other; Messrs George K. Kimondo, Smokin Wanjala, both lecturers of the law faculty whose intellectual insights showed me the path to follow in undertaking the work.

Highly indebted to also are my colleagues, Mweti-Munya, Kamau Wa Mbugwa, Ken Njuguna, Kiptanui Kimaiyo and John Maina Mburu where constant presence reminded me of the great duty we owe to the society.

To my supervisor, Ahmednasir Abdullahi, great gratitude remain owed to you for creating a hope when all seemed to fail. To all, I feel greatly indebted.
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INTRODUCTION

In this dissertation, we examine the general role which the laws and other institutions allied to it play in the socioeconomic and political developments in Kenya. Thus in our approach we are both sociologically and politically inclined in order to come out with the real effects that the law as an institution, has had in the country. However, we also engage in a historical excursions as well as materialistic approach towards establishing the origins of the phenomena that forms subjects of our study such as law, social classes and, the institution of mortgage.

In our study, we hold the view that in any society there exists a dialectical connections among the laws governing various institutions, the ruling organ of state and the individuals in the society. While this view inclines much towards a dialectical materialist approach, our major concern is to establish the interlinks that exist among, and between, variables that we intent to examine. Thus, in our examination of how the mortgage institution, a creature of law with the sole purpose of enhancing economic development of the country, affects the member of society [middle class], we intent to unearth the instrumental nature of laws that makes it an affective tool of defining the political economy of the country which is solely placed in the hands of the ruling class.

However, on the whole, we seek to generalise a legal hypothesis that would help enhance our understanding of the law and
its role by attempting to explain the relationship existing between variables we have chosen to examine. Thus we concretise our study through involving in a sample case study of the mortgage institution and how it has affected the socio-economic and political spheres of Kenyans.

In our study as a legal work, we adapt Professor Kahn-Freund's approach towards study of law; when he submits that;

"In the best kind of legal education, the student needs to look at each concrete situation from two angles, the legally dogmatic on the one hand, and the social situation requiring the solution of a social problem on the other. . . . The one without the other becomes either an arid exploration of technicalities or eleganter Jurist, or an easy retreat into a realm of undisciplined politics".

In our case therefore, we involve both sides that are necessary to make the study complete.

THEORETICAL FRAMEWORK.

In this dissertation, a materialistic conception of history is put into use. The conception holds out that there is a dialectical relationship between socio-economics structure and the legal structures found in a society. Thus our premise of any analysis of the phenomena existing within the society is that the mode of production adopted at independence, qualifying capitalistic characteristics, has largely determined the content of the legal superstructure and therefore, any other feature emanating from it such as the discernible socio-economic structures within the
society.

In this paper, we argue that the mode of production adopted has maintained the economic and politically powerful classes at the top and it is during the interactions and intra struggles between members of the ruling class that the political economy of the country is defined and transformed. This, we maintain that the lower classes of peasants and workers after being exploited economically and oppressed by the members of the petty bourgeois are ever politically marginalised, and as such, have less say in deciding important economic and political matters of the country. It is the dominant class who run the national structures and hence formulate what legal, political, and social institutions are necessary for their continued stay in power and in maintaining the capitalistic mode of production which works in their favour. Also realised is the link between the local capitalism practiced within the country, and the International capitalist Economic order of the western world which makes the latter have political and economic influences in matter of the sovereign state that is Kenya.

Thus, in our first chapter, we deal with the historical connection between colonialism and present day Kenya. We analyse how the means of production introduced through colonialism created social classes in Kenya.

Chapter two picks up from the previous one and through examining the mortgage institution, it shows how it has managed to play the general role played by laws, in the continuation of the colonial socio-economic relation. In the chapter we raise the
to our last chapter, as a form of discussing some of the
earlier periods of the country. The period covered thus starts from mid-1880 to the
politicized and social changes that took place in the recent past in
the area which the middle class have played in the light of
the examination of the role of this institution through looking at
the examination as an institute of economic development whose effects
post-independence era. Indeed, it is an analysis of the role of the
corporatist among the members of the middle class cadre in the
institution has played in crafting a culture of political
Chapter 3 is an examination of what role the mortgage
examination of the operation of the new regulations the institution
sphere of the country. The chapter is intended through the
managed to play in the general development of the socio-economic
fundamental question of what role the institution has actually

keep it necessary to serve as solutions to problems identified
in a summary form in order also to give some recommendations that we
suggest features found in our study, we review the whole work in

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In the whole of this study, we reflect upon the effects of the bourgeoisie class in the society as expressed by Karl Marx in *The manifesto of the communist party*, pp 11-119.

"The bourgeoisie, whenever it has got the upper hand, has put an end to all feudal patriarchal, idyllic relation, it has pitilessly torn asunder the motley feudal ties that bound man to his "natural superiors," and has left remaining no other nexus between man and man than naked self-interest, than callous "cash payment". It has drowned the most heavenly ecstasies of religious fervour, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egoistical calculation. It has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free trade. In one word, for exploitation, veiled by religious and political illusions, it has substituted naked shameless, direct, brutal exploitation... The bourgeoisie has torn away from the family its sentimental veil, and has reduced the family relation to a mere money relation."

These remarks epitomise the effects of money economy on the members of the petty-bourgeoisie psychology and their perception of events happening in the social—economic and political spheres of the country.
CHAPTER ONE

THE HISTORICAL LINK BETWEEN THE EMERGENCE OF THE CURRENT LEGAL ORDER AND THE RISE OF THE AFRICAN PETTY BOURGEOIS' CLASS IN KENYA.

THEORETICAL BACKGROUND

The class structure that is conspicuously evident in the Kenyan Social Scene is a product of the colonial history which cannot be satisfactorily explained without paying attention to the historical context in which it arose. History plays an important role in tracing the rise of phenomena in any society by showing the socio-economic and political forces that create and determines changes in any society.

In this chapter therefore, we will attempt a historical excavation of the factors that influenced the rise of a class structured society, and particularly the emergence of the middle class in Kenya, as a class separate and distinct from the rest. The middle class, we hold here, are the class that forms the suitable variable in explaining the dynamics of the political economy in our country. However, this exploration of the past is only to form a foundation of understanding the socio-economic and political changes that are taking place within the country in this decade of 90s. The period of 80s and 90s in Kenya have witnessed and recorded an unprecedented
agitation for changes in almost every sphere since the country attained her independence in 1963. These efforts to introduce changes have been aimed at establishing a democratic and civil type society.

However, in this paper, we hold from the start that efforts already employed were directed at wrong quarters, and as such, the establishment of a truly democratic society is far from being achieved. What is observed of the efforts already put into the work of democratisation of the institutions found in the country are mere calls for the implementation of an economic order christened 'liberalised economy' and a political system of 'Multipartism' as the main features of democracy.¹

While these attempts would not be wholly wrong as steps towards attaining democratic system of Governance, what makes their intentions hopeless is their inherent inability of bringing meaningful changes within the society. These two features that have been promoted with a lot of zeal in the late decade of 1980 and early 1990 as indicators of democracy not only have their creation from a capitalist mode of production and political ideologies of the Western Europe and other Northern states,² but are part and parcel of the international economic order and political system that we hold have been instrumental in maintaining the dictatorial institutions and structures within the country. As this dissertation would show later, these two concepts that have
been central in the agitation for changes as alternative systems to be implemented to guarantee development of a democratic system in the society are the western nations ideopolitical and economic policies that are being offered for sale to most African countries after the collapse of the Soviet Union in the late 80s.

In this paper, we provide different and concrete reasons for holding that it is the capitalistic system that has principally operated as inimical to the development of a democratic culture in most African states Kenya included. In the first place we find that the system was introduced in Africa during the colonial period and as such its foreign ideologies terms of economic production and socio-political organisation was not compatible with African traditional way of life. However, this is not to assert with authority that there never existed some forms though remote, of capitalistic practice in some African communities. If there was, then no evidence has come up to date.

Our second reason for distrusting capitalistic system with the duty of promoting democracy in African countries is that it disregards socialism as a system compatible with the democratic culture. The folly of the capitalistic ideology in denying possibilities of development of democratic society as a result of practicing socialism is that, due to its selfish and individualistic nature, it refuses to recognise socialistic practices as enabling equity in the distribution
and providing access to the means of production possible. Thus, we maintain that due to the capitalist system of production stress on the individual as a unit capable of owning means of production, a foreign aspect that was never in the African economic sphere before colonialism, it has only managed to create division and struggles within the society and therefore it serves only as obstacle to true realisation of democratic practices in most African countries, and Kenya in particular.

In our study therefore, we highly take cognisance of the important role played by history in creating and defining the country's political economy and also the class structures evident in the society. It was during the colonial period that a centralised form of state was introduced in Kenya⁴, and with it was a legal order and system that we have maintained almost in the same form up to date.⁵ These forms of political structures as state and the institutions of law that came with colonialism in Kenya, were premised on capitalistic economic and political ideologies, and we hold that they are largely responsible for the democratic constraints we are having in the country, this century. The governing structures and institutions, with a supportive legal system reflective of capitalistic society inherited from the colonial past, are the root causes of our problems and therefore in this chapter we would concert our efforts into establishing the historical origins of some phenomena and structures, that we believe are
the source of our political and economic crisis in this country. Our study recognises that most changes which took place in the socio-political and economic circles revolved around land, and it is from it, therefore that we shall begin the trace.

1:1 THE COLONIAL LAND POLICIES AND THE ESTABLISHMENTS OF A CAPITALIST LEGAL ORDER

The emergence of Kenya as a centralised state and the introduction of a legal system can only be explained against the backdrop of the colonial experience it had as a territory in the 20th century until she received her independence in 1963. The colonial period thus, forms the historical context within which we will be able to explain the emergence of the legal system and the colonial political economy that were responsible for the radical transformation of the socio-political and economic set ups of the African native communities found in the region. Lenin, once observed of the importance of historical Link of events;

"The most reliable thing in a question of social science, and one that it is most necessary in order really to acquire the habit of approaching this question correctly and not allowing oneself to get lost in the mass of detail or immense variety of conflicting opinion, the most important thing if one is to approach this question scientifically is not to forget the underlying historical connection, to examine every question from the standpoint of how the given phenomena arose in history and what were the principle stages in its development, to examine what it has become today"
Thus, in this study, the colonial period marks the origins of the legal order existing in our country and the class structures that resulted from the colonial political economy of capitalist land tenure system.

As historical events do not operate in isolation, the factors that lead to the colonisation of African territories, and Kenya in particular are linked to what was happening in Europe prior to the beginning of colonialism in Africa.

Colonisation, as a form of imperialism, has been regarded by Lenin as the highest stage in the development of capitalism. In the 18th century Europe, there took some developments in economic and social spheres that lead to the colonisation of Africa. In its Economic transactions Europe had experienced a tremendous growth in her industries due to the "industrial revolution" which took place, a condition which lead to an increased commercial transactions among European countries in the industrial products. The commercial "boom" in Europe at this period therefore not only created rivalry among the participating European nations over her limited markets, but also attracted other countries such as United States whose goods found their way into the European markets. What resulted was the introduction of the doctrine of 'Laissez Faire' in an attempt to create fairness in the transactions, but this, unintentionally, ended up promoting some countries commercial enterprises while others sank into the oblivion. The commercial rivalry among the nations was too
The role of life in both the political and economic sphere of the British Protectorate over the Territory, Kenya, in June 1925, was all aimed at the introduction of a capitalististic political structure. The laws which followed the establishment of a legal order which could help them to realise their communities the British government, thus the need to get from Africa was the introduction of African regions. The British government, which solved the conflict of European nationals over African regions, had already some territorial in the vast African territory and, a chartered company of the British government for their respective mother countries, the British commercial companies that had established, some the white companies, the was already in the territory. The establishment of protectorates over African countries by the colonial government began. However, it is possible that prior to the new territory found was Africa and the process into new areas for search of new material and markets for her products. The new territory found was Africa and the process into new areas for search of new material and markets for her products.
Colonialism, and therefore the British rule over the Kenyan territory could not be based on anything else other than on precepts of exploitations of the raw materials and local labour to ensure maximisation of profits; an inalienable element of capitalist economy. Thus, the whole process of governance started with the introduction of a legal order and a new land tenure system reflecting a capitalistic type of society.

THE COLONIAL LEGAL ORDER AND THE CHANGE OF THE LAND TENURE SYSTEM

While the forgone paragraph has managed to underscore the sequences that led to the colonial rule in the region, Kenya, this subsection, would be an attempt at discussing and examining the particular aspects of the British rule that were responsible for changes in the country.

At the center of the transformations which took place in the socio-economic and political sectors in the region, was the issue of land. Ochieng, asserts that land has formed a crucial agenda in Kenyan history, and in understanding how these revolutions in the region took place, then we shall study a brief history of the evolution of land as private property in Kenya. The reason which makes land become the center upon which changes revolved, is that it forms the
The concept of communal ownership of land was not a peculiarity to claim land by virtue of his membership to clan. "In most traditional societies, rights to land were inherited when he notes in his book, "Peacock."

Thus, the communal aspect of land ownership the only virtue of belonging to the respective community by a communal asset, where individual had rights to use by managing during the pre-colonial period, land was viewed as a particular belonging the individual in the community's in the role of territorial Kenya, land, forming the central and main means of before the advent of the European colonizers in the present at what was there before the changes took place. The organization was gradual and it would be important if we look result into a new land tenure system and a new social order. The changes which took place to land ownership. However, the changes which brought about the result of such changes in the tenure system was therefore the modernization of the African concept of communal land was accessible to the settlers who were coming into the region to change in the land tenure system in order to make land resources, their first attraction was in land. The indigenous were mainly interested in the exploitation of local economic primary source of capital accumulation in the primitive stages.
thing to Kenyan territory as it featured mostly in other African territories. Land, did not only possess an element of socio-political aspect in the role it played in the society but also had a religious and ritual attachment. The economic value of land on the other hand was limitless in relation to the African life adopted and therefore was not confined to an individuals benefits. James, RW, further grounds well this concept of communal land tenure system among the African communities when he says;

"African land tenure is much the same in every part of the continents it is communally owned and an individual only has security whilst he is using it."\(^{15}\)

At the beginning of the colonial establishments before the capitalistic tendencies in economic spheres took root, the colonial government, through some court pronouncements recognised the fact of communal land tenure among the Africans. In the case of Jibana Tribe V Visram,\(^{16}\) the court emphasised the position and enforced a claim by Jibana Tribe vs against a defendant who had purported to sell land to a stranger. The land belonged to the community and Hamilton, C.J then, said;

"Belief that land belongs to God and cannot be sold either by individual or by the elders of the tribe is true."\(^{17}\)

These authorities are only for underscoring the importance that the communal land ownership was given in African communities. The communal aspect of land ownership of
land helped in the balancing of the needs and desires of an individual and the community at large. This aspect of communal land ownership of land is however a general observation of what was in most African societies. Colin Leys take note of the existence of individual land tenure system among some African communities in Kenya. He observes thus:

"In Kikuyu land, and in neighbouring Embu and Meru, individual forms of land tenure had existed alongside them."19

The individuals land tenure system in Africa as observed, were however so minimal to be neglected as a general case. What was seen in the African economic concept was lack of property which atomises communality of life into units of individuals possessing rights and obligations over means of economic production.19

As capitalism in its ideology Lays stress on the individual as the basic unit that can have property over land or chattel,20 the communal aspect of land ownership could not therefore be compatible with the colonial land policy. This therefore necessitated a change in land tenure system to reflect the capitalist ideologies that was in the colonial political economy. However, the introduction of a new concept in a foreign land could not be achieved easily other than through the use of force. The force that managed to achieve the European settlers and governors ambitions was found in the legal structure of law which was introduced in the region way
back in 1889, having established their official protectorate over Kenya through the *Africa Order in Council* of 1889, the British colonial government created a comprehensive framework of administration, to use Ghai and McAslan words, "including the power to hold courts and promulgate rules and regulations to be exercised usually by consuls, and over British subjects, British protected persons, and certain classes of indigenous inhabitants and foreigners."

Thus, as far back as 1895, the declaration of a protectorate over Kenya formed the basis upon which other laws were to be introduced. What followed in matters related to land was the adoption of the *Indian Land Acquisition Act*, which helped in the compulsory acquisition of land for the construction of the Kenya-Uganda railway in 1894. Ghai and McAslan observes why land had to be acquired compulsorily in the region by the colonial governments:

"The position [of land] presented a major obstacle to the colonial authorities, first, because in Africa, no less than in England, he who controls land is in good position to influence the government." It was therefore the first priority of the British colonial administrators to introduce laws which could vest land in the crown. In this way, the colonial government could grant land to the incoming settlers as well as gain control over the territory. Land forms a crucial socio-economic and political resource and therefore its control was to be acquired in any way possible. In the year 1897 therefore, the British colonial
administration through a legal superstructure of law, were able to vest the land in the crown. The East Africa Order in Council Land of 1901 made it possible for the British colonial government to have all disposition in land, which right of grant and disposition were vested in the governor. Crown land was thus defined as:

"All land which for the time being are subjected to the control of Her Majesty by virtue of any treaty, convention, agreements, or of Her Majesty's protectorate, and all lands which have been or may hereafter be acquired by Her Majesty under the Land Acquisition Act of 1894 or otherwise howsoever."

To the British colonial administrators as was with the Africans, land was a very important asset and all its disposition had to be regulated closely by the dominant settlers who had the political and economic powers. Thus, both legal and political techniques were employed in guaranteeing the British colonial government the total control over land. The 1901 African Lands Order in Council, had made the governor responsible for the administration of all land in the territory. The position of the British control over land was secured even more when the crown land was redefined by the 1915 Crown Lands Ordinance. Which declared even land under the African possession, crown land. The colonial governor could administer even the land under the actual possessive of the Africans. The case of Mainani v. Murito, coming soon after the introduction of the ordinance laid down the new position, that the Africans were to be tenants-at-will of the
would attempt to show in this topic how the whole process took
its course in the creation of a class-stratified society, we
would maintain that the colonial land policies had

The social classes in Kenya.

In creating a new land tenure system which in turn created the
political economy adopted during the colonial period resulted
in the colonial history. The colonial government policies and the
existing legal and economic structure are the products of
society, and which we maintain has been supported by the
society.

The social class structure, that is evident in Kenya

AND THE CREATION OF AN AFRICAN CAPITALIST

THE EMERGENCE OF A CLASS-STRUCTURED SOCIETY

Subject of our next sub-section is an African petty bourgeoisie in the region would form the
society. How this process was achieved, and the creation of the
burden of the economically based class structures in the Kenya
colony, political and economic classes. Thus, thus formed the
burden ensured that in the long run, the whites were the
preached and the economic production system of capitalism
that ensured their stay in the region. The legal order
was the muscle in building political and economic structures
in the country. Over land, the British colonial government strived
Having used the legal ideology of law to have the total

Grown.
place.

As documented elsewhere in this study, the effect of colonialism was the wrougthing of the social economic and political set ups and pattern of the African's lifestyle. The Africans therefore, having had their land alienated by the white settlers, found themselves in the 'African Reserves' that were created specially for them. The Reserves were less productive that were taken there. The underlying motive of creating an African landless class was to prepare a way in which cheap labour could be gotten out of the Africans who were rendered landless and without means of economic survival.

It had been said earlier that the colonialism introduced in the region was for necessitating the exploitation of the raw materials in the region and gaining profits from the African cheap labour force. Thus, Africans found themselves introduced to a money capital economy when they went in search of work in the European farms. Using the legal instrument of Labour laws, the British colonial government created a pool of African labour force whose existence was enhanced through the taxation laws introduced in the region. Both the Poll tax and Huk tax were made compulsory to the Africans who were therefore forced to look for money to pay these taxes. Although this is just a summary of the long process which took place, the evident results of the developments taking place in the colonial economic sector was the ushering in of the Africans into a capitalistic monetised economy. In the region
therefore, it could be found African wage labourers, small scale peasants, and jobless groups that depended for their survival, the money that was remitted back to the villages by those who found jobs in the developing towns in Kenya.

At this period when the Africans were being introduced to the money economy through labour system, the British settlers in the region had managed to wade through all social and political obstacles to the center of the colonial economy. Not only did they own large farms that provided them with necessary produce for export, but they also managed to monopolise all forms of commercial transactions in the territory. They therefore emerged as one dominant class with economic and political bases in the region. Supported by their legal order they had introduced, the white settlers pursued an economic line that was wholly capitalistic in nature. What issued from these developments in the economic field was the emergence of classes in the society. One class, composed of the Europeans, formed the petty-bourgeois class, while the Africans, formed the class in the lower strata of wage labourers and peasants.

In those developments that were taking place in the socio-economic spheres of the territory, the dominant European administration did not wish the creation of an African petty bourgeois class. This class, if created at this period, would have resulted into problems faced in Europe during the developmental stages of capitalism in Europe.
However, events taking place in the territory at a later stage made it inevitable that an African petty-bourgeoisie class had to be created. The Africans, having been dispossessed of land and introduced into a wage labour economy formed a group of disgruntled subjects who were strongly opposed to the British colonial rule. The grievances over land and other economic-social related problems were taking a political angle and this forced an emergency political problems, to be solved by the colonial government. Colin Keys, no's of what conditions proceeded the creation of an African petty bourgeoisie class in Kenya:

"It was at last clear that the policy of maintaining the reserves as providers of subsistence foodstuffs for low-paid wage workers families had overreached itself, and that unless steps were taken immediately to make the reserves produce wealth for their bursting populations, the conditions which gave rise to Emergency would become chronic." 29

The white settlers and the colonial government took their cue of the imminent insecurity to their developing capitalism in the territory. Through a planned move, the process that was to witness the creation of an African landed gentry opposed to the agitation for political independence was started by appointment of the Hamilton Young commission. 30 The commission was appointed with the terms of considering African grievances arising from alienation of land to non-Africans and to recommend ways in which they could be solved. However, it was with the 1955 much known Swynnerton Plan 31 (A plan to intensify the Development of Agriculture in Kenya) that a direct
response to the imminent danger in the colony begun. The
Swynnerton Plan had these as its objectives;

"... that the African farmers must be provided with
security of tenure through an indefeasible Title. It will
courage him to invest his labour and profits into the
development of his farm and will enable him to offer it
as security against such loan (financial credits) as he
may wish to secure from such source as may open to him,
the commitment that land and chattels will be mortgaged
as security."

The Swynnerton Plan involve therefore the consolidating of
land fragments into single holdings and issuing registered
freehold Titles to individuals. As Colin Leys asserts, "the
larger leaseholds would then be able to borrow from the
commercial banks or from the government on the security of
Titles." It was at this time therefore that the colonial
government deliberately embarked upon an agrarian policy to
help in the ushering in of the African wage-earning lot to
decrease his capital through the land holding system. What
emerged in the colony was an extensive agricultural activities
in the territory which even the Africans participated in and
were able to derive some capital necessary for primitive
accumulation process.

The success of the scheme adopted by the colonial policy
is evidenced by the fact that most semi-educated and semi-
skilled African labourers, teachers, and others working in the
colonial administrative institutions strove hard to enter the
middle class created. The result of all these developments on
the whole was the creation of an African petty bourgeois akin
to that one of the white settlers class. However, the development of this class never prevented the development of the wage-earning class and other strata found in the society.

At independence in 1963, the Kenya social scene was characterised by various social classes. In addition to the petty bourgeois strata whose creation we have considered, there was the middle level salaried found in both state and parastatal apparatus and in private sector and mostly concentrated in towns. This class, though strictly not a petty-bourgeois stratum even though majority own land, it forms a distinct class apart, whose outlook is not proletarian in anyway. Another class seen is the one of peasants owning very little if any of small pieces of land in the rural areas. However, through the transitional period, there was a creation of another substratum of the commercial bourgeoisie to the petty bourgeois class. Initially after the independence this group was mainly composed of Asians but Africans managed to find their way into it. In this paper however, we treat both the petty bourgeois class and the middle level salaried class as one. This class therefore forms the middle class that is crucial in explaining the dynamics of the political economy of the country.

The middle class found in Kenya therefore is a creation of the colonial political economy which revolved around land. It is this class which took over the political reign of the country after independence and thus, it forms a crucial
conventions are activities outside the formal system of law where there was an overarching norm and institution that laws and

... the legal political majority when he said... representing the interests of those in power, whereas society often assumes an instrumental role of providing up and down, to uphold the general will of all members of society, far from being an institution which... the different interests in the society. Law, in aInstrument of government, law assumes a neutral role of political majority that exists among the people that, as an... political majority. This role is harder to discern, the legal middle class who forms the dominant political group by any link between the role played by laws in the society and the middle class in this section that there is an

KENYA

THE OPERATION OF LAW AND THE MIDDLE CLASS

... class in the society... and economic group, must of course found to be petty-bourgeois... in the constitution of law as an instrument of the dominant political structure in this, thus, what follows would be a partial look into the validates the activities of the ruling order of state have... within the context of legal order which through laws, however, the changes that have been carried out have been done transformative and not witnessed in the country, variable in explaining the social and political
power and control. This leads to erroneous assumption that the laws and conventions have power of their own. Alternative power perspective would show that the laws and conventions are not neutral but political instruments of the rich and the powerful."  

As seen above, laws cannot operate on their own in any society, being a product of the social's interactions.

In Kenya, as found in most societies whose economic and political systems are capitalised in nature, it would be realised that there is a link between the function of law in the society and the middle class who owns the political power and influence over the countries wealth. This class therefore not only have influence over the legal ideologies behind laws operating without a community, but can manipulate the law, to serve their interests in any sphere starting from politics to socio-economic matters. Thus, in a society such as ours where capitalistic tendencies are buttressed in every sector, laws become an effective instrument of the dominant political elites in controlling social relations and order. As Dr. Oki-Ooko Ombaka asserts, laws in such institutions, becomes fora for resolving the inherent class struggles in the community. Hoebel, provides a good picture of the efficacy of law in a community when he says:

"Law is but a response to social ends; Every legal system stands in a close relationship to ideas, aims, and purposes of society law reflects the particular ideas, ideals and ideologies which are part of a distinct legal culture."

Therefore, in Kenya where we have a legal culture where laws
The community at large helped in the balancing of the needs of an industrial and the commercial asset. The communal aspect of land ownership for land in the mode of economic production released on land as an independent, the political of governance then largely depended and later became a British colony, were truly free and independent, the people living in the territory, which constituted that before the advent of the British Imperial and the historical reality that influenced the social political what this chapter has attempted therefore is accounting.

Conclusion could be said that no phenomenon that forms the subject of our study that a good
it was only through historical accounting of the case of the middle class, which has been needed to create an political middle class in Kenya, to how the institution of mortgage, a legal institution to the subjects of our examination as the paper to date middle, which forms the institution of law, and the middle class, which forms.

In this chapter we are placed a chance of the two varieties.

Conclusion

...
However, with the coming of British colonialists and subsequently settlers, a new concept of land tenure was introduced which dismantled the communal ownership of land. The communal land ownership which had survived for many years in African communities was thus an obstacle to the introduction of a capitalistic individual land tenure system. Thus, through the laws brought into the territory, the British imposed a land tenure system which was not only based on foreign culture but was also on a capitalistic ideology which disregard socialism as a system of communal ownership of means of production. With the new system, individuals were able to monopolise bundles of rights capable on land and therefore land was transformed into private property with title to land protected by the laws. The transformations taking place and which surrounded on land issue were carried under the legal ideology as brutal force of laws were employed in the territory. All the developments however, resulted in the creation of social classes structured society with the dominant petty-bourgeois class having the total control over political and economic matters. The lesser class, formed of Africans peasants, were marginalised by the colonial political economy centered on land, but with time, there also resulted the creation of African petty-bourgeois class. The African petty-bourgeois class (middle class) took over the political and economic reigns of the country at independence as it is their role in the political and economic matters that we
determine in this dissertation.

Due to the middle class propensity towards accumulation of private property and their pre-occupation with economic matters, it forms the best variable in explaining how they have been adversely affected by the political repressions that were seen in Kenyans in the period of 80s and 90s. It is in this light therefore that we proceed to determine how the mortgage institution, an important element in the economic sector, has been used against the middle class to make them conservative in the face of political and social repression taking place in the country. Therefore, in the second chapter, we shall look into the nature, creation and operation of the mortgage institution and its social political aspects in the country. This would pave way to the determination of how it has operated against the middle class in Kenya, in our third chapter.
FOOTNOTES FOR CHAPTER ONE

1. In the call for political transformation in the Kenyan scene, stress was laid in the adoption of 'multipartyism' and implementation of free market economy.

2. We maintain the position that whatever was happening in the Kenyan political scene had some links with events taking place in Europe.


4. Kenya as a state was found with the coming of British colonialists.

5. The existing legal system in Kenya was introduced during the colonial period.


7. Lenin, V. I., as quoted in *Class, Power and Conflict*.

8. In our argument, we point out at some historical facts which links the rise of social classes with the land policies adopted during the colonial period.


10. The Berlin conference of 1885, was convened to among other things, resolve the issue of scramble over land in Africa by
European countries

1. Ochien, W F, The second wold essays on Kenya history
   East African Literature bureau, 1979, Pg 50.

2. It was during the colonial period that the land tenure system
   was converted from communally owned asset to an individual's
   owned property.

3. Individuals in most African societies used to find attachment
   in the community through specific lands belonging to that
   particular clan.

4. Gluckman, M, Ideas in Barotec Jurisprudence,
   Manchester University Press, 1972 pg 78.

   E.A. Literature Bereau, 1970


7. Supra. note 16, as per Hamilton C.J.

8. Colin Leys, The political Economy of underdevelopment
   in Kenya.


10. The capitalistic system of economic production lays much
    stress on the individual as a unit capable of possessing
    property.


2. Ghai and McAuslan, Public Law and Political change
in Kenya, Oxford University Press, 1970

pg. 25.

23. Legal order was introduced in the territory of Kenya after 1889 Africa order in council.

24. Supra, see note 22. op. cit page 25.

25. East Africa order in council, 1901.

26. Supra. section


32. See note 31

33. See note 29

34. Colin Leys, Political Economy of Underdevelopment in Kenya

35. M'Mweneria, GK,

36. Oki, Ooko-Ombaka, As quoted in Women, the law and Development

37. Hoebel, As quoted in Law and society.
CHAPTER TWO

THE NATURE CREATION AND OPERATION OF THE
MORTGAGE INDUSTRY IN KENYA.

OVERVIEW

Although the central thesis of this chapter is an examination of the salient features found in the mortgage transaction, it also serves as a forum for exposing its economic nature that has affected both the socio and political spheres of Kenyan nation. As Leonard, K, observes, socio-economic structures and public politics are linked in a complex and never-ending process of mutual causation. Economic problems and factors, interact with existing social structures to stimulate government response; such policy initiatives are modified by ways in which they are directed, creating new problems and policies in an unceasing cycle.1

Mortgage industry is a creature of the institution of laws and its main purposes is the facilitating of credit acquisition and therefore, capital. However, as seen in the previous chapter, laws are not neutral but political instruments designed for achieving a definite purpose in the society and so are their creatures, appearing in the forms of institutions and structures. In this chapter therefore, it behoves us to expose in whose interests, whether political or economic, is the institution of mortgage existing.

28
In this chapter as anywhere else, we maintain that it has been to the advantage of the middle class found in the country that most colonial institutions and structures have existed. Thus, how this class has managed to manipulate the legal machinery to create the institution of mortgage to serve their interests, using the legal ideology would be presented.

2:1 THE DEFINITION AND CHARACTERISTICS OF MORTGAGE INDUSTRY

The mortgage transaction, has at its center of operation, the concept of property which is often provided as security to obtain a loan. This, provides us with the conventional definition of the mortgage transaction as an exercise whereby land or any other chattel, is offered as security in return for a loan, often from a financial institution.

In the ordinary parlance, the transaction commences when a person called the mortgagor or charger undertakes a contractual agreement with another called the mortgagee, to get a loan on the condition that the mortgagor offers land or any chattel as security. Ballentines law dictionary² says of the mortgage business;

"In the ancient sense, a qualified estate under a conditional conveyance given by way of security for the performance of an obligation, usually one of payment of money. In modern sense, a security or lien for the performance of an obligation. A conveyance of property to secure the
performance of some obligation; the conveyance being void on performance of an obligation.

However, a classic definition of the transaction was given in 1880 by Lindley, R. J. in the case of Santley v. Wildo., when he remarked:

"A mortgage is a conveyance of land or any assignment of chattels as security for payment of debt or discharge of some other obligations given."

The elements of the mortgage transactions are thus found to be the conveyance of title to property in order to obtain loan with a clause or condition of reconveyance, upon paying back of the debt owed. The date when the debt is to be paid back is often stated in the terms of the contract.

While the transaction is seen to revolve around possession of property as one of the condition necessary to create it, the real position however is that it is only the conveyance of title to the property as security that is necessary. Possession as such therefore does not become a compulsory ingredient in the creation of a valid mortgage transaction. However, when it does, the mortgagor then is strictly held accountable in equity for all the income and profits realised from the withholding of the property. In the transaction, the mortgagor's title to land is conveyed as security by way of encumbering it although this is possible also with other chattels.4

At this juncture, it is imperative that we discuss briefly other transactions which are similar to the mortgage.
transaction and these are the pledge and lien transactions. These two often bring confusion to one trying to understand the mortgage transaction.

Although similar, the mortgage transaction is quite different in nature and form to the pledge and lien transactions. A lien is a common law doctrine whereby the repairer of property can retain possession of property until he is paid for his services. The right in lien transaction is passive and does not give the retainer the power to sell the property or deal with it in a manner other than that of retention. The property held thus is normally for the compulsion of the debtor into paying the borrowed sum. The lender therefore lacks the right of sale found and in the mortgage. However, there is similarity that is seen existing between the two transactions of mortgage and lien in the sense that the owed party takes possession of the property, a condition created by the contractual relations entered by parties. However, as for the charge transaction there is only the encumbrance of the property and therefore no conveyance of property is made. This however is only a technical difference between the charge and mortgage transaction and as to their contractual nature, they are the same.

On the other hand, a pledge is a loan secured by the security of chattels delivered to the lender. Here, the lender takes possession of the goods but not the title which is oftenly retained by the owner. In the modern mortgage transaction
created under the Transfer of Property Act², the lender only
gai's title without taking possession.

What can be seen out of the whole mortgage transaction
is that it derives its nature and character from dealings
with land as property although it is possible with other
chattels also.

Ogendo, asserts in his manual for teaching land law in
East Africa, that the power given by property can be immense
and could take many forms. He turns to comment aptly as
follows;

"Property confers power, the exercise of which is in a
capitalist society, subject only to a limited state
control. The power can be used to create interests less
than full ownership or access and rights of such
transactions."²

Therefore, of the uses to which powers conferred by
property can be put is the imposition of burdens or
encumberancing of oneself or land. Ownership of land alone
therefore confers such powers and the mortgage institution,
is a burden oftenly created on land in return for commercial
or other benefits to the land owner. The benefits derived from
although the most commonly practiced one is for the obtainance
of credit. Credit forms an organic institution of the economy
of a capitalistic society. In Kenya therefore, with a capitalistic
system of production at its monopolistic stage, the impact
of the mortgage institution in the socio-economic spheres is
bound to be felt. The relevant of the mortgage institution in
a developing country such as ours is that it represents the
largest single form of financial indebtedness incurred by an ordinary individual in the society and therefore it exerts profound effects in the society in a number of ways. The mortgage transaction, does not only provide the individual with the means to capital accumulation, a prerequisite to material acquisition and socio-economic mobility, but also gives the individual a chance to improve the economy of the society at large through other avenues such as investments of the capital acquired. The capital, if invested, provides the individual with further security for future borrowing and this enhances commercial expansion in the community.7

However, the mortgage institution, like any other institution created by a legal order which has an inherent instrumental nature in its effect on society, cannot have only the positive repercussions in a country. As asserted earlier, the legal system in Kenya was a creature of the colonial legacy, and therefore by and large, a product of a capitalistic mode of production. While our stress here would not be an emphasis on the system of production, we maintain that there is an inherent link between a system of production of the law and other institutions emanating from their existence. The capitalist system of production not only managed to wreck the African communal life and sense of wholeness ensured through good relations with the means of production, land,9 but has also managed to influence other quarters with the effect that there has been a blatant negation
of creating a suitable control over the economy by the majority in the country. 23

What this has ensured in the current Kenya is the marginalisation of most people who never had the opportunity to acquire land at the time of independence or thereafter. The petty bourgeoisie class which had acquired large plantations hitherto belonging to settlers, managed to build an economic base which is suitable for their class survival. Institutions that emerged from our laws controlling the economic policies of the country, have the main intentions not of promoting the general economic growth of the country, but of the petty bourgeoisie class who happen also to have the political control of the country. Therefore, to see how the mortgage institution has been designed to act on the behest of the petty bourgeoisie class having property in land in Kenya, it is important we examine how the legal regime controlling the transaction on land and by implication the mortgage transactions, arose in Kenya. This exercise would be carried alongside an equal exposition of how the respective legal regimes creates and controls the whole business in Kenya.

THE EVOLUTION OF THE REGISTERED LANDS ACT AND THE OPERATION OF THE MORTGAGE BUSINESS

As asserted earlier, land occupied a central role in explaining the political economy of the country, especially
in the capitalistic type of society where it provides the means of capital accumulation in the primitive stages of development. Thus, it follows that the ideologies central to laws regulating transactions in land would reflect the interests that are at stake and of necessity those of the economic and political dominant class in the society.

The mortgage transactions is controlled by two distinct legal regimes in Kenya, and therefore, to have an idea of what interests normally underlies the operation of these laws, then a general view of their role in society would provide a good start.

Ghai and Mc Auslan, maintains in their book\textsuperscript{11} that the role played by the received laws from the colonial period was that of serving the dominant political class, which class also had the economic reins of the country. This role played by the laws during the colonial period did not change in that at independence, most of the institutions and laws existing in the colonial period were adopted without alteration of their nature whatsoever. The constitution, the basic law of the land which other laws find validity,\textsuperscript{12} is presented in the book further as a compromise document between the British colonial government and the petty-African bourgeois who fronted the nationalist struggle for independence.\textsuperscript{12} The simple implication which can be drawn out of this is that the general laws found in the post independence era have not departed much from the role they played during the period of colonialism. The role
of the laws therefore in the country, tends to serve the ruling petty bourgeoisie class having the political and economic power of the country. As a sample study of how laws are adopted to suit the interests of the dominant ruling class, it suffices here that we further examine briefly the history of the Registered Lands Act, an Act of Parliament which introduced after independence, controls transaction in lands registered under it.

The Registered Lands Act, enacted after independence is applicable in controlling the transactions over land registered. Placed in its proper historical perspective, the basis of the Act was in the colonial period with the main purpose of transforming the land tenure system from a communally owned concept of land to that of individual. Thus, the introduction of the Act in the first place was an attempt, which succeeded later, in the buttressing the individual ownership of land after registration of titles.

Coming after the independence, the enactment of the Registered Lands Act had its constitutional basis under section 75 of the Kenyan constitution which provides protection of private property, an inseparable feature of a capitalist mode of production. The Act therefore, acts as a tool of the ruling class having control over the country's economy. As Dr. Oki-Ombaka argues, law in a capitalist state acts as montage of compromises of struggles inherent in the society over control of the means of production. Land matters
have always presented major problems and therefore after independence, the laws enacted to control regulation in it, including its acquisition and dispositions, were to be reflective of the interests of the ruling class.

In its character and operations, the Act has managed to introduce and implant a land law system akin to that found in Britain in the feudal stages. Its adoption and operation has managed further to wipe out the last residues of communal land tenure in some areas. The Act, in one of its sensitive provisions, section 27 has overtly stated thus:

"Subject to the provisions of this Act, as the registration of a person as the proprietor of land shall vest in that person the absolute ownership of land together with all rights and privileges belonging appurtenant thereto".37

The Act, which was introduced as "An Act of Parliament to make further and better provisions for the Registration of Titles to land for regulations of the dealings in land so registered for purposes so connected,"38 taken together with the constitutional provisions in section 75, stating in no uncertain terms that legal protection would be provided to those having titles already, immaterial of the means they got them, have only ended up in disinheriting most Kenyans of land as primary means to economic production. The benefits which are brought therefore by the operation of the Act is mostly to those who had land at independence and those who managed to purchase it later. It is mostly found that the middle class in Kenya are the ones who benefits from the
contractual rights which form the springboard of all
contract law, the freedom of
contracts to the contractual relations, is the freedom of
based upon which the contractual relations start.

Relying upon the capacities of parties, but also preserving the
capacities of parties, is the question of whether or not only the relations and
relations recognized by law. Thus, at the beginning of the
transference of the transaction, is the contract, as such, which the

role of other parties comes into play.

From the beginning to the end, and as such, it is found that
do not operate alone in the regulation of the transactions
which creates the charge institution. However, these statutes
by the Transfer of Property Act, and the Registered Land Act,

To its operation, the mortgage transaction is regulated,

Institution

The Legal Operation of the Mortgage
contractual relations, is a legal development of the 18th century Europe which in its introduction, presupposed the guarantee of fair dealings between the parties engaging in transactions of contractual nature. Therefore, it is found that the theory is fundamental to all transactions of contractual nature including the mortgage business. In its development, the theory assumed a political world view that justifies a relatively constant property relations as one existing in Kenya before the colonial period. The theory posits that all contractual relations are based on fair understanding as society should be composed of people having equal access to the means of production, and therefore absence of economically determined social classes.

However, in Kenyan society with social classes, whether it is possible to uphold this theory in most contractual transactions without causing substantial injustice is undoubtful. The Kenyan society is composed of social classes with some people owning the capital and means of production, while others belonging to non-capital owning group. It cannot therefore be said that the traditional bonds which characterised social relations in the pre-capitalistic society are in existence, and thus, the law of contract and other statutes regulating contractual relationships are reflective of the new order. What can be observed of the freedom of contract, is a myth that attempts to mitigate the oppressive nature of the inequalities inherent in contractual
transactions. The Contract Act, veils the injustices found in these transactions by failing to take into account, on practical point of view, of inequalities arising from class positions and the unequal economic powers. In its treatment of the people as equal and free, the theory fails to consider the forces found in the free market economy and only manages to put into practice of some elements of injustice inherent in colonial capitalistic legal institutions and ideologies.

The colonial politico-economy developed structures and institutions that marginalised the poor at the expense of promoting the petty-bourgeois political and social status. However, the concept of freedom of contract is inherent in most contractual relations in the country, and the Contract Act, the Transfer of Property Act and the Registered Lands Act, all have in theory, the elements of freedom of contract in their operations.

The exposition of the ideologies found beneath the enactment and framing of laws is important in helping us understand the political relevances of law, within the social and economic contexts in which they operate. While there is always a denial that laws and politics are one but the same thing, the truth known is that the process by which legal principles are established is pre-eminentally political. The particular set of values enshrined in the provisions of our statutes masquerading as 'rules' 'theories' and 'procedures' are preferences of the groups in power at the time of their
enactments. Pontop and Gill asserts that legal principles tend to reflect the basic values that the legal system upholds, and we are aware too well of where our legal system originated from. In the study of how mortgage transaction operates in the country therefore, the concept of power as the ability to get others do what you want them to, through use of threats or sanctions, as with laws, forms a basis upon which we shall comprehend the transaction well. Principally, the creation of the mortgage business and its operations are regulated by the legal regimes of the Registered Lands Act and the Transfer of Property Act. It is now the turn to look briefly of how this process takes place.

THE OPERATION OF THE MORTGAGE TRANSACTION

This chapter noted at an early stage that at the center of the mortgage transaction, is the property which is offered as security in exchange for loan. Though there exists other forms of properties which can be offered as security, our focus would be on the kind of mortgage where land is offered as property.

The two principal statutes that forms the subject of our examination in the understanding of the creation and operation of the mortgage industry are therefore the Registered Lands Act and the Transfer of Property Act. However, in between, comes other statutes such as the already discussed Contract
Act, the Equitable Mortgages Act and the Land Control Act. The importance of these statutes is that, while the Contract Act controls the contractual nature of the transactions, the Equitable Mortgages Act, a creature of the Transfer of Property Act, gives same remedies available to a mortgage made under the parent statute, to a mortgagor. The Land Control Act on the other hand, creates a Land Control Board, whose consent must be gotten before any transaction in agricultural land is embarked on.

The mortgage transaction however commences with the borrower, having security, approaching a bank for loan. The title of land is therefore offered as security for the money obtained and is subject to re-conveyance upon the payment back of the money borrowed. The important aspect of this transaction which needs noticing is that any interest in land can be mortgaged or charged. The aspect is a common law doctrine that has been reproduced virtually in the Registered Funds Act. Section 58 of the Transfer of Property Act gives the proprietor of land the power to mortgage or charge it. The mortgagor or chargor may engage in the transaction to secure the payment of an existing, future or contingent debt or the fulfillment of any condition.

What is ensured by the principal statutes regulating transactions in mortgage institution is that any person having title or any interest not amounting to absolute ownership can acquire capital in form of loan. This is important in the
development of the economy in a capitalist society as credit
institute forms an integral part of the system. Karl Marx once
commented on the aspect of credit in such a society:

"The moment a person goes to the bank to get a loan, he
does so as a future capitalist." 18

The relationships of parties to the Mortgage transactions thus
created is that the lender of money, often the financial
institutions, has control over ones property so long as the
debt is still subsisting. The element of the Financial
Institutions having control over ones property in the
transactions is important in tracing how the state finds its
way in regulating this relationships otherwise viewed as
private. However, the state, being the organised unit of
political control of the country, has the Central Bank Act 19
and the Banking Act 20 through which it has intervened in the
transactions between a mortgagor and mortgages. The state also
has the power provided by laws to appoint the management of
the Central Bank who are also responsible for the checking of
the financial activities of Banks and other institutions.
These responsibilities further gives the state a leeway into
the transactions between parties.

Thus, the mortgage transaction having been created
validly as between the parties and in accordance with the
statutes, starts to operate. The contractual terms normally
contains the date of repayment of the money borrowed revolves
around the private law subjects such as the mortgage
institution stresses the notions of contract in a bourgeois legal system, and the notions, reflects the dominant market and commodity exchange in the economy. The system therefore manages to entrench the economically dominant petty bourgeois class at the expense of the peasants and workers in the country. Thus ideologies of segregated economic development are not strange since they have their roots in the colonial economic policies which were directed at marginalising the Africans.

Therefore, though there exists different categories of mortgages with different remedies available to the parties, we observe that the institution is a creation of the structures and institutions reflective of capitalistic type of economy. Here we maintain that the institution has principally existed for the benefits of the economically dominant petty bourgeois and the lower strata of the middle class and the peasants have little or none of the benefits created by this institution. However, still with a distinct social class that is economically and politically dominant class as the middle class in Kenya, it is observed that these exist struggles between and among the social classes and this has not been for the benefit of even the members of the ruling class. What the inherent struggle in a socially structured societies have achieved is to make laws and other institutions instrument of those holding political power at one particular time. The laws and institutions though of noble intentions,
are converted into tools for protecting both the political and social status of the leaders in power against the members of the ruling class who might conspire against those in power. Thus, this is the backdrop upon which we shall view the role the mortgage industry has played in the socio-political and economic development in the third chapter.

CONCLUSION

This chapter was an attempt at examining the nature and operation of the mortgage institution in the society. We therefore presented the link that exist between the institution of mortgage and the concept of land as private property in a capitalist society. We therefore managed through this chapter, to identify the members of the social classes within the country who are likely to participate in the kind of transactions created by the mortgage industry.

However, in examining the legal regimes that controls the operations of the industry, we examined and discussed the central economic ideologies underlaying in the operations of the statutes discussed.

What is underscored in this chapter therefore is a show the existing link between the legal structure in our country and the economically dominant socio-political class. This class manipulates laws and other legal structures to suit their interests and obtain their ambitions. How this
is done will be presented in detail in the third chapter which discusses how the ruling class using the institution of mortgage has created a docile middle class in Kenya.
FOOTNOTES FOR CHAPTER TWO


Ballantines law Dictionary, 3rd Edn. 9xoml, 1956, Pg 316.

Santley V Wilde, (1899) 2 ch. 477.

The definition of mortgage institution includes conveyance of the title to other chattel's other than land.

Transfer of property act, 1882 of India.


Karl marx, as quoted in Classes Power and conflict classical and contemporary debates, Page 17.

The legal system in Kenya is a product of colonial rule.

Prof Katama Mkangi, Practices Principles and Institutions of Governance and Accountability in Moral, ethical and cultural spheres, paper presented at conference in 1983. He argues in the paper that the African Communal land tenure system was based on unique ingenuity of balancing the needs and desires between the individual and the community.

Matise G,G, Kenya politics, policy and society. F A literature
Burenu, 1975 Page 79

12. Section 3 of the Kenyan constitution.
13. See note 11, op. at page 85.
15. Osi, Ooko embaka, as quoted in *Women law and development*, page 30.
17. Preamble to the *Registered lands Act*, cap 300.
18. Our interpretation to section 75 of the constitution.
19. Both the *Transfer of property Act* and cap 300, controls mortgage and charge transactions respectively.
21. The underlying ideologies central in our laws are reflective of colonial economic and political ideologies.
25. Interests in land of any kind may be mortgaged or charged.
CHAPTER THREE

THE POLITICAL ECONOMY OF THE MORTGAGE INSTITUTION AND THE CREATION OF A POLITICAL MIDDLE CLASS IN POST-INDEPENDENCE KENYA.

3.0 GENERAL PREVIEW.

The history of the colonial Kenya is terribly critical in the understanding of the root causes of the social political and economic problems our country is embedded in to date.

While the crises that faces our country in almost every sphere in this decade of 80s have their roots in the colonial history where they were orchestrated, their current manifestations seems to stem from the national economic and political structures that were adopted at independence.

At their present state, almost all, if not every institution of governance and economic structure found in our country are reflective and supportive of a capitalistic system of production. This system whose profound effects during the colonial times were witnessed in the changing of the social political and economic patterns of the African life styles, has to date, through its supportive structures, nurtured a culture of regression and exploitation in the social economic and political spheres. The system has managed to create an economic dependency syndrome in the country, a factor which together with its twin aspect of political patronage, have
bred an environment conducive to thriving of political dictatorship and autocracy witnessed in the post-independence period.

Thus, what this chapter attempts to explore is why there has been an obstacle in the development of a democratic and civil society in Kenya, and on the other hand, why the culture of autocracy and political dictatorship has survived for long in Kenya. While we would attempt to determine how a particular branch of economic development i.e. the mortgage institution has operated with the result of creating an apolitical middle class in Kenya as the main thesis, this would only form a sample study to show how economic institutions and economic matters in a capitalistic state affects the general political and social spheres. We present here therefore, that democracy being what it is, forms a paradigm of good governance and an element of a civil society as it ensures the participation of the majority of the citizens in a country in the shaping of their destinies. We hold out that in a democratic society, and therefore a civil one, the citizens of a country are allowed to freely participate in the shaping of their national affairs without fear of repression from the governing unit of state. While the real nature of a democratic culture would be seen in the systems, rules and procedures adopted to enhance it, a civil society is a product of all these democratic practices of a societal ethical moral and institutions put into use and respected by the leaders and the ruled in a
quires the country is faced with, we pay regard to the attempts that have been made in the recent past which resulted in the re-introduction of political pluralism in Kenya. These efforts that were geared towards promoting the development of democratic practice in the political governance from what was an outright political autocracy in the form of monolithic one party state, are events that flooded the political scene in the periods of 1988 to 1988. However, owing to the efforts of the class that took the largest contribution in the advocacy for change, we wonder whether the changes would bring any benefit to the rest of the citizens.

It is the majority of the members of middle class formed of lawyers, priests, and other professions that participated mostly in the call for change. What is observed at the efforts of the members of this class is that it emerged from wrong quarters, and the solutions to the problems facing the country were sought from the very world that created them. We maintain that what these efforts by the middle class cadre characterise in the call for change in the society through adoption of "Multipartyism" and "liberalisation of economy" are futile, misdirected, and superficial search for palliative solution to the problems at hand. It is in realisation that the real causes of the problems found in the country are embedded in the economic and political institutions we are having that we proceed to demonstrate how the solution cannot be found without overhauling the existing economic and
political structures in the country owe, if this means destroying them altogether.

In this paper, therefore, we maintain that it is indeed necessary in order to get real solution to the problems of the society, in finding the forces that breed the autocratic tendencies in the society, and in a capitalist society such as ours, this is reality found in the economic system of production adopted. The system was responsible for the creation of social classes and the inherent inter and intra class struggles over the control of the means of production and political governance. With the emergence of the classes was the middle class as distinct class, whose interests are found in the accumulation of wealth and therefore, as they occupy central places in the country's national governance, they have created legal and economic institutions supportive of dictatorial tendencies in the society. This creation and support for autocratic form of governance however is not intentional. The creation of an autocratic culture is done through creation of economic institutions and legal structures of laws. Both elements support and maintain a social order conducive to governing by elitist ruling class formed from the middle class cadre. The strength of such a social order conducive to the rule of the middle class would not, to adapt Gromsci's argument "lie in the violence of the ruling class or the coercive power of its state apparatus, but in the acceptance by the ruled of 'a conception of the world', which belongs to the rulers".
Conversely, further illustrating how this is achieved that "one way in which the rule accept this conception is by spontaneous consent which is caused by the prestige which the dominant group enjoys because of its position of function in the world of production."

Therefore, as the argument goes, what determines the form of governance in a society would depend on the system of economic production in the society. Thus there that we be able to trace the real root cause of the social economic problems in the society. As a matter of fact, there is found an inseparable link between the system of production adopted by a society and the politics formed in it. A well grounded idea of the link is provided by Dr. W. M'Mwereria in his definition of politics capturing this interrelationship of these two phenomena:

"Politics is about power. At the heart of political environment (social economic development), the rich and powerful decide what is to be produced, how it is to be produced, who will benefit from the product, at how much it will cost."

Thus, what this interrelatedness of politics and economic matters confirm is that in the political arena of a society with social classes there will always be a struggle between number of a class to attain the position of political rulership. It is therefore within this knowledge that we would examine how economic factors based on and the capitalist system of production, and, therefore, governance, have created a culture of oppression and economic crises in Kenya. This we
do in the light of the efforts made by the middle class to introduce a change in the country through calling for the adoption of political pluralism in Kenya. To begin with is an examination and analysis of the role of this class in the call for change in the society.

THE MIDDLE CLASS AND THE CALL FOR CHANGE IN KENYA

To have a well-grounded trend of the events that witnessed the re-introduction of political pluralism in Kenya, and the role which the middle class played in it, later have a general picture of changes that have occurred in the country as captured by Mutua and Gilles.

"Demands for a more open society and political pluralism were not new in Kenya. They fueled the struggle for independence and dogged Kenya's first president, Jomo Kenyatta throughout his reign. They have confronted President Mwai Kibaki whenever he has turned to... But in 1990, with the East-West conflict aiming to a close, the one-party state found itself increasingly isolated from its Western benefactors."

The period of 70s and 80s have recorded an intensive campaign for the re-introduction of political pluralism in Kenya and other democratic changes that would bring reforms to the autocratic system of governance that had been experienced in the political and social spheres. The practice of democracy, or the introduction of some features such as "multi-partyism" and "free market economy" were seen as positive steps towards the creation of a civil society which
as Bayart argue "as the process by which society seeks to 'breach' and counteract the simultaneous totalisation unleashed by state".

However, the realisation of a democratic and civil society equally demands, as Christopher Mulei puts it, "that it be carried out within a culture which protects and promotes egalitarianism, the notion of justice and liberty". This simply indicates that the system of governance and economic production a country adopts has a bearing on the development of democratic culture.

The Kenyan political and economic scene have been marred with crises and upheavals since independence, and in this paper, we maintain that most of the problems faced have their roots in the system of production inherited from the colonial government at independence. Capitalism therefore did not only manage to wreck the African communal focus of life encompassing all human activities from politics, economic production, to social organisation, but also through its supportive systems and structures, there has been a breeding of a culture of repression and autocracy such as one experienced in Kenya in the recent past prior to charges which are taking place. However, the most noticeable aspect is found in the emergence of economically based social classes due to the colonial political economy adopted, reflective of capitalistic means of economic production. The creation of social classes in Kenya explains the emergence and presence
of the middle class as a class distinct whose influence in the political scene has had profound effects on the society. This class, has members who are not only economically powerful, but also have immense power over political affairs of the country. As a product of economic relations, and therefore the political economy of the country of capitalism. As of tradition, the members of this class, forms a good variable in explaining the dynamics of the political economy of the country to date.

However, due to the middle class propensity for the accumulation of capital and other material wealth, it forms also a dynamic determinant in explaining the politics of the country as prospects of better economic matters make its members shift and re-align themselves with groups that is seen to have political powers of the day. This explains why there comes, though intermittently, calls for change from the members of this class as each time there are new changes it has been in the hope of an implementation of democratic system of governance.

The call for change in the society, for whatever purposes, seems to center in the interest of the economically dominant social class of the middle class. This class which championed the call for change in the political scene in the period of 80s and 90s advocates for the re-introduction of political pluralism to guarantee them a chance of participating in the political matters of the country after
the only ruling party, Kenyan African National Union had turned oppressive and dictatorial to their interests.

The change called for came in the guise of demand for democratisation of political affairs and process in the country in the face of what was a blatant repression in political and social circles, advanced by the ruling party. Thus, the repression and culture of dictatorship in Kenya during this period forms a good example of how the capitalistic social classes can breed a culture of autocracy, as Banko has argued, "Power struggle between and among various factions of the ruling class takes the form of military coup, conspiracies and intrigue." As for Kenya's case, it was after the attempted military take over in 1962 that the government stretched its repressive arms in all circles. The government had felt threatened by a section of its own class members and resorted to intensify its state insecurity. What followed was an increased suppression of those whose opinion did not conform to states policies, and, as characteristic of all dictatorial governments, state doctrines became the official thinking lines of the day.

Gilles and Mutua aptly describes the scene as follows:

"Beginning in March 1966, a new wave of arrests started. Civil servants, journalists, businessmen, students, lecturers, teachers, and small farmers were arrested in connection with a clandestine organisation called "Mwakenya". The government alleged that Mwakenya sought its overthrow by force of arms. Scores were convicted of political offences after giving forced confessions. Many were tortured in custody. Hundreds of others were arrested and had been for months without charge."
What can be observed for the happenings in the country was a development of an autocratic culture. During this period, authoritarian rule had entrenched deeply in the social and political circles to the detriment of the middle class welfare. Not only was the power concentrated in the executive and the military but also there was the marginalisation of the other organs of state such as the parliament and judiciary. It has been observed that the sixth Kenyan Parliament was the most decade in the history of independent Kenya. The laws that were passed during this period in regard to power relations were characterized by exceptionalism as the head of state was given overwhelming powers in the state matters. The ruling elite being exempted, at least in practice, from prosecutions and adverse challenges of their conduct. Prior to this period, the system had favoured the middle class and what was witnessed was an atmosphere of contentment and therefore conservatism. The political and economic sectors favoured member of the middle class who opted to preserve the status quo which provided them with economic gains as well as their yearned for social status. To gauge the attitude of the members of this class, Murua and Gillan, observers of lawyers who belong to this class from a historical and a long standing perspective;

"The reasons for the silence lay in a conservatism nature of the legal profession (in Kenya). In the historical context. At the time of independence, virtually all lawyers in the country were either of Asian or European origins. Because of their origins, they enjoyed a relationship of privileges and comfort with the colonial
state. Upon Independence, they threw their support behind the new government to retain their privileges and status.**

What characterised the attitudes of lawyers towards politics however was not confined to them only but was a common observation made of other professionals found forming the middle class cadre. Their economic endeavors were not disturbed and thus this explains their general contentment with the political and economic systems which gave them an advantage over the rest of the members in the society. This class that has been known to spearhead social-political changes in history was thus tamed in Kenya and only to resume its role when their spheres of survival were threatened by the ruling elite.

What happened in Kenya was akin to time developments in socio-political and economic spheres during the colonial period which led to the struggle for national independence. Thus a culture of repressions, stemming out of the capitalist class structures and institutions of governance, prompted the members of the middle class to call for changes. However, the changes were further supported by events happening in Europe and would be looked into later.

The political repressions that dominated the Kenyan political and social scenes could not be tolerated by members of the public who started to demand for an end to one party system of government. Members of the middle class frontline the struggle for change saw the ruling party, KANU, as a symbol
of autocracy that was to be destroyed or tamed through adopting pluralistic system. The government, had not only restricted the basic rights of the citizens through outlawing organisation of any form but also constricted the political process by its constant employment of sedition laws on views that were critical of it. That emerged of all the efforts employed to stop the seemingly unending culture of repression is both in the united and isolated calls for the re-introduction of political pluralism in the country. The intentions of re-introducing a new political process within the country however noble, are in our view, misdirected attempts at finding an everlasting solution to our social political problems. We regard that the root causes of the crises our country is experiencing are found in the system of production adopted at independence and maintained afterwards by structures and institutions supportive and sympathetic with the capitalistic ideologies. The capitalist system of production has also created, within the social circles, a class structure of different people having different economic powers and therefore lack of common interest and ambitions in the political welfare of the nation.

However, while we recognise that in adopting of political pluralism within the country's political process would be a step towards putting a check on the governmental activities, there still remains a question as to whether the parties formed can provide good leadership which can be trusted with
the enormous task of putting the autocratic tendencies of
ruling elite into check. However, in an attempt to show how
the events which lead finally into the re-introduction of
political pluralism in Kenya were not operating simply or with
only the mere effects of some members from the middle class
cadre, we would turn into looking at events happening in
Europe at the same period which affected changes in Kenya.

A history attested, the period of late 80s in Europe
marked the demise of the Soviet Union as a superpower in world
affairs characterised by a long period of cold war between the
Eastern bloc and the Western bloc. This meant that the United
States of America, with its allies from the Western Europe,
emerged as the sole power in international scene. From this
period henceforth, the ruling ideology and political-economic
patterns of the Western Europe started getting their way
strongly into the African and other developing countries.

The dilemma the African countries faced with the emerging of
United States and its allies as the world powers is well
presented by Richard Bowden

"The Soviet Union's withdrawal from Africa pulled the
rug from under the allies and removed an alternative
political model. Western countries no longer had to prop
up tyrants just because they were anti-communist... Through
the world bank and the International Monetary Fund, the west pushed for privatisation, free markets,
floating currencies, and other economic reforms. Realising
that these could not come about without political reform Western donors began to write "good
governance" onto the agenda."20

The above summarised world events influencing changes in
most African countries, explain the international political and economic forces that saw Kenya's political economy plural in 1960. The demand by the U.S. and its capitalist allies that most African nations be democratic in their affairs had nothing to do with their love for mankind and particularly those found in the southern hemisphere. The overriding motive for such political economic moves were to ensure that their investments found in the country and their commercial transactions through Transnational corporations were protected both politically and economically. Good governance not only ensures them of the safety of their trading companies, and market for their products but also the possibilities of taking the advantage of African labour in the world market.

The trading relations between the developed and the developed countries in the international trade system has been one of exploitation of the southern states. M'Mwendera calls observes of this,

"The south is generally marginalised in the world trading system. Africa, for example accounts only for 7% of world trade. The implication is not just that the south is poor, vulnerable and powerless, but also that it is dispensable in international trade relations."

However, Africa has never been dispensable in the world trading pattern and the western countries have ever concerned themselves with the African political affairs only for purposes of gaining for themselves in the economic circles - a feature and indispensable characteristic of capitalism.
Ideology. The implication which can be safely drawn for the sudden turn about by the U.S. and its allies in the African political and economic affairs under the guise of political pluralism and liberalization of markets is that they would readily get access to the internal culture of the developing states and thus, they have been through the sector of the financial support of most African states with compulsory economic and political reforms dictated from the west. As Pierre and Samuel Nkisi observe, at the heart of this linkage to the larger issue concerning two sets of economic institutions and in our view it is the Northern moral values and a global system of profit maximization that underlay the international communities influence of changes which took place in the country.

For the Western countries which lent stress to the democratization of the African countries' governments and institutions, thus came the catch words of "multipartyism" and "liberalization of economy" which were taken by the local petty bourgeoisie class agitating for change. The call for change gathered momentum when the policy of good governance was tied to economic aid given to the African countries, and for African governments which were reluctant in implementing changes as in the view of the Western countries conception of democracy, faced extinction from economic deterioration. Thus, paying a visit to Kenya in the early year of 1992 before the repeal of the controversial Section 2A of the constitution,
Douglas Hurd, Secretary for African Foreign Affairs in the British government reiterated in Kenya what he had said to the Overseas Development Institute in 1982, showing the official political economic policies to the African nations adopted by the West:

"Countries which are heading towards pluralism, public accountability, respect for the rule of law, human rights. Market principles should be encouraged. Governments which persist with repressive policies, corrupt management, wasteful and discredited economic systems should not expect us to support their folly with scarce aid resources."

What makes one suspect the sudden concern shown towards African States governance is why these countries demanding for changes had been silent all along while the authoritarian tendencies were developing in most of the African states. However, in view of the economic interests these countries have in most African countries, Kenya included, it is not a surprise that upon the demise of the Eastern Bloc, they came out strongly to show their philanthropic concern for the people in Africa. Still, however, one cannot fail to see the role that the liberalised market would play in the trading transactions. Owing to the cheap industrial productions coming from the complex industries found in Europe it only made us to stretch our minds a little bit to realise the imminent fate of the local products and therefore economy generally. In their trade through the Transnational corporations, there is a greater likelihood that most of the country's industries would face extinction due to the stiff competition they are
likely to face from the well organised world trading patterns by the Western countries and the inevitable monopoly in the economic circles by the Transnational corporations. However, the Western capitalistic mode of production lays stress in maximisation of profit and if the democratisation process of the African countries could make it a reality then would, this nothing would stop them from the programme embarked upon. "Sapnechomsky captures the and tab - by this system through his description of the capitalist system and its effects.

"Precedent capitalistic created a complex industrial system and an advanced technology it acquired considerable practice and shared certain moral values, but within limits that are now being pressed down and must be overcome. It is capable of meeting many tasks that can be executed only in collective labour, and its concept of competitive man who seeks only to expand wealth and power, who is given "freedom" to provide the relationship of exploitation and "natural" authority until hated and intolerable in the deepest sense."

Thus, the Kenyan state with her structures and institutions reflective of capitalistic nature of production and political governance, found herself subject to the demands from the Western countries which demanded change in her political process and economic systems. With the stage that had been set for changes by the role of the middle class in the country, there was a change in the political process in the country as new parties ushered in before the General election held in December 1982. Although there were changes in the first eight months that came after the multiparty general elections were concluded, the trend the country has
tally seems to revert to the same position artificially
abandoned with the repeal of section 2A of the constitution
which had made this nation a de jure one party state. In the
elections that follow, we would try to examine how this trend
is still possible in the face of changes that have taken place
within the political structures in the country. We would
further look into the issue of mortgage institution and how
it has managed to create a conservative middle class in the
cut of great political and social changes in Africa and the
world generally.

THE POLITICS, ECONOMY OF THE MORTGAGE INSTITUTION
AND THE CREATION OF A POLITICALLY-POWERED MIDDLE CLASS

IN KENYA

The post-independence period in Kenya as has been seen
in the previous chapters saw the rising of the African middle
class as the dominant political and economic group having the
ruling organ of state at its disposal. Examined in the for
gone section also, was the development of an autocratic
political culture within the country in the decades of 70s
extending to the late periods of 80s and how these two factors
related forms the central thesis of this section. Having arose
to the position of political leadership after the
Independence, the ruling elite of the petty bourgeoisie embarked
on a programme of consolidating its powers through building
an affecting economic base within the country. Their compromise with the international capitalism in the economic circles that the petty bourgeois class were to act as the local agents on behalf of the British interests, found in the country, ensued the petty bourgeois of economic dominance of no other class would pose a challenge to their economic endeavors. Thus what characterised Kenyan economic Sphere in the periods which followed was a frantic effort by the center of the ruling elite to expand their economic avenues through creation of institutions capable of propping up their interests. One such institutions created of economic importance was the mortgage industry which forms the subject of our discussion.

As we had observed again in the previous chapters, the middle class had managed to acquire large tracts of land that had been left by the departing settlers and their other economic ventures were found in the road transports commercial enterprises as well as buying of partnership in the foreign owned corporations and local companies. What these efforts embankment plan implies was that there existed an urge for property accumulation which could ensure the maintenance of the petty bourgeois class which as noted, can only survive on a strong economic base. To get how these efforts functioned, we would examine the effects the mortgage institution has brought on the economic spheres of the country and by extension, its political implications.
The idea of laws which negated equal distribution of resources among the people is land, the institution of mortgage.

From the time of its inception has managed to play a class role in the society. It is not only legalized the division of society into economically 'superior' and 'inferior', but also reinforced the idea that only the rich can mortgage, participate in it. It proves that it has discriminately locked out the participation of the propertyless peasants and workers, while offering the same opportunities to the rich to members within the society. However, the general skiing of this institution is that it exercises pressurized effects upon individual actors of the society in a plethora of ways in its operation.

Being an institution principally designed to facilitate the acquisition of credit for financial institutions, the mortgage industry promotes the general economic status of the individual in the society in that one is off of an opportunity of incurring debt on himself with the prospects of improving the economic status. This aspect of economic improvement extends to the general welfare of the nation as when the rank and file of the middle-class members engaging in it manages to get capital which is invested further to obtain more moneys or assets. The country generally attains ill prospects of reaching the status observed by Lord Diplock of England in the case of *Reit v. Retit* when he remarked, "the
mortgage industry has seen the emergence of property-owning particularly in real mortgage to building social 'owning Democracy'. What this simply implies is a status of general improvement of the economy as individuals realise their dream of real property ownership. Individuals engaging in the transaction are able to have an upward mobility in both social and economical circles, a good background which is utilised well could lead to other political endeavors as common in our country. However as Weber asserts

"Property in itself in a capitalist society provides one with certain preferential treatments which enhances the social and political ambitions." 

It is upon this backdrop as propounded by Weber that we attempt to explain the Kenyan middle class fractional in transacting in the mortgage industry in the country. Other than their involvement in the transactions to increase their source of income, there are some other observable reasons which have driven majority of the members of the middle class to involve in the mortgage institution. The thirst for an elevated social status among the rest of the society and an inspiration for home ownership are just among the observable reasons for involving in the mortgage industry. It is however in the pursuance of easy life and acquisition of material wealth which provides status of honour that the institution of mortgage becomes relevant. 

However, in its providence of the finance that makes most desired needs of material wealth and comfort achieved, the
general side effects created by this institution are noticed in the lax attitude that it implant in people who are its beneficiaries as it preoccupies the minds of those who are involved in it, and in this aspect therefore, the institution of mortgage becomes instrumental in creating political conservatism among the people. The period of 60s upto late 80s resembles the re-introduction of political liberalization was characterised by the general apathy among the people towards politics due to their pre-occupation with acquisition of wealth that was witnessed in the country. In these periods, the political elites in the country had advanced the political ideology of ‘developmentalism’ which was held to be equal to material expansion of wealth in forms of infrastructures and institutions, that were pronounced as necessary for the society.

‘Development’ thus characterised by material gain and rise in social status became the ‘vocal’ word of the day. The political elites within the country consolidated their powers and advanced in economic wealth. What resulted from the trend taken was that there cropped up the marginalisation of the people in the political spheres which remained only for those in the political leadership. The existing instruments and structures found in the country which are inherently weak could not help in the checking of the autocratic rule that was developing in the country. At this point in the development of autocratic rule in the country, the middle class whose,
status guarantees them an opportunity to act as a check against the rise of repressive culture within the society were found busy looking for protection for their acquired wealth, and, exploiting other opportunities available to increase their economic positions. Only the government could provide adequate security and environment conducive to their development, and as such, there was a general disapproval of any dissent that could disrupt the peace that they enjoyed. The government and its attendant institutions of governance such as law, parliament, and courts were viewed as ‘neutral’ frameworks for the protection of the society. To this attitude of contentment that was building up among the people with property and other prospects, not even the students in the national universities were spared. The state, in its consolidation of power and therefore political monopoly, intended its machinations to tame the student community, who, if left alone, could interfere adversely with any policy advanced by government. Realising that the university students have also the prospects of joining the middle class cadre through education, the government embarked upon a loan system that made some money be available to the students. While this was not seen as wrong on its own, what emerged from the programme was a creation of apolitical culture among the students who like their counterparts in the professions and commercial circles became materialistic and generally inactive in political matters. It is noticeable that the students
resumed their active engagement in political matters only after some of the Alliances were withdrawn in 1992. However, this was not the only way the government managed to create political stability among the citizens.

The most direct way in which the mortgage institutions have been employed to create political conservatism among the middle class in Kenya is in relation to the transactions followed in this industry. Despite the fact that the loan available to individuals are get from financial institutions, there are some ways in which the government has been found to involve in the transactions that the banks and other financial institutions are engaged in. This involvement by the state in what is an open transaction between legal personalities of citizens and institutions, comes by way of the operation of the Central Bank Act. 44

The Central Bank Act provides not only the supervisory powers to the management of the Central bank of other financial institutions, but also brings along with it some political elements in the loaning industry. Under Section 13 of the Act, the Central bank, through its management Board, have the supervisory powers to inspect the financial activities of other institutions and what arises from such arrangements is that most of the financial transactions the institutions engage in are subjected to the approval of the central bank management board. The simple implication that can be read into such a practice is that the Board of
Directors of Central Bank being typically political appointees, tend to implement the policies of the government that is in power. The mortgage transaction itself involves the conveyance of property which acts as security to money borrowed. In case of any default on the part of the mortgagor it becomes subject to rule in realizing the money lend and it amounts to a risk. In such cases, the position of the mortgagors becomes shaky and to have some assurance they often engage in arrangements with the political elites who have overwhelming influence over banks and other financial institutions to secured their positions. This kind of arrangement is seen also whereby the mortgagors further seeks the intervention of the ruling political “godfathers” to make preferential treatments favourable to them whereas they need the loan. These treatments which are not ordinarily practiced by banks could come in the form of extending the period of repaying back money or getting a larger amount of money not permitted in ordinary transactions for the Banks.

However, what is witnessed of those seemingly underhand transactions is that the hands of those engaging in such transactions are tied into supporting the doctrines and ideologies for the political rulers of the day. Thus, as it is witnessed that majority of the middle class are the ones found in such like practices in Kenya, it is a wonder whether they can still maintain their role of checking the government excesses effectively. Their view of the state as they look for
environment of economic advancement is perverted as they tend to assume a political stance of viewing the state and its apparatuses as neutral instruments working for their benefits. This emerges in the society in a kin to what Carper calls entities "obscured crowd". Therefore, in the face of their economic inclinations, the weakness of the middle class is no surprise as the class that cannot bring meaningful change in the society. They have an inherent propensity for wealth and as such, institutions like one of mortgages that provide them chances of prosperity can easily take them to the condition that was witnessed of this class as from the 70s into the late periods of 80s as had been examined before. At this juncture we pose a question as to whether we can "just the layers," opposition parties in Kenya to provide alternative instruments in the society that enhances the development of a democratic culture, knowing too well that they also belong to the middle class cadre
To maintain that since democracy in its simplest form envisages a government by the people, for the people and to the people, it is participatory in nature.

"Kobie, Samuel. The Quest For Democracy in Africa. NCCK, 1993, Pg 33"

This statement has been adequately in the first chapter.

This forms the basis thesis of our dissertation and it is underscored through the examination of the laws regulating the mortgage as an economic institution which has entrenched a political conservatism culture.

Although other social classes participated in the call for change in the periods of 80s and 90s, the middle class emerged as the main participants in the struggle.

In our argument we maintain that the Western capitalist like the United States of America and Britain plus their ideological allies, propelled in the changes which saw Kenyan political scene go plural.

Tumusi, A, Selections From the Prison Notebooks No. 2 - quoted by Dr. C. S Ko-Sobaka in Political Turmoil in Kenya. A prolegmenate an Inquiry into the use of Legal Procedure. For Political purposes in East Kenyatta Era.

June, 1982 (Unpublished Work)


Muafah, Christopher, Human Rights and Democracy. Getting our Perspective Right (Pg 1).


Spero (See note 11) Page 12.

During the 1960s and 1970s, the emergence of political parties was largely dominated by the executive who had monopolized all the political and governing machinery of the government. As a result, the powers vested in the parliament were bypassed. The transition of any kind during the period of 1971-1974 was best in evidence by the passing of sections 51 of the constitution in 1972, and the only decision made in the voting system be changed to a single voting-system, prior to
The 1992 General elections.

Cliffe and Meyer. (See note 11) Pg 72


Suva (see note 10) Page 10

Suva (see note 7) Page 16

Douglas Hard. An address to the Overseas Development Institute in July 1990 (quoted in the Financial Times)

Noam Chomsky. For Reasons of States. (Fontana/ Collins 1977, pg 170) as quoted in Christopher Mulei (see note 12)

We maintain that both the Registered Land Act and Registration of Property Act exist principally for those having title to land or to property legally recognised. (They are 1920 law of Kenya, and 1952 India C. finance Act respectively)

The institution of mortgage exists to facilitate acquisition of property through the money lending system. It provides

Petit V petit,

Mar Viber, As quoted in Glasser, Power and Conflict

Ms. William Press Ltd. 1992 Pg 25

The institution of mortgage provides finance which can and is oftenly used to purchase goods and items for comfort.

Collections from Economic reports in newspaper indicates that there was a general economic improvement among the refugees and the country generally during the immediate period of the
independence until mid 80s.

The loan scheme most commonly known as 'Roap' among students was mainly a student's personal allowance for personal use.

Central Bank Act, cap 401 laws of Kenya.

This we hold since it is the majority of the members from this who have the ability and means of transacting in the mortgage institution.
In this concluding chapter, we intent to present in a summary way, the salient features that formed the central thesis of this dissertation. This would be by way of identifying some features or factors that in our view are obstacles to the attainment of a democratic culture within the social and political spheres and therefore what seems to be unethical to the development of a civil society whereby individuals have freedom in shaping the destiny of their country.

All along in our work, we have maintained that the root causes of our problems are embedded in the mode of production adopted by the country at independence and further in the supportive structures, institutions and system of governance that in our view are out of place within the social political context that we have inherently cherished from time immemorial.

While it would be a cheap scholarly view to maintain that nothing of a foreign origin can work well for the benefit of our country, the position remain true that most of the systems implanted without an autochthonous growth in the community have largely been the basic causes of socio-political and economic crises the country is trapped in. Thus, here we only attempt to identify with specificity of instances where the adopted systems and values have promoted the crises we are trying to grapple with in
this decades.

As our country adopted a capitalistic system of economic production which is further translated into systems of political governance and social organisation, we realise how the whole process of crises as there exists a dialectical connections among the institutions and structures found within and further connections with the ruling organ of state, the material condition and the individual character found in the society. Though the link seem complex, its simplicity is found in the manner in which one factor/sector affects the other with other profound noticeable effects in the social-political and economic spheres.

Thus, during the colonial experience when the capitalist mode of production was introduced, we found changes in the family and social organisations in that what emerged from it on the social scene was a reflection of the changes in the land tenure system and economic mode of production which laid stress on the individual as owner of property. The capitalistic mode of production adopted not only changed the concept of property from communal ownership of wealth to that one of an individual bourgeois ownership of capital, but ended up in wrecking the hitherto existing system and structures that bound the people in the society together. What resulted from all these changes and which was witnessed in almost every sphere was the self-assertion by individuals who in their clamour for economic and political gains develops a selfish syndrome of disregarding the other members of the society and this brings about a psychological effect of implanting exploitative and
suppressive tendencies. This explains what is commonly witnessed in the Kenyan political-economic scene as individuals develop a struggle mentality over few available resources, whose immense accumulation to the detriment of the rest, promises one an elevated social status and political opportunities. What this entails further then is the use of the available state apparatuses by the ruling elite to entrench their positions and maintain the social and economic structures that promises them security and favourable power relations. The domino effect of such practices and developments is the equal marginalisation of the majority in economic and political affairs such that they rely largely on the ruling class and the innermost political elites within the larger class of petty bourgeoisie to shape the destiny of the country for their benefit. Nothing can prepare a conducive atmosphere for the thriving of a political dictator that this system of production and governance. Thus, what is discerned in the economic circles is the great inequalities in the distribution of resources as few are entrusted with wealth that is misallocated and is openly subjected to mismanagement and destruction. In our argument therefore, we hold that the capitalist system of production makes it possible that tremendous wealth is concentrated in the hands of a few who normally have the political leadership of the country although they do so in partnership with those within the Transnational corporations representative of the international capitalist order. The country is thus divested of her wealth and chances of real development as nothing supportive of the system ensures an
equitable growth of economy or human development. Stress is thus laid on the material acquisition which becomes a symbol of power and in the political scene, the power relations becomes one of defence for those holding political reins and for manipulation of all machineries to buttress their positions. Therefore in view of all these machinations and crave for wealth, and political power brought about by our system what hope remains for the country?

What is readily discerned, and therefore forms the premises upon which we provide our alternative suggestions of what is to be done, is that the country is trapped in a quagmire and nothing palliative can be taken seriously to have a curative solution to our social economic and political problems. Whatever solution, thus we attempt to offer, will directly relate to the systems and structures that we adopted. As observed and maintained all along in this paper, solutions that comes from quarters that are linked with the systems producing the crises, such as having political "opposition to the ruling elite", or "liberalisation of economy", as a prerequisite for having financial backing from the Western countries, are just mark timing attempt that would offer no lasting solution in the end. As good as they appear, political parties and systems whose values have no scintilla of humanness, and which lacks the general welfare of the country at heart, would only breed more trouble for the country. We are aware of how the organisation of political parties starts and who forms their leadership pool, and therefore it would be naive for us to expect, these members of the petty bourgeoisic class, found in the leadership of opposition
parties to destroy the economic and political systems that empowers them at the expense of the masses. The opposition leaders, their thinking orientations and mindsets are not different from those of the ruling elite they oppose as they share most of the things in common and having been caught up by a system of governance and power system of their own making, it is a wonder if they can manage to extricate themselves from the web and empower the masses and by this act, mark their demise as a class system of power brokers.

Therefore, in as much as we advocate for the overhaul of all existing economic and political structures that exists in the country and are reflective of the system loathed, the work to be employed in dismantling it is overwhelmingly immense and it would appear impractical to insist on such a move. On the other hand, it would be out of political infanility to trust those in power to change a system that favours them just as they would be ready to put a stop to any movements that calls for the same. However there are practical and sound alternatives that could go along way into having providing solutions to the crises glaring at our country.

To develop a truly democratic society within our country the first step should be made at empowering the masses who have been marginalised in the socio-political and economic spheres. The empowerment would come by way of raising public awareness and mobilisation of the people to learn of the existing political structures and systems of economic distribution inorder to engage actively in the shaping of the national destiny. After all democracy that we are yearning for as a country is about people
participating actively in all spheres of the national structures. Knowledge of the national affairs helps in the shaking of the foundations of dominant political elites, found in the political system, economic institutions structures. This further ensures that a stop is put to the middle class members habit of employing exploitative and manipulative tactics by using the masses to fight for their own battles for craving for power and economic wealth. The exercise cannot be impossible and can be safely carried about through the existing education centers such as the legally oriented legal Aid centers, Legal education Aid programme and other church organisations which purports to be dedicated to mass education.

However, the main solution would be found when we engage in a rediscovery process as a nation to understand our identity, sense of purpose, belonging, and determination. This process simply involves the de-colonisation of our minds which have been trained to believe that any system and values coming from the Western worlds in whatever form or name are meant to be good for our development. As a community we cannot live as a society apart in isolation from the rest of the world and as such we should borrow and co-opt what is good for us. However, our ability to question the practical value of every system or order borrowed should be our safety valve against illusions and disillusionments. Palliative political remedies coming from the Western capitalist states are majorly foreign and aimed at purposes that are seemingly far from helping the country disengage herself from the crises that holds her up. Rediscovery process therefore involves the implementation
mortgage. We attempted to unearth the underlying political ideologies and interests underlying the legal regimes regulating the industry through analysing the Registered Lands Act and the Contract Acts as samples of laws in the country.

In our third chapter, we engaged in the determination of how the mortgage institution has managed to create operate against the members of the middle class in Kenya. In doing this we took the changes which takes place in the social political and economic spheres as the backdrop and we managed to show why many of the members of the class opted for silence. In the face of political repressions that were taking place within the country. All these were attempts at showing how the mode of production adopted at independence, have permeated the social political and economic spheres of the country by have various effects that impedes the development of democracy.

In our concluding chapter was a review of the features that appeared mostly in the debates advances and recommendations given solutions to problems that we find in our social political and economic spheres.
of African traditional political and economic systems that promotes the well being of the nation. Thus, such a start should begin in introducing some aspect of African communal focus of property ownership into the production system to mitigate the injustices caused by the capitalist mode of production. This would in away ensure that most available resources are equitably distributed to an extent that each and every individual offering his labour in a productive form is not hindered from profiting from the product but would also ensure the bridging of the expanding gap between the rich and the poor. Further, there would be the mitigation of the harshness created by the inter class exploitation and struggles over power and means of production that creates environment for dictatorship. These two recommendations, are not absolute solutions for the problems, but we treat them as the basis for finding solutions to the existing problems.

Thus, on the whole, in this work that was majorly an examination of how the mortgage institution, a creature of laws reflective of a capitalist mode of production has had effect of creating a conservative middle class in Kenya, we have realised how the whole process took place. In the first chapter, we managed to have historical excavation of the root causes of the problems raised through looking into the colonial period as the time when the capitalist system was introduced and the social classes that resulted from its operations.

In the second chapter was a brief examination of the creation, operation and socio-economic effects of the institution of