

A CRITIQUE OF THE LEGAL MECHANISMS  
FOR LAND ACQUISITION IN  
COLONIAL KENYA

A Dissertation submitted in Partial  
fulfilment of the requirements for  
the L.L.B. Degree, University of  
Nairobi.

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By

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**DEDICATION**

**TO MY DAUGHTER MISS WAMBUI WAHOME**

**AND**

**MY PARENTS MR & MRS BABU**

**MANORE**

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(ii)

ACKNOWLEDGEMENT

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ABBREVIATIONS

E.A. - East Africa 34

G.E.A.Co. - German East Africa Company 43

I.B.E.A.Co. - Imperial British East Africa Company 45

K.L.R. - Kenya Law Reports 45

E.A.L.R. (Case No. 19 of 1935) - Eastern Africa Law Reports 45

I.L.R. - India Law Report 45

C.L.O. - Crown Lands Ordinance 45

K.B. - Kings Bench 45

A.G. - Attorney General 45

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		1875
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A CRITIQUE OF THE LEGAL MECHANISMS FOR LAND ACQUISITION  
IN COLONIAL KENYA 1895-1952

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INTRODUCTION

PROBLEMS:

The purpose of this study is to critically analyse the legal instruments and mechanisms through which the colonial state alienated land for the purpose of European settlement. Why did the British intend to settle in an alien country where they had no rights to land?

The imperialist expansion was largely due to economic reasons. During the 18th and 19th centuries, imperialism emerged as the development in which the dominance of monopolies and finance capital had established itself. In this process the export of capital had acquired pronounced importance. This fastened the division of all territories of the world among the capitalist powers.<sup>1</sup>

The main objectives for the British in Kenya were: to acquire an area in which they would invest their finance capital, establish themselves in that colony and make it a source of raw materials and a market for their manufactured goods. The territory was also valued as a source of cheap labour which would be utilized in the economic field and particularly in agricultural exploitation.

They were however other professed objectives for colonialism. The Europeans argued that they aimed at abolishing slave trade on the East African Coast and introduce legitimate commerce. This, they argued could better be achieved through the introduction of religion(christianity) and education among the Africans.<sup>2</sup>

Others saw the acquisition of colonies as an act which would bring them prestige among the European nations. While it was also true that some of these colonies were strategically placed for trade and in case of war.

On the contrary, I would argue that the Europeans were motivated into taking such activities in East Africa and other regions where they founded colonies because of the economic potentialities lying untapped. As such, we find that there was a struggle for power and acquisition of possessions among the metropolitan states and in order to avoid the risk of war, the powers divided the territories among themselves.

The major powers in East Africa were the British and the Germans. The British sphere of influence was Kenya and Uganda, whereas the Germans acquired Tanganyika. The coastal strip was left to Sultan of Zanzibar. This division was arrived at in 1886 through the Anglo-German Agreement of that year.<sup>3</sup>

The British activities of administration and land acquisition in Kenya, may be said to have been initiated by the Imperial British East African Company. This Company started as a mere association as early as 1887 and as an agent of the Sultan of Zanzibar. In this year, a Provisional Concession Agreement was concluded by which the Sultan made over to the association for a period of fifty years all the power he possessed on the mainland. These powers included rights of administration to be carried out on behalf of the Sultan, and the subject to his sovereign rights.<sup>4</sup>

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After the grant of a royal charter 1888, the Imperial British East Africa Company ceased to be a mere agent of the Sultan and became an arm of British imperial policy. This meant that the company derived its powers first and foremost from the British Government and as such its major role was administration and land acquisition. This was achieved through the various treaties concluded with the Sultan and the Chiefs. In pursuance of the power of administration, the company could appoint commissioners to administer districts, promulgate laws and establish and operate courts of justice. The company was also empowered to acquire or regulate land which had not been occupied and hence all public lands were to be purchased by it or through it. (5) This was therefore the basis of British Policy in administration and land acquisition. At the declaration of a protectorate 1895, the British Government simply took over what was already laid down by the company.

The important issue here is that of land alienation and the length at which British Policy makers were willing to go in order to give Europeans land on most favourable terms.

Even before the British Government had embarked on the activities of land alienation, policy makers were well aware that, they did not have any right to deal with the land. The Government had been advised as early as 1833 by the law officers, that the exercise of protection over a state did not carry with it power to alienate land contained therein. The advisers emphasized that unless a right to deal with waste and unoccupied land was specifically reserved in an agreement or treaty of protection, no such right could be allowed in a protectorate. Even in respect

of waste and unoccupied land, it was not clear whether it would be alienated. (6) This being the case, then how did the British acquire legal power to alienate land in a protectorate for the purposes of settlement, or how did they justify the alienation in constitutional terms?

In our discussion, we shall see that the British could acquire land through treaties as already stated, Agreements as is illustrated by the 1904 and 1911 Masai Agreements and also through various legislations. The question here is, were the legislations so made for purposes of land acquisition constitutionally justifiable? Did the legal instruments take into consideration the proprietary rights of the indigenous population? What were the implications and effects of the legal instruments and mechanisms on the african customary land tenure and land rights?

#### THEORETICAL FRAME-WORK:

State and Law are not abstract phenomenon, they do not operate in a vacuum. They exist within a socio-economic context. They can therefore be best understood only within that context. Marx states that:

"Law is a system of juridical standards and prescriptions expressing the will of <sup>the</sup> ruling class and protected by the coercive power of the state." (7)

Therefore Law expresses the will, perpetuates and conserves the interests of the dominant class in the society. According to Marx, any benefits which accrue to the oppressed and majority class in the state are only incidental to the major interests of the ruling class. (8) Thus the state is a domination of the powerful class, whose role is to preserve and promote the interests of this dominant

class in the society. The state is said to have arisen from the class antagonisms and conflicting interests of the people. The state then emerges as a power standing above the society whose role is to reconcile the <sup>un</sup>ending class struggles and conflicts. (9)

The state seizes upon law, and the police force to main control among these classes. Thus in every state, law is a major instrument used for protecting the interests of the dominant ruling class. We see law being employed to perform this class role nowhere more directly than in the colonial state.

HYPOTHESES:

Like any other state, the colonial state was largely determined by the mode of production and not that mode of production pertaining in traditional african community of Kenya but as found in Britain. To provide cheap labour and land for settlers, which were essential for the settlers, the state promulgated laws and polices which adversely affected the indigenous population. This was because the interests of the ruling European settlers were ofers paramount importance as far as the state administration was concerned and as such, had to be protected and promoted.

In order to meet their objectives, the British aimed at establishing an empire with a new socio-economic base, and which would replace or penetrate into the pre-capitalist socio-economic formations. John Ainsworth illustrates this in his statement "White people can live here and will live, not... as colonists performing manual labour as in Canada and New Zealand, but as planters etc. Overseeing natives doing the work of development!" (10)

With this kind of objective in mind, it was inevitable to introduce certain legal mechanisms and instruments which would help them in administration and land alienation. From our perspective, we see that Law and State were the essential superstructures imposed and used to promote the interest of the dominant European class. Hence it was no surprise that the legal mechanisms applied adversely affected the indigenous population while they promoted the interests of the European settlers.

#### HYPOTHESIS:

The legal mechanisms implemented in the colonial state (Kenya) did not take into consideration the African propriety rights. Law was used as a tool of exploitation, to make land available for European settlement and subsequently promote their interests in that land. The existing rights of Africans in land were adversely affected by the land laws applied. The various legislations used were not constitutionally justifiable.

#### Methodology and Data:

This study relies wholly on secondary material, available in the library. It will involve an analysis of the relevant statutes. I will also examine the colonial Government records and the legco reports in order to determine the policy considerations behind these legislations.

The relevant case law will be included as found in the law reports. Other material will be gathered from the law journals, law reviews and text books.

Dissertation Formata

Chapter 1 - deals with the factors behind acquisition of colonial possessions, the legal origins of colonial power in Kenya, with reference to Berlin Conference 1884 and the IBEA operations, treaties, grants, agreements and cessions before 1895., The Foreign Jurisdiction Act 1890 and its significance will be analysed. As an introductory note to the Chapter, I will look at the nature of the African customary land tenure system before the imposition and penetration of the capitalist mode of production with its attendant property law.

Chapter two will analyse the nature and content of the legal instruments of acquisition of land between 1897 - 1920. It should delineate the effect of the legal instruments on African propriety rights. NB. The argumentation here shall revolve around the constitutionality (where came the power to alienate land in a protectorate?) of expropriation of land in a protectorate as distinct from a colony.

Chapter three 1921-1952 - I will deal with the consolidation of the European settlement - as seen in the dual policy (Non-Africans) to develop on separate lines. The nature of the African propriety rights in the reserves will be analysed in this Chapter - as created by the successful implementation of the policies of the expropriation phase 1895-1920. Finally it gives a brief observation of the land hunger which led to the peasant revolt of 1952.

PRELUDE TO COLONIAL ERA

CHAPTER ONE: INTRODUCTION: FOOTNOTES:

1. V.I Lenin: Imperialism: the highest stage of capitalism.  
(Moscow 1970) P.46
2. See Roland Oliver and Gervase Mathew:  
History of East Africa. (Vol - 1 1963, P.373 - 4  
Oxford, Clarendon Press)
3. IBID. P369-74
4. General Act: Herslet. Vol. 11.P. 339-45,  
especially articles 1, 11 and 12.
5. Ghai and McAuslan: Public Law and Political Change in Kenya. (Nairobi, London, New York, Oxford University Press 1970) Ch. 1
6. IBID. P.25
7. Clemens Duff: Fundamental of Marxism - Leninsm. 2nd Ed.  
(Moscow 1968) P.127
8. Marx: Preface to a contribution to the critique of political economy in Marx and Engles. (selected work in Two Vols. Vol. 1 Moscow 1958)
9. Engels: Origin of family, Private Property and the state. at P.231 and 229.
10. A quotation from R D Wolff stated by John Ainsworth.  
Britain and Kenya 1870-1930, Ch.3.

PRELUDE TO COLONIAL ERA

and therefore no authority to handle matters of acquisition and disposition of land rights, to others who considered

CHAPTER ONE:

that Chiefs possessed such authority. This theory is derived from an analogy between the King in England and the Chief in Africa.

SECTION 1: THE NATURE OF CUSTOMARY LAND TENURE

This section deals with the African customary land tenure in Africa society and his relation to land occupied by his system before the imposition and penetration of the capitalist mode of production with its attendant property law, I will attempt a discussion of the rights accruing to the Africans in relation to communal, tribal, group or individual ownership of land, as opposed to the English property law ideology. Did African customary land tenure confer any rights to the Africans over the land?

The purpose of this discussion is not to give an exhaustive account of the customary land tenure and nature of the proprietary rights as found among the numerous tribes, but to examine the African concepts of land ownership generally.

The general view of various writers, and especially among the Western writers is that African land tenure is communal. Gluckman<sup>(1)</sup> has traced this communal fixation from the writings of scholars such as Sir Henry Maine<sup>(2)</sup> and Paul Vinogradoff<sup>(3)</sup> who regarded communal ownership of property as an essential characteristic of early stages in human development. Gluckman adds that, the Western Theories tended to question whether a tribesman had any specific secure rights of ownership over particular parcels of land.

Opinions varied from those who saw no institutions at all

and therefore no authority to handle matters of acquisition and disposition of land rights, to others who considered that Chiefs possessed such authority. This theory is derived from an analogy between the King in England and the Chief in Africa society and his relation to land occupied by his subjects. In England, all the land was said to belong to the King who acquired it by conquest (during the Norman conquest).<sup>(4)</sup> He was said to be in ownership of the radical title in land and had therefore the power to dispose of any of that land. The relationship of the King to land was likened to that of the Chief in an African society. Since in England, the King owned the <sup>radical</sup> title in land, by analogy, the Chief in an African society owned the radical title in land which he could dispose of. The signing of the Masai Agreements 1904 and 1911 respectively between the Maasai and the Protectorate Government can be explained in these terms. But as seen later by the response of the Masai in 1911, the Chief was a mere political leader. He did not have any right to dispose or alienate the <sup>tribal</sup> land without the consent of his people. It is worth noting that not all tribes in Africa held land under the supervision of Chiefs.

The other theory advanced is to the effect that ownership of land in African societies did not rest in individuals but in communities. Nyerere supports this theory.

at different levels of social organisations. For example, the cultivation rights were generally allocated and controlled at the extended family level, while the control exercised

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matter of concern for a much wider segment of society. (6)  
He says that:

" To us in Africa, land was always recognized as  
say that land was communally held, families had the  
belonging to the community." (5)

It is true that land was taken as belonging to the  
distributed to the members of the entire family. Even the  
community, but it is also true that in every community it  
particular members of the family could assert that they had  
was possible to identify individual possessory interests in  
or owned land as against any outsider. The only limitation  
particular parcels of land, wither in respect of grazing,  
put on these rights of land ownership was right to alienate.  
cultivation or hunting rights.

It was generally accepted that the land was for the benefit  
Gluckman asserts that tenure of land arises from and is  
of the whole society and alienation right was therefore  
maintained by fulfilment of obligations to other persons in  
reserved to the consent of the community of the family  
society. The obligations derive from membership of particular  
concerned. In any case alienation was subject of at least  
socio-political groups and it is this fact that gives access  
African communities. It was only when a member of that  
to the use of land. For such a person then, it is the nature  
group of people, or a stranger did not have the land that he  
of man to man relations which influence the African tenure  
would be given hunting, cultivation or grazing rights over  
system. This may be said to be a form of communal ownership  
land belonging to another group or tribe to use it, but  
coupled with personal participation in the society, and his  
subject to conditions of that tribe family or group  
contributions towards the other members of the society.

Among the Kibuyu, there was no form of tribal or communal  
In any given community a number of persons could each  
tenure, despite frequent European assertions that land was  
hold a right or a bundle of rights expressing a specific range  
owned communally by the tribe. The Kibuyu pioneers obtained  
of functions. In a typical case therefore, a village could  
their original (Ishaka) (7) by a process of occupation and  
claim grazing rights over a parcel of land subject to the  
first clearing or by purchase from the autochthonous holders  
hunting rights of another, the transit rights of another and  
The Daxibu people for example carried out purchase operations  
the cultivation rights of yet another. Each one of these  
tions and rituals with the Daxibu. The records show that  
categories carries with it varying degrees of control exercised  
at different levels of social organisations. For example,  
North-East, buying their land with stock from the Daxibu  
the cultivation rights were generally allocated and controlled  
or hunter tribes of Nopanda. (8)  
at the extended family level, while grazing rights were a

matter of concern for a much wider segment of society.<sup>(6)</sup>

In such a case, we cannot correctly generalise and say that land was communally held, if families had the responsibility of overseeing that cultivation rights are distributed to the members of the entire family. Here, the particular member of the family could assert that they had or owned land as against any intruder. The only limitation put on these rights of land ownership was right to alienate. It was generally accepted that the land was for the benefit of the whole society and alienation right was therefore reserved to the consent of the community, of the family concerned. In any case alienation was unheard of in most African communities. It was only when a member of that group of people, or a stranger did not have any land, that he would be given hunting, cultivation or grazing rights over land belonging to another group or tribe to use it, but subject to conditions of that tribe, family or group.

Among the Kikuyu, there was no form of tribal or communal tenure, despite frequent European assertions that land was owned communally by the tribe. The Kikuyu pioneers obtained their original 'Ithaka'<sup>(7)</sup> by a process of occupation and first clearing or by purchase from the autochthonous holders. The Kikuyu people for example carried out purchase negotiations and rituals with the Dorobo. The records show that "The Gikuyu themselves say they came from the north and North-East, buying their land with stock from the Dorobo or hunter tribe of Nomands."<sup>(8)</sup>

The 'Muguri', that is the original buyer of land was given a right of cultivation of land in return for a stock, but on condition that land could be redeemed at any time. But Sorrenson<sup>(9)</sup>, tells us that the Dorobo were lovers of meat, and instead of redeeming the land already sold, they kept on giving away more land in return for animals.

The pioneer had to legitimise his occupation by placating the Dorobo <sup>n</sup>ancestral spirits. He also went through elaborate adoption ceremonies with the Dorobo in order to safe-guard future rights on the land he had bought. The boundaries were clearly defined and established against any incoming immigrants.

Under the Kikuyu customary land tenure the original founder of a 'Mbaari' (10) acquired what was in many respects an individual title to a 'Githaka' (11). On his death, a communal form of title was created, since the Kikuyu social structure was extremely segmented and no centralized tribal authority, there could be no tribal ownership of land as <sup>such</sup> ~~such~~. I would therefore submit that the individual founder of land, had proprietary rights in land as opposed to usufructuary interests which were created on his death, and which passed to his sons, in equal shares of the land cultivated by their mother.

The 'Muramati' (head and guardian of a family after the death of its founder) had the duty of allocating land to the

sons and had a final veto on the admission of tenants and alienation of land to strangers. It was in these respects that something less than a full individual title emerged after the death of the founder and it is this very aspect which has tended to be confused with communal ownership of land. (12)

In addition to individual and group ownership there were other interests in land. These include the customary law tenancy, customary law mortgage or pledge of land. Customary law tenancy was different from the English concept of tenancy. This is because, there was no rent paying and no fixed period. The cardinal factor in these interests short of ownership is that they were perpetually determinable and may cause hardship when the person entitled has been in occupation for a long time and may have made considerable improvements. Under customary land tenure, it was defined rule that no occupation of land owned by another with or without the owners licence or leave or mere tolerance for any period of time could ever ripen into ownership and oust the title of the original owner. Such tenants were known as 'Muhoi' and 'Muthami' among the Kikuyu. The 'Muhoi' owned temporary cultivation rights on the basis of friendship. The 'Muthami' had similar rights to those of 'Muhoi' except that he had additional right to erect buildings. These two tenancies conveyed no rights to ownership as distinct from the use of land.

In conclusion, I would say that African proprietary rights, whether individual, communal or group or even tribal ownership conferred rights to land upon the holders of such rights. Occupation or cultivation rights were only found among a few people through a tenancy. The Chiefs only held land for their people or subjects but cannot be said to have been empowered with rights of disposal or alienation without the consent of the entire tribe.

Even where land was unoccupied, the concept of "waste and unoccupied" land adopted by the European was inapplicable. Land was only physically unoccupied, but the owners were traceable. It was the early commissioners who pleaded with the Government to assert title at least to these waste and unoccupied land, simply by virtue of its protection over the area. This is why they further argued that Africans owned land only in terms of occupational rights and as such it followed that unoccupied land reverted to the territorial sovereign.

When asked their opinion, as regard title to land, the law officers released a set of principles in 1899 to the Government. These were

"..... in protectorates of African variety, where protection was excersided under treaties which did not specifically grant Her majesty the right to deal with waste and unoccupied land, the right to deal with that land accrued to Her majesty by virtue of her right to the protectorate, since protection in these circimstances involved control over all lands not

appropriated either by the sovereign or individuals." (13)

These views were adopted by the imperial Government and incorporated in the 1901 order-in-council and subsequent Local Law which conferred on the commissioner power to dispose of all waste and unoccupied lands on such terms and conditions as he might think fit, subject only to such directions as the secretary of state might give.

What was waste and unoccupied lands? In practice, it was to African tenure and which were imposed

" absolutely laid down that not native has any individual title to land and that the land is the commonwealth of the people. A Native's claim to land is recognized even according to Native custom only as long as he occupies beneficially. The principle usage is to recognise all unoccupied land as crown land and the administration is free to deal with it as it considers to the best advantage, vacant land i.e. land vacated by a Native reverts to the crown automatically." (14)

This passage clearly indicates the view of the Europeans as regards the proprietary rights of Africans. For them, it was not ignorance but a complete denial of the existence of African rights in land. To say for example that the founder of 'Mbaari' did not have any proprietary rights over the land he occupied is nothing less (15) than this denial. I would therefore submit that African customary law tenure conferred real proprietary rights and there was nothing like waste and

SECTION II

FACTORS IN THE ACQUISITION OF COLONIAL POSSESSIONS BY EUROPEAN POWERS

and unoccupied land. If such land existed, it was owned by an individual or group and awaiting occupation in the future. Hence the term waste and unoccupied is misleading. The assertion made by the European settlers that Africans held no more than mere occupational rights or only communal rights is an unnecessary generalization. This was in keeping with the English doctrines and principles of property law, which were alien to African tenure and which were imposed on Africans in an attempt to safe-guard settlers interests.

unequal exchange in trade. It was superseded by the competitive stage advocating laissez faire philosophy under whose banner foreign markets were penetrated and their isolation was broken. The result was to drain their (foreign resources.

Thus the commercial revolution enabled by the enormous mercantile finance capital plundered many areas of the world and partly led to the accumulation of capital in Europe. The commercial world was in search of new markets for its manufactured goods, new sources of raw materials and new areas for investment of surplus capital.

The concentration and centralization of capital in a few hands resulted in the creation of monopolies competing for the accumulation of finance capital. Thus ...../18 monopoly capitalism, the search for markets intensified culminating in colonial acquisitions and divisions of the world amongst monopolies.

SECTION II

FACTORS BEHIND ACQUISITION OF COLONIAL POSSESSIONS BY EUROPEAN POWERS IN THE 19TH CENTURY

The activities of the Germans and the British in East Africa

From a Marxist perspective, the imperialist expansion was purely economic. The mode of production having become a fetter to further development in respect of the enormous finance capital and market products was burst <sup>asunder</sup> as under giving rise to capitalism. Thus arising out of the ferdal mode was the commercial revolution, the Era of mercantilist imperialism in Europe. Historically, this was the time of unequal exchange in trade. It was superseded by the competitive stage advocating laissez faire philosophy under whose banner foreign markets were penetrated and their isolation was broken. The result was to drain their foreign resources. The

Thus the commercial revolution enable by the enormous merchant finance capital plundered many areas of the world and partly led to the accumulation of capital in Europe. The commercial world was in search of new markets for its manufactured goods, new sources of raw materials and new linking areas for investment of surplus capital. (15 Red Sea was

The concentration and centralisation of capital in a few lands resulted to the creation of monopolies competing for the accumulation of finance capital. Thus under monopoly capitalism, the search for markets intensified culminating in colonial acquisitions and divisions of the world amongst monopolies. Egypt, Sudan and Uganda. (17)

Amongst the major monopoly capitalists were the British, the French and the Germans.

The activities of the Germans and the British in East Africa for the acquisition of colonial possessions were taken up by the Imperial British East Africa Company and the German East Africa Company. It was found necessary in the phase of this competition to partition foreign lands into spheres of influence in order to reduce the risk of war. The Anglo-German Agreements of 1880 and 1890 made this division final.

The Anglo-German Agreement of 1886, partitioned East Africa into three main spheres of influence, Present day Kenya fell under the British sphere of influence, while Tanganyika mainland became a German sphere of influence. The Sultan of Zanzibar obtained a 10 mile coastal strip and most of the islands along the coast of East Africa including Zanzibar, Pemba, Lamu, Pate and Mombasa. (16)

The British aimed at controlling the waters of the Nile and the regions through which the River Nile passed. The whole region <sup>from</sup> Egypt, Sudan, Uganda and Kenya., linking it with the coast and the Suez Canal on the Red Sea was an area of great economic potentials. Britain was not alone <sup>in</sup> with this since Italy and France had already shown their interests with the same region. The French aimed at joining the Western coast, through Senegal, Chad, Sudan with the Red Sea, and as such the British had to work faster to gain control of Egypt, Sudan and Uganda. '17)

It is Evident from the activities of the two Companies (G.E.A.Co.) and I.B.E.A.Co.) that the home Governments gave them state support in terms of protection and capital. For example the granting of the <sup>Charter</sup> chamber to the British East Africa Company is one of the indications that the Government had stepped in its place, and that from then onwards the company had to receive directions from the British Government. In fact as from 1888, it ceased to be a mere agent of the Sultan. In West Africa also, the Royal Niger Company called upon the British Government to declare a protectorate over Nigeria and Ghana so as to end competition and create a monopoly of trade <sup>for</sup> the company.

The 1886 Angolo-German Agreement did not solve all the problems regarding territorial claims and as such, the Germans continued to push the Sultan of Witu to reject the overtures of the Imperial East Africa Company. However, by the 1890 Anglo-German Agreement, outstanding questions were settled between Germany and Britain. Germany renounced all claims to Witu as she did to Uganda and a British protectorate was declared over it.

Although there have been a number of states or professed reasons for the imperialist expansion, such as Prestige and Stepping of slave trade, these cannot be accepted as the true reasons for the expansion. I have already stated that in the view of the capitalist development sweeping across the Western world, the expansion was purely economic. The Metropolitan states could have gone into war so as to retain the possessions

acquired or to gain new foreign lands. Such great risks cannot be said to have been taken purely for prestige or humanitarian reasons. Thus the primary factors for European acquisition of colonial possessions were purely economic.

... until 17 September 1885. But it was also ... the first stage in the process whereby ... acquired ... and took over the ... from the Imperial ... ... This ... that the declaration of the protectorate ... the ... as the ... of ... and ... (18)

Although the ... for Africa was a ... process ... with ... in the ... the year of the Berlin Conference 1885 may be taken as the starting date for this ...

The Berlin Conference of 1885, had as one of its main objects the desire to remove the misunderstandings and ... which might in the future arise from ... of ... on the ... of Africa. (19) The Conference ... with the immediate aim of dealing with ... disputes which had arisen in West and Central Africa. Its ... in the General Act of the .../23 had a significance for the ... of Africa, for ... it set out the rules of international law relating to the acquisition and establishment of authority over territory ...

SECTION III

LEGAL ORIGINS OF COLONIAL POWER

Ghai and McAuslan agree<sup>d</sup> that the declaration of a protectorate over much of what is now Kenya on 15th June 1895 marked the beginning of official British rule in Kenya, a rule enduring until 12 December 1963. But it may also be regarded as marking the end of the first stage in the process whereby Britain acquired control and took over the administration from the Imperial British East Africa Company. This means that the declaration of the protectorate signified the death of the company as an instrument of acquisition and administration. (18)

Although the scramble for Africa was a continuous process and not something which sprang up over night in the 1880's, the year of the Berlin Conference 1885 may be taken as the starting date for this scramble.

The Berlin Conference of 1885, had as one of its main objects the desire to obviate the misunderstandings and disputes which might in the future arise from new acts of occupation on the coasts of Africa. (19) The Conference had convened with the immediate aim of dealing with certain disputes which had arisen in West and Central Africa. Its conclusions set out in the General Act of the Conference had a significance for the whole of Africa, for, by purporting to set out the rules of international law relating to the acquisition of and establishment of authority over territory

in Africa and <sup>coupling</sup> compiling these with moral injunctions to stop the slave trade and bring civilization to Africa, they gave new impetus to the scramble, and justifications to its protagonists.

The 1885 Berlin Conference was followed by the Anglo-German Agreement of 1886 which I have indicated that it split East Africa into three spheres of influence. The agreement had been made without any reference to those people who were likely to be affected or even the desires of the Sultan of Zanzibar. Germany had already acquired possessions in Sultan's dominions without even consulting him, so long as the Chiefs had accepted the treaties for the acquisition. It was necessary to consolidate the position obtained by these agreements if they were to be respected by other European powers. For this purpose, William Mackinnon who believed that there were commercial possibilities in East Africa formed the British East Africa Association. Let us now look at the activities of the Imperial British East Africa Company.

William Mackinnon, who had faith in the Association received encouragement from consular officials in Zanzibar and from politicians in England who saw in the Association a cheap and indirect method of carrying out the policy of retaining and if possible expanding the British sphere of influence. In May 1887, a provisional concession Agreement was concluded by which the Sultan of Zanzibar made over to the Association for a period of fifty years all power he possessed on the mainland together with the rights of administration.

These rights were to be carried out in the Sultans name and subject to his sovereign rights.

By 1888, the company had concluded so many treaties with Chiefs of which it has been said that 'most of the tribes cannot have been aware of their real meaning'<sup>(20)</sup> Otherwise they would not have agreed to their making. Hence the British Government saw that the Association's efforts were worthy of support and therefore granted the Association a Royal <sup>Charter</sup> Chamber of Incorporation, thus obtaining a new name. (Imperial British East Africa Company) 1888. The significance of this was that the British Government was the backing force behind the company's operations. It was an announcement to other European powers that the company was not just a mere agent of the Sultan but that it was an arm of the British Imperial policy.<sup>(21)</sup>

From this period thenceforth, the company undertook all the obligations of the Government under any previous treaty made, or any agreement entered into with another state. The Foreign Secretary was empowered to give directions or make suggestions to the company.

In pursuance of the power of administration, the company could appoint commissioners to administer districts, promulgate laws and establish and operate courts of justice. It was required further to acquire and regulate land which had not yet been occupied, and all public lands were to be purchased

either by the company or through it.

The IBEAC may have been useful in allowing the British Government to obscure the full implications of its policies but by early 1890's, it had rapidly declined in its activities and financial status had deteriorated. Hence the declaration of the protectorate in 1895 of the whole Kenya came just in time to save the company from open embarrassment. The declaration or assumption of power by the British Government must therefore be viewed as an ouster of the company and its administration. Infact by this time, the company had acquired for itself the name 'ramshackle' and was 'stigmatized' as poorly conceived, badly managed and grossly undercapitalized. (22)

How did the other European powers conceive the action of the British Government? Internationally Britain was seen as having taken up the responsibilities and obligations of the Imperial British East Africa Company. In legal terms, the Government asserted that it was exercising jurisdiction under the Foreign Jurisdictions Acts of 1843 to 1878 and in pursuance of the Zanzibar order in council 1884 and Africa order in council 1889. The 1843 to 1878 Foreign Jurisdiction Acts were consolidated into the Foreign Jurisdiction Act on 1890. The Foreign Jurisdiction Act 1843 provided for the exercise of jurisdiction by the sovereign in Foreign countries. It was these legislations in form of Acts and orders in council made thereunder, which provided the statutory base for the extent and exercise of jurisdiction by the IBEAC and the British Government in East Africa.

The 1890 Foreign Jurisdiction Act provided for the exercise by Her Majesty of any jurisdiction, whether obtained by treaty, capitulation, grant, usage sufferance or any other lawful means.

This jurisdiction could be exercised in foreign countries regardless of whether obtained before or after the commencement of the act and could also be exercised in an ample manner as if it was obtained by conquest or session. This applied to Kenya which fell under complete British power in 1895. The 1890 Act, passed before this year (1895) was applicable. The Act also provided that, where a foreign country was not subject to any form of Government from which jurisdiction in the above manner could be ascertained. Her Majesty should by virtue of the Act, have jurisdiction over her subjects in that foreign country. The jurisdiction was thus specified and defined in the orders in council already mentioned. Under these legal instruments, the consuls and colonial officials were empowered to hold courts, promulgate legislations and carry on administration in the area to which the order in council applied. Did the British Government exercise only such jurisdiction as was permitted by these legal instruments? The answer to this is in the negative. For instance the Zanzibar order in council 1884 applied to the British subjects and British protected persons in Zanzibar and also foreigners in cases specified in the order. The African

order in council applied to British subjects and protected persons, foreigners who signed their own consents and the consents of the proper authority of their own Government. It also applied to foreigners whose States or Governments had consented to the exercise of jurisdiction over them. (23)

The practical operation of these orders in council in relation to criminal jurisdiction over foreigners may be illustrated by two cases - R V Montopoulo (24) and Imperatrix V Juma and Urzee. (25) In the case of Montopoula, the accused was a Greek National who had been sentenced to ten years imprisonment for culpable homicide by Court of Zanzibar. His appeal was on the ground that, though he was under British protection, he was not subject to the criminal jurisdiction of the consular court, nor had the Greek authorities consented to that court exercising jurisdiction. The High Court of Bombay, which listened to the appeal considered that evidence showed that the Greek Government was a party to the assumption by the British Government of the protection of Greek in Zanzibar. As such the question of consent did not arise, since protection connected jurisdiction. In Juma and Urzee case, the persons of German origin had been convicted for offences committed in Bunyoro and not in Buganda. Bunyoro was not a British protectorate but the court did not hesitate to convict the said persons. The court quashed the convictions but went on to hold that the persons could only, under Africa Order in council be convicted without their states consents for offences committed against British Laws within a British protectorate. This decision and the one stated above show

that jurisdiction exercised by British administrators in a protectorate went far beyond the terms of the legal instruments or orders in councils. According to British views, the assumption of protectorate made the protected persons stand on equal grounds with British subjects in respect of the laws applicable to the British subjects, but when benefits were considered, the British subjects (proper) were given first priority. A modification of British views to justify the situation was stated in 1891:

....."the civilized powers of the world recognized as a principle of international law that the protection of an uncivilized territory carries with it many of the most important attributes of a sovereign state, and that the subjects of a civilized power are within such territory to have the benefit of and be subject to all administrative and judicial institutions established by the protecting power to the same extent as the subjects of that power."<sup>(26)</sup>

This means that the authorities were aware that jurisdiction did not mean full exercise of control over the territory and the subjects therein. It was an assumed jurisdiction based on the signing of the General Acts of the Berlin and Brussels Conferences.

○ From a legal stand point, the declaration of a protectorate over <sup>a</sup> people's territory meant that the subjects were under the protection of the protecting power as against any other power which would threaten to take over jurisdiction, But this did

not mean that the subjects were under the control and administration of such a power. If anything, the protecting power was expected to leave the subjects to their own sovereign.

The true version as put in practice by the British authorities was the existence of a protectorate in an uncivilized country imported the right to assure<sup>M</sup> whatever jurisdiction over all persons might be needed or is necessary for its <sup>e</sup>effectual exercise. (27) This new doctrine was embodied in the East Africa Order in Council 1897. It was the first to apply to the whole of East Africa. Probably this was so enacted so as to erase those problems that were arising in areas where jurisdiction was not established. The 1897 order provided that the power contained therein applied to foreigners who were defined as subjects or citizens of states in amity with Her Majesty<sup>d</sup> not being natives. This legislation laid down the legal basis of assumption<sup>of</sup> power over East Africa and from henceforth, the administration assumed jurisdiction both over the people and the land.

In conclusion, I would say that neither the law officers, the British policy makers nor their politicians saw the function of law as standing impartially between the protector and the protected. The Law was flexible enough to ensure full governmental powers in a protectorate. Most agreements or treaties made were capable of being broken if need be to pave the way smooth for the European administrators and subsequent settlers. Where an embarrassing situation was discovered, the law would permit an Act of State to be pleaded, and hence

no need to legally justify the action or face the inquiry of the court. From a Marxist point of view then, the law introduced in East Africa was one of the main weapons used for colonial domination and in several fields particularly land acquisition remained so for most of the colonial period. This will be the subject of discussion in the following Chapter.

1. 1856 A.D.
2. J.N. Nyerere: Nyerere - The Basis of Socialism in East Africa in his Book Nyerere's Thoughts on Socialism Oxford University Press, 1968) at p. 7.
3. Dr Othello Ojando H.W.O.: In Judith Heyera Ch. 3. African Land Tenure Reform. ...../32
4. 'Itihaka' - Kikuyu name for parcels of land occupied by a single family or an individual.
5. In The Native Law of the Southern Highlands of British East Africa. Journal of the African Society, April 1910.
6. Sorenson: Origins of European Settlement in Kenya. Oxford University Press.
7. 'Mbaari', Kikuyu name for a land holding unit, usually comprising an entire ridge.
8. See 'Footnote 7'.
9. Sorenson: Origins; See also Lambert: The Systems of Land Tenure in the Kikuyu Land Unit. Pp. 33 - 35.
10. Chel and Makusani: Pp. Cit. P. 36.

FOOTNOTES:

CHAPTER ONE:

1. Gluckman: Ideas in Barotse Jurisprudence
2. Sir Henry Maine: Ancient Law. (Murray and London). P. 86
3. Vinogradoff P; Outlines of Historical jurisprudence. (Oxford University Press London. 1920).
4. 1056 A.D.
5. J.K. Nyerere: Ujamaa - 'The Basis of Socialism 'an Essay in his Book Ujamaa Essays on socialism (Oxford University Press. 1968) at P. 7
6. Dr Okoth Ogendo H.W.O.: In Judith Heyers Ch. 5. "African Land Tenure Reform."  
\* 'Ithaka' - Kikuyu name for parcels of land occupied by a single family or an individual.
8. In "The Native Law of the Southern Gikuyu of British East Africa." Journal of the African Society. April 1910.
9. Sorrenson: Origins of European Settlement in Kenya. (Oxford University Press).
10. 'Mbaari', Kikuyu name for a land owning unit, usually occupying an entire ridge.
11. See. Footnote 7
12. Sorrenson: Origins; See also Lambert: The Systems of Land Tenure in the Kikuyu land Unit. Pg. 93 - 95.
13. Ghai and McAuslan: )Pop. Cit. P. 26.

....contd.

....contd. FOOTNOTES

14. Dr Okoth Ogendo: Op. cit.
15. Marx. Op. cit. P. 362 - 363.
16. See Roland Oliver. Op. cit. P. 373 - 374.
17. Michael Crowder: West Africa under Colonial Rule. The Chapter on partition generally.
18. P. 3
19. General Act. Hertslet Vol II 468 - 87.
20. Oliver and Mathew Op, cit. Vol I P. 397.
21. IBID. P. 380 - 81.
22. IBID. P. 393 & 409.
23. Ghai and McAuslan: Op. cit. P. 31
24. (1895), 19 I.L.R. (Bomb), 741.
25. (1898), 22 I.L.R (Boamb), 54.
26. McNair: International Law Opinions (Cambridge University Press. 1956), Vol I, PP. 49-50.
27. IBID. Pp 54 - 5.

CHAPTER TWO:

ACQUISITION OF CONTROL OVER LAND

The object of this Chapter is to analyse the nature and content of the legal instruments of acquisition of control over land between 1895 and 1920. This is the period between the declaration of the protectorate and the establishment of the Kenya colony 1920. The Chapter will also attempt to show the manner in which this control over land was achieved and the effects of its achievement on African proprietary rights.

The importation of the basic doctrines and principles of English land law at the beginning<sup>of</sup> this century was in response to the needs of the settler economy then in the process of establishment. That the substantive rules and organisational structure of property law were likewise determined primarily by the needs of the colonial economy, (1) which needs the law had to protect.

These doctrines had adverse effects on African proprietary rights, and in most cases they could not fit in the African nature and concept of land tenure. For instance, according to the British law the crown was the source of all title to land. Thus unless the crown established an original title to land, normally a consequence of sovereignty, it was legally impossible to make grants in fee simple or under any other form of tenure recognized in British law. As protectorates were technically

foreign territories it was difficult for lawyers to see how the crown could assert title to land or grant titles to British Subjects. It was possible to obtain rights to deal with land by treaties with the existing sovereign authority of a protectorate; but then, the crown acted by delegation of authority according to the terms of the treaty. On the contrary, the African concept of ownership did not recognize any sovereign as having such powers and rights over land belonging to any given community. Power was limited to political leadership and supervision of rights over the land, and these powers were exercised on behalf and subject to approval of the community.

What were the legal instruments which enabled exercise of control over the land held traditionally by Africans? The first major rules introduced by the Protectorate Government were the 1897 Land Regulations. These Land Regulations were promulgated under the power of East Africa Order in Council of the same year. The dispatch of these principles was as a result of a suggestion made to the protectorate government by the colonial office. The regulations required that the authorities could not issue 'certificates of occupancy,' as an administrative act. The certificates did not confer any transfer of title. These regulations drew a distinction between land within the Sultan's

dominions and land elsewhere in the protectorate. The certificate provided for 21 years lease to those who wished to take up unoccupied land. The rules were unsatisfactory for one, because the period of occupancy was a limited one, and applied only to some areas, whereas the hunterlands were left untouched or unoccupied. Also, the rules did not confer any titles upon the holders of the certificate. In disgust, one of the settlers described the rules as

"the most idiotic land laws that ever were seen; no man in his right senses would ever think of taking up land on such conditions."<sup>(2)</sup>

The only way in which title to land could be acquired was through sales by indigenous people or through treaties with Chiefs. Previously in Ukambani, acquisition of land was found to be impossible through treaties, because the commissioner situated there reckoned that there were not Chiefs.<sup>(3)</sup> Hence the commissioner urged the Government through the Foreign office to abandon altogether, at any rate in Ukambani, the fiction of having to act under delegation from or Treaty with, the native Chiefs, and simply <sup>lay</sup> down the principle that Her Majesty having assumed protection <sup>the</sup> over people and in their own interests that no alienation by them collectively or individually, of any lands or other rights shall be recognized by her as valid unless ratified by her or <sup>on</sup> her behalf by officers committed to the Government of the country.<sup>(4)</sup>

The Government received undue pressure from the settlers and this time called up <sup>on</sup> Mr Gray (a private advocate who acted as a legal draftsman for the Foreign office) to draw up new Regulations. The new Regulations were expected to make it clear that the Administration has a right to deal with waste and unoccupied lands as crown lands and to create freehold tenure instead of mere leaseholds as those created under the 1897 Regulations. The misconception was that, they believed that the native anywhere was bound to accept the right of the crown to take waste land. <sup>(5)</sup> It is certain that even the law officers who were expected to protect the interests of the weaker African, if not to arbitrate between the Administrator and the African, protected the policies of the British Administration.

Thus in 1899, the Law officers released a new set of principles to the Government. These were to the effect that the protectorates of African variety, where protection was exercised under treaties which did not specifically grant Her Majesty the right to deal with land, the right to deal with that land 'accrued to Her Majesty by virtue of her right to the protectorate.' Protectorate in this sense meant that the crown had acquired control of all lands which had not been appropriated either by a sovereign or by individuals. <sup>(6)</sup>

The East African (Lands) Order in Council 1901 gave effect to the opinions of the Law Officers. Under this Order all crown lands were vested in the commissioner and consul-General and such other trustees as might be appointed on behalf

of Her Majesty. Subject to the directions of the Secretary of State, the commissioner was empowered to make grants or leases of crown lands <sup>in</sup> such terms and conditions as he might please.

The 1901 East Africa Order in Council defined crown lands as:

" all public lands within the East Africa Protectorate which for the time being are subject to the control of Her Majesty' by virtue of any treaty, convention, Agreement or of Her Majesty's Protectorate and all lands which have been or may hereafter be acquired by Her Majesty under the Land<sup>d</sup> Acquisition Act 1894 or otherwise howsoever." (7)

This was the first attempt to define crown lands prior to the 1915 crown lands ordinance. But the definition was vague in that it merely described 'crownlands as public lands' without attempting to explain the meaning of the term. Under the 1902 ordinance, the commissioner was empowered to sell land and grant 99 year leases. This was good encouragement to European settlers, who from then onwards started taking up land more seriously and in a larger number.

The above definition widely defines crown lands and this meant that almost every action taken by the crown through its officers was included in the definition in so long as it achieved control over land. The commissioner could deal with land in any manner he deemed fit, The rights of the indigenous people over land could not bar the exercise of this jurisdiction

These rights were now seen in terms of 'mere' occupational rights and nothing more than that. It was now not necessary to consult the owners of the land, after all there rights were limited to occupational rights. Whenever land fell vacant, the authorities could claim this under the ordinance to be crown lands. The admissions of the appellants council in the Masai case <sup>(8)</sup> gives us a good illustration of the effects of the legislations created by the colonial government. It was submitted in that case that the protectorate authorities were under no legal obligation to make an agreement with the Masai, that legislations was adequate to acquire the land. The implication here is that the colonial government could compel by legislation a people to vacate their long held traditional lands.

In spite of the continuous assertions that land belonged to the sovereign, and that the Maasai were a sovereign entity, the authorities did not give the legal effect embodied in a sovereign. If they had considered that a significant element of sovereignty in the land vested in the Maasai after the 1901 order in council and the 1902 crown lands ordinance, the protectorate government would have been obliged to negotiate an agreement with them. My submission is that the legislations so far promulgated were well calculated to deny and take away any existing rights in land from the Africans and bestow them on  
on to legislation

the crown. For instance the 1902 legislation was drafted on the assumption that the Africans had no title to waste or unoccupied land and accordingly the crown could assume a title to such land and alienate it to immigrants. Even the occupation of land either for the grazing of stock or for cultivation was considered to be merely a temporary right of usufruct, and once occupation lapsed it was assumed that this land could be alienated.

What was the attitude and the position of the Judiciary in respect of the legislations made and law in practice? The Judiciary no doubt was part and parcel of the instruments of coercion used to create orders. These instruments were made to protect the interests of the dominant ruling settler class and subsequently to safeguard the interests of the same people as seen emanating from such orders.

The Masai case highlights lack of remedies to Africans when they sought the help of the Judiciary. Other cases as will be seen later in the discussion spell out the courts unwillingness to allow any challenges of the constitutionality of the colonial legislations and policies. Summing up a

succession of cases on jurisdiction in protectorates, Denning L.J (as he then was) said in Nyali Ltd V Attorney General.<sup>(9)</sup>

"Although the jurisdiction of the crown in the protectorate is in law a limited jurisdiction, nevertheless, the limits may in fact be extended indefinitely so as to embrace almost the whole field of Government..... The courts

themselves will not mark out the limits. They will not examine the treaty or grant under which the crown acquired jurisdiction, nor will they inquire into usage or sufferance or other lawful means by which the crown may have extended its jurisdiction. The courts rely on the representatives of the crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the crown the courts will not permit it to be challenged."

The courts were therefore serving British imperial interests.

A similar decision had been provided earlier in R V Earl of Crewe Ex parte Sekgome <sup>(10)</sup> which was quoted with approval in the Maasai Case. I would therefore feel safe at this point to say that all the legislations made, and those to be enacted, including other legal institutions such as the judiciary and Law Officers were all devoted to seeing that control over land was achieved. It did not matter how this would be done but the necessary legal affect would be given.

Ghai and McAuslan say that if there were any doubt as to the extent of the power, the Protectorate Government was claiming by the 1902 legislation, they were set at rest by the crown lands ordinance 1915. <sup>(11)</sup> The ordinance redefined Crown Lands so as to include land occupied by native tribes and land reserved by the Governor, for the use and support of members of the native tribes. Crown land shall mean:

"all public lands in the protectorate which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement or by virtue of His Majesty's protectorate and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever and shall include all lands occupied by the native tribes of the protectorate and all lands reserved for the use of the members of any native tribe." (12)

Part VI of that ordinance says that such reservation of land for the use of native tribes shall not confer on any tribe or member of any tribe any right to alienate the land so reserved or any part thereof. (13) It was thus clarified that the protectorate government had complete control of all land occupied by natives and that it reserved to itself right of disposal and alienation. No member of the native tribe could be heard to say that a particular parcel of land belonged to him and he may dispose or alienate it. In addition, land reserved for the use of members of a native tribe could at any time be cancelled and taken away for alienation to European settlers. The provision for this was Section 56 of the same 1915 Crown Lands Ordinance. It stated that:

"The Governor in Council may at any time by notice in the "Gazette" if satisfied that the whole or any part of any land so reserved is not required for the use and support of the members of the Native tribe for which is has been reserved, cancel such reservation as regards the whole or a part of such land and thereupon the land the reservation

of which has been so cancelled may be sold, leased or otherwise disposed of under this ordinance."

Together with creating reserves for the natives, the rights over all land were automatically placed on the crown. The natives ceased to have any rights the view of the Protectorate Government. The ordinance attempts to give some statutory safeguards to the Africans, such as reserving the land for the use and support of the members, of the native tribes. But it further removes this safeguard by providing for cancellation or alienation of such land so reserved if the Governor was satisfied that European settlers needed the land and that the natives could be moved elsewhere.

One wonders what could have been the intention of the legislature<sup>in</sup> promulgating the ordinance. But then in view of all other legislations and instruments already given in this discussion, it becomes clear that the intention was to renounce all proprietary rights belonging to the Natives and subsequently vest them in the crown. According to Dilley in his Book, the British Policy in Kenya Colony

"The ordinance was interpreted to provide no legal right to land for Natives, either individually or tribally. Natives were held to be merely tenants at will of the crown and could be dispossessed at any time. Administratively the Law was interpreted to mean that Natives could be dispossessed, that is, part of the reservation could be

cancelled by the Governor with the approval of the secretary of state, if the land was not 'beneficially' occupied. There apparently was no security for Natives, they held land under a tenure no Whiteman could accept."<sup>(14)</sup>

Dilley must have come to this general conclusion after analysing administrative and judicial pronouncements in relation to rights of the Natives.

The judiciary upheld the intention of the legislature and in fact gave it legal effect. As already stated, the judiciary could not have held otherwise because it was part of the colonial system. As such, it was operating within the system and intended to perpetuate the colonial system. It held the view that the effect of the Crown Lands Ordinance 1915 was 'inter alia' to make the Natives tenants- at - will of the Crown. The view was first given judicial approval in the case of Isaaka Wainaina and Another V Murito Wa Indangana and another.<sup>(15)</sup> Briefly stated, the facts of that case were that the plaintiffs both members of the Kikuyu community claimed possession of land situated in Kabete in one of the Kikuyu reserves. They based their claim on the inheritance by them of a moiety of the rights alleged to have been bought by their father and uncle from a Dorobo at a purchase value of 900 sheep. They filed an action against the defendants for trespass and subsequently the Attorney General was made a party to the case. The plaintiffs

also alleged that the defendants had been tenants-at-will of a portion of the land for some years and that such tenancy had been terminated by notice

One of the main issues before the court was whether the plaintiffs were entitled to the occupation of the land as against the defendants. The colonial court found as a fact of Law that the land dispute was part of crown land and was therefore occupied by Natives subject to provisions of Part (VI) of the Crown Lands Ordinance 1915. The provisions of the ordinance specifically stated that the reservation did not confer any right on any member or tribe to alienate land so reserved. In holding that the effect of the Crown Lands Ordinance 1915 was to make Natives tenants-at-will of the crown, Sir Barth C.J. said:

"In my view the effect of the Crown Lands Ordinance, 1915 and the Kenya (Annexation) Order in Council 1920 by which no Native private rights were reserved and the Kenya Colony Order in Council 1921.... is clearly, inter alia, to vest land reserved for the use of a Native tribe in the crown. If that be so then all Native rights in such reserved land whatever they were.... disappeared and Natives in occupation of such Crown Land became tenants-at-will of the crown of the land actually occupied." (16)

This was of course a wrong decision. It is worth noting that Wainaina V Murito overruled a more rational decision of the

earlier case of Kimani wa Kabato V Kioi wa Ngai. (17) In that case, Maxwell J. held that a member of the tribe could acquire and retain tracts of land within the reserve and that such rights could be enforced by a suit for damages for trespass and for an injunction.

The error made by the learned Judge was failure to distinguish between title to the country which was acquired under the Kenya (Annexation) Order in Council and title to the land which had been acquired as early as 1901, although the effects of the 1901 East Africa Order in Council had not been clearly spelt out until 1915 when the Crown Lands Ordinance was enacted.

In the view of the colonial authorities, the distinction between a protectorate, title to land, and title to the country did not matter. What was important was effective control over land and its subjects. Control over land and the subjects therein was gradually achieved by the end of the establishment of a colony over Kenya.

Barth's judgement was followed with approval in a later case by Stephen J. - Douglas Mwangi and others V A.G. and Another. (18) In that case, Stephen J, held that the Natives had not even rights of occupying<sup>ancy</sup> in land within the Native Reserves but that 'probably' they had a limited right of occupying<sup>ancy</sup> only as against the members of the tribe so long as that tribe was allowed by the crown to remain on the land.

Ordinance. (19) The legislation provided a system of

In general the effects of these judicial pronouncements was to give the necessary legal effect to the legislations. As against African proprietary rights, the achievement of control over land through these legal instruments portrays disastrous effects. From this period of expropriation onwards, the colonial administration could move Africans from the reserves, thus violating some of the sacred traditions and beliefs of the Africans. The African for instance believed that land belonged to them and their ancestors, that they had a duty to protect this land from any other claimants. Such an action of violating African traditions and tribal boundaries was illustrated by the removal of the Maasai from Laikipia in order to create room for European settlement. Africans could no longer proudly assert their inherent traditional rights over their land without undue interference. The overall effects of the legislations, and especially with the establishment of the Kenya colony in 1920 was to extinguish African proprietary rights, and a complete disinheritance of African claims over land was attained. Tribal groupings were split and reorganized in new areas. The colonial authority was prepared to go to all limits to secure land for European settlers and in this case, under every possible comfortable conditions.

To secure protection for the alienated land, the administration introduced statutes which created private property rights in land. The major legislation to this effect was Land Titles Ordinance. <sup>(19)</sup> The legislation provided a system of adjudication

of rights in the coastal strip. Under this statute, it was possible to make a claim for ownership to a plot of land. This claim was not subject to protectorate claim. The Europeans who had bought land from the coastal Arabs thus had their private rights protected while those intending to buy were guaranteed titles over the land.

The certificates issued under the land Titles Ordinance were conclusive and final upon the claimants. (20) Similar certificates of Titles were issued and registered under the Registration of Titles Ordinance. (21)<sup>a</sup> Once more the certificates under this ordinance were taken as conclusive evidence that the proprietor is the absolute and indefeasible owner of the land specified thereunder.

Registration system in the Highlands of Nairobi area and its surrounding was governed by Crown Lands Ordinance 1925. Today such areas <sup>are</sup> registered under the Government Lands Act. (21)<sup>b</sup> The Government may use it for settlement schemes, or left for government reserved areas.

In conclusion, it is my contention that the Imperial Government managed to acquire by legislation land from the Africans. In practice, the declaration of a colony in 1920 was not different from the assumption of a protectorate. (22) Africans became British subjects assumingly to have equal shares of benefits with British (proper) subjects, not to mention

that control over land by Britain was complete.

The Administration proceeded to provide security through the issue of certificates of Titles to the already acquired land. Once, more, it is my humble submission that land was snatched from the original <sup>claimants</sup> elements through effective implementation of Law by the colonial government. Africans were thereafter taken to be tenants at will of the crown, not in Britain but in Kenya. They had not negotiated any terms of tenancy, nor had they paid any rents for the land to their Landlord. Was there any real tenancy then, or was it just a mere imputation of the colonial government?

Tenancy at will of the crown was in this respect, a creation of the European imperial government, which they unsuccessfully tried to impose on the Africans. Indeed the restlessness and insecurity caused by such legislations and assumptions which were intended to disinherit Africans of their land manifested itself in the Kikuyu agitation of land. This agitation increased as the Europeans continued to guarantee more and more security to European settlers while they disregarded the African feelings and grievances. This will be the subject of discussion in the third Chapter.

FOOTNOTES:

CHAPTER TWO:

1. Dr Okoth Ogando: "Political Economy on Land Law."  
\* An essay in the Legal Organisation of Underdevelopment  
in Kenya, 1894-74.
2. See Hall paper, 20th April 1897.
3. Handinge.
4. F.O. 107/53 Handinge to Salisbury 11 June 1896.
5. F.O. 107/55, Memorandum of 9th October, 1896 in colonial  
office to F.O. 4th September 1896
6. Ghai and McAuslan: Pg 26.
7. Sorrenson M.P.K. Op. cit. Pg 53 Para. 21, Ghai and McAuslan.  
Pg 26 para 2., 1901 East Africa Order in Council Sec. 1.
8. Ole Njogo and other V.A.G. (1914), 5 E.A.L.R. P. 70.
9. 1956 K.B.I. at p.15.
10. 1910 2 K B 576 at pp. 609-610 quoted with approval in the  
Ole Njogo case.
11. Pg 27 No. 12 of 1915.
12. S. 5, 1915 C.L.O.
13. S. 54, PART VI of 1915 C.L.O.
14. See Dilley: British Policy in Kenya Colony 2nd Ed., 1966.  
P. 352.
15. 1922-23 (9) K.L.R. 102

....contd.

.....contd.

16. IBID P. 104

17. (1919-1920) 8 E A L R 129

18. Supreme Court decision (case No. 113 of 1925)

19. No. 11 of 1908.

20. S. 7 of No. 11 1908

21. No. 26 of 1919

21.B Crown Lands Ordinance 1915.

22. Kenya (Annexation Order in Council 1920.

An examination of these instruments reveal that during the transitional period the authorities had preserved all their former legal and constitutional structures arising out of the status of Kenya as a protectorate. Powers and policies which were consistent only with colonial status were carried out unchanged. To this effect, therefore, the subsequent change to colonial status in the 1920's did not in practical terms either increase the powers of the administration or call for implementation of different policies.

That the Kenyan Government asserts that this change of status had legal and constitutional implications. In itself it was an act of state done by virtue of the prerogative.

CHAPTER THREE:

THE PERIOD OF CONSOLIDATION 1921-52

SECTION: I

LEGAL INSTRUMENTS OF CONSOLIDATION  
OF EUROPEAN SETTLEMENT:

This section is an analysis of the legal instruments that were used to consolidate European settlement, that is, the mechanisms which the colonial government applied to consolidate the settler gains of the expropriation phase.

The preceding Chapters have attempted to show that law was the instrument used to acquire control over land as against the proprietary interests of the African. After these achievements, there was need to find a means for providing security to the Europeans who now were owners of large freeholds. The same method of seizing upon the Law as a means of providing security was used.

An observation of these instruments reveal that during the Protectorate period the authorities had proceeded as if there were no legal and constitutional structures arising out of the status of Kenya as a protectorate. Powers and policies which were consistent only with colonial status were exercised and implemented. To this effect, therefore, the subsequent change to colonial status in the 1920's did not in practical terms either increase the powers of the administration or call the implementation of different policies. (1)

Ghai and McAuslan assert that this change of status had legal and constitutional implications. In itself it was an Act of state done by virtue of the prerogative.

The annexation however, excluded the dominions of the Sultan of Zanzibar, but included the Sultan of Witu. As a Protectorate the Government's authority was still provided for under the authority of Foreign Jurisdiction's Act. (2) The Order in Council made effective annexation of the whole East African Protectorate.

The British Government agreed that the British subjects had settled in the protectorate for long and in large numbers and it was proper to extend the Dominions of His Majesty to cover these subjects. In addition, Kenyans became British Subjects, to be ruled as a colony subject to British laws and policies.

In the following year, Kenya was made a colony under the Kenya colony order in council. From this year, Kenya was governed and administered as a colony. The Foreign British laws of administration were now effected to suit the European purposes of settlement. The initial problems of trying to establish jurisdiction and laying down a legal basis for such jurisdiction had now been removed. It has been stated that in practice, there was no difference between a protectorate and a colony. The authorities exceeded the powers provided for in the two circumstances.

The object of this Chapter has been stated as analysis of the legal instruments used to consolidate the settler gains of the expropriation phase. In our endeavour to show how this consolidation was done, we shall attempt to analyse the provisions and the policy considerations behind the various

statutes enacted during this period.

Of first consideration is the Crown Lands (Discharged Soldiers Settlement) Ordinance of 1921.<sup>(3)</sup> The purpose of this ordinance was to provide land for those soldiers who had been in the world war one. The ordinance removed the restrictions and requirements on commercial dealings which had been put by the earlier ordinance.<sup>(4)</sup> The earlier ordinance required that the settlers should reside in the protectorate and on their farms for fixed proportions of the first three years of that grant. They were not allowed to engage in general commercial dealings until the purchase price had been paid.<sup>(5)</sup>

The ordinance portrays the intention of the Imperial Government to provide land on favourable terms. Freedom to use the land in the best way possible was guaranteed, and so long as the improvements of that land were satisfactory, the purchase price was remitted. This freedom did not exempt the settlers from observing the requirements of the Crown Lands Ordinance of 1915. Critically one would say that, the government could not stand aloof and watch the settlers misuse the achievements of the colonial government. It had to give them the necessary support and encouragement. In so doing, the agricultural Law and administration policies effected from this period onwards, aimed once more at serving the interests of the settler economy.

In Chapter two, it has been mentioned that the government had introduced a registration system of titles of the owners

of land. (6) This was a guarantee of security to the settlers. The Europeans were now seen as tenants of the European government. What the 1921 legislation and its amendment ordinance (7A) did was to destroy any existing relationship between the African and the European. The European could easily buy land, or be settled by the government, without having to consult with the Africans. After all, Africans had been reserved in the Native lands, and they had no right to interfere with transaction outside the established Native reserves.

By 1921, therefore, the development of a dual policy was inevitable. A framework of Law and administration had been created through which the European gains were to be protected. This created a settler community which was seen as the source of the development. Land allocated to them had to be profitably developed. To achieve this object, the government found it necessary to provide security of tenure and plentiful supply of cheap labour. Both of these were provided. Both of these priorities required that the Africans be deprived of their security of tenure and be confined to reserves.

The settlers were now given privilege and security in the Highlands. But as we have seen, the African were left dissatisfied and as such, there was need to secure this privilege through

provisions. The Kenya Land Commission 1933-34,<sup>(8)</sup> was given as a term of reference the duty of providing a solution in the highlands. The previous protection which provided security in these highlands in terms of Elgin pledge of 1908 and the Devonshire Declaration of 1923,<sup>(9)</sup> were seen as inadequate. These two had recommended that the European Highlands should be reserved to European settlers only and that the Indians should be prevented from acquiring land in the Highlands. The commissioners recommended that the final solution should be to give an assurance to the Europeans. The assurance meant that the reserves of Highlands should remain inviolable. For this purpose, they advised that an order in council should be promulgated whose object would be to set out precise boundaries in the Highlands.

Two major ordinances implemented the commissioners recommendations. These were the Native Lands Trust Ordinance 1938<sup>(10)</sup> and the Crown Lands (Amendment) ordinance 1938.<sup>(11)</sup> A clear cut division was made between the Highlands and the 'Native land'. A Highland Board was created and given powers over land in the Highlands, whereas a Trust Board was created and empowered to preside over all land matters in the Native Lands.

The two Boards were thus given two separate areas of jurisdiction under the Kenya (Native areas) order in council<sup>(12)</sup>

and the Kenya (Highlands) order in council<sup>(13)</sup> both of 1939. These arrangements remained substantially the same until Independence in 1963 and thereafter receiving minor alterations.

Along side the Highlands Boards, another non-statutory Land advisory Board which was established as early as 1928, continued to function. The Boards main function was to advise the governor on proposals for alienation and any grants of Crown Land. Its intention was concentrated on the Highlands obviously because this was the region where the government's attention was and future hopes for development.

The other major legislations by the government were in form of the Crown Lands Amendments in 1942 and 1944.<sup>(14)</sup> The Crown Lands (Amendment) ordinance must be seen as an interference of the boundaries already fixed. Under this ordinance 34,000 acres of land were removed from the Masai Native Land Unit and made into a settlement of resident labourers. The labourers had posed a continuous problem to the government since they had no land and were now becoming many in numbers in the Highlands, where they had been working for their European Masters. Thus the Government had to do something. One thing is certain, that they could not be encouraged to stay or to move from their Landlords, since their stock was a lot, and the European settlers found these cumbersome to <sup>keep</sup> in their land. They could also not be put into

land in Native reserves because land in most reserves had been subjected to over population, overgrazing, soil erosion being a major problem, not to mention that land was scarce. But the action taken by the authorities was apparently no solution to such problems, because this meant a reduction of the Masai Native Land Unit. (15A)

The resident labourers and the squatters were some of those classes of people whom the colonial regime had completely disinherited land through the various colonial legislations. Their problem will be analysed in the next section of this Chapter.

A further amendment of the Crown Lands Ordinance is the 1944 ordinance. The ordinance was concerned purely with the Highlands and it conferred on the governor wide powers in respect of dealing with land therein. Any companies which had interests in the Highlands were directly under the supervision of the governor and his consent was necessary for any transactions especially those involving inter-racial groups.

Finally after the war period, the government adopted a new approach to land development. Before, it had allowed free land use without any control, even where it had provided financial assistance. But now, increased Government control was necessary in order to help a faster economic recovery. Settlement began soon after <sup>the W.W.I and in order to cope with</sup> its administration, the Government established the

implemented to secure the better gains mainly in the

European Agricultural Settlement Board under the European Agricultural Settlement Ordinance of 1948.<sup>(16)</sup> Land for this settlement was ~~not~~ alienated not from the native reserves but from the large unoccupied European owned land in the Highlands. The government must have had no alternative, because land was scarce in the reserves.

For effective governmental control, it is noted that a Land Control Board had already been established by the Land Control Ordinance in 1944.<sup>(17)</sup> Why was there a change of policy in the administration of Land? We note that by 1939, the Imperial Government had consolidated its gains, were it not for the disruption which came with the second world war. Therefore, any change of policy was due to the inevitable circumstances which the government found itself in. Moreover, the Africans had ~~an~~ increased their agitation for the return of their land and the recognition of their rights in land.

We shall show in the next section that although the colonial government achieved control over land, through the discussed provisions, its policies left a lot to be desired. They ignored the most important group of people, that is the Africans, without whom, the security of tenure in the Highlands could not peacefully be guaranteed. If they had considered that the Africans owned land, the land hunger revolt which resulted in 1932, would probably have been avoided. Thus the legal instruments and policy considerations implemented to secure the settler gains mainly in the highlands

were no different in substance from those instruments

SECTION TWO

used in the expropriation phase. The sole purpose for these legislations was to acquire land and the necessary security interests in the land for European settlers.

was simply to make way for European Settlement. This was an important content of the 1913 Crown Lands Ordinance to include land occupied by native tribes, and land reserved for the use and support of members of the native tribes. In Part VI of that ordinance, such reservation of land for the use of native tribe was expressed not to confer on any tribe or member of any tribe any right to alienate the land so reserved or any part thereof. It must be noted that this reservation was not for the use of the native tribe. If the government means it to be for the use of a member of native tribe, or a particular tribe thereof, it should not have gone further to legislate that the land so reserved could be alienated for European Settlement; if the governor found that the member of the tribe did not require the lands. Thus, the provision was a mere falacy.

At this point, I wish to submit that African land rights in the reserves were destroyed by the legal instrument which assured that Africans had become mere tenants at the will of the crown and that the only rights they possessed were rights of occupancy. Such rights did not confer on them any rights of alienation of land in the reserve. Hence, the legal instruments used in the expropriation phase, and those used in the reservation of the land policy had the effects of

SECTION TWO:

NATURE OF AFRICAN LAND RIGHTS IN  
THE RESERVES:

The original reason for the establishment of reserves was simply to make way for European Settlement. This was an important concern of the 1915 Crown Lands so as to include land occupied by native tribes, and land reserved for the use and support of members of the native tribes. In Part Vi of that ordinance, such reservation of land for the use of native tribe was expressed not to confer on any tribe or member of any tribe any right to alienate the land so reserved or any part thereof. <sup>(18)</sup> It must be noted that this reservation was not for the use of the native tribe. If the government meant it to be for the use of a member of native tribe, or a particular tribe thereof, it would not have gone further to legislate that the land so reserved could be alienated for European Settlement., if the governor found that the member or the tribe did not require the land. Thus, the provision was a mere falacy.

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taking away by legislations land belonging to Africans and vesting these lands on the European settlers. What then was the nature of African Land rights if any in the reserves?

In the view of the Imperial administration and the judiciary, not to mention the European settlers, Africans held rights of occupancy at the will of the Crown.

By 1920, when Kenya became a British colony, the settlers struggle for land had reached a landmark. The government had become the owner of the radicle title in the land, and Europeans were able to get indefeasible titles of ownership.

But the liberal circles in the British Parliament were of a different attitude. They observed that the inclusion of "native reserves" in the definition of Crown Lands was tantamount of a complete dispossession of the indigenous people.

The implementation of the reserves policy meant that there was more room for European settlement and also that the Highlands would not be left for the settlers occupation. Occupation and movement by natives was from now on restricted in certain areas only, Any occupation outside the reserved land was illegal.

It is not suprising that the view of the legislative council committee, which had been asked to make a report on the final bill which redefined the Crown Lands so as to favour of the settler population. It reported that:

" The extension of this definition so as to include native reserves having been criticized in England, the committee wish to record emphatically their opinion that the definition as drafted should stand. It must be remembered that many if not most of the native tribes have no individual or tribal tenure of land as tenure is generally understood in England and it is of utmost importance that the land in the reserves or occupied by Native tribes should be vested by statute in the crown, thereby giving the crown power to afford the natives protection in their possession of such land.... If such lands are vested in the crown it will be possible for the crown to regulate their occupation in the interests of the natives and finally to evolve a system of tenure for the natives thereon giving them real and definite right to land."

The above view assumes that the Africans did not have any tenure of land, and as such it would be in their interests if land was vested in the Crown so that that the Crown would develop a system of tenure for the Africans which would give them definite and real right to land. But since the Europeans had already denied that Africans possessed any rights in land, it is therefore difficult to agree with the above view. I would therefore submit that the new definition was only good in so far as it served the interests of the settlers. It was the settlers interests which were of paramount importance.

How far were the Europeans prepared to recognize the rights of Africans which would be evolved by a tenure system, based on European property law theory and not an African property law theory? Section 56 of 1915 Crown Lands Ordinance and the judicial proclamation in the Wainaina V Murito <sup>(20)</sup> case refute such a claim. There would be no protection afforded to the natives. The true position was that Africans had been declared mere tenants at the will of the crown and that they held land at the will of an unsympathetic Landlord.

Having that in mind, it is important to note that Africans were dissatisfied and this discontent manifested itself negatively. There was started some political movements by the Chairman of the Young Kikuyu Association, Mr Harry Thuku in 1922, which was followed by the Kikuyu Central Association formed in 1924. <sup>(21)</sup> Through these associations, the Kikuyu's aimed at making their grievances be heard by the authorities. The movements indicate that a new wave of insecurity and frustration was evident in African areas, especially among the Kikuyu and the people of Kavirondo region. Thus, if by taking away land by legislation, the settlers thought they had acquired security, they were sadly mistaken. <sup>(22)</sup>

Insecurity and restlessness within the reserves, was

Africans in the reserves.

first seen and reported by the East African Commission or the Ormsby-Gone Commission which met in 1924-25.<sup>(23)</sup> The commission noted with some concern that there were grievances among Africans over the land issue. It noted that:

" "there is probably no subject which agitates the natives mind today more continuously than the question of their rights to land...."

Notwithstanding such an observation, Sir Barths C.J. judgement was quoted with approval in a 1925 case - Douglas Mwangi V.A.G.<sup>(24)</sup> In that case, Stephen J. held that the natives had not even rights of occupancy in land within the native reserves except in so far as rights existed between the natives themselves, which were now subject to the crown.

In 1926, the government suggested some form of security for Africans rights. This was through the 1926 gazettment<sup>(25)</sup> of reserve boundaries. But this was not security for the African, rather, it was what the government thought was suitable for the Africans. As Ghai and McAuslan put it, Africans:

Continued to be denied both rights in the land and control over its administration. They remained tenants at will of a demanding and unsympathetic landlord."<sup>(26)</sup>

Some authoritative definition of the reserves boundaries was once more considered by the Hilton-Young commission selected between 1927-29.<sup>(27)</sup> This also failed to provide security to Africans in the reserves.

It is not surprising that even the first legislative instrument - Native Lands Trust Ordinance 1930, (28) replacing part IV of the Crown Lands Ordinance 1925 as amended by No.22 of 1926 did little to advance this legal position beyond laying down the terms upon which the Crown held "Native Lands". Such land remaining crown land for all other purposes.

Its ostensible purpose was to declare and reserve the areas gazetted in 1926 "for the use and benefit of the native tribes of the colony for ever." But the legislative council debates make it clear that the only concern of the <sup>Government</sup> was to control these lands and how to ensure maximum public order in reserves without excluding possible future European expansion and expropriation.

This comes out clearly on reading the debates of the legislative council. One native representative Rev. Canon Leaky confessed that:

"it seemed almost as if (it) was rather intended to regularise the methods by which land might be taken away from the natives for the use and benefit of non-natives." (29)

The debates further portray that nearly all the members in the council commended those parts of the bill which empowered the governor to encroach upon the native reserves. A most eloquent of all recommendations is that made by Conway Harvey; he said:

"I think no one can be found to quarrel with the principle, <sup>that if some land</sup> at present in native ownership is not required by natives for their use, it is only fair, just and reasonably, and

quite proper that, that land should be leased to non-natives or others who are willing to work it entirely in the interests of the native owners and themselves." (30)

Ironically, the Europeans wanted to acquire land in the native reserves to develop it for the use, benefit and interests of the natives. One wonders what interests they were talking about.

Section 15 of the Native Lands Trusts Ordinance provided that:

"No land shall be excluded from a Native Reserve... unless the Central Board is satisfied that the proposed exclusion has been brought to the notice of the Local Native Council and of the Natives concerned and that representatives of the location or section concerned have been co-opted on the Local Board."

A provision like the one stated above might lead one to think that the colonial government had now changed its attitude towards African ownership and started to attach some special importance to the rights accruing in respect of such ownership. On the contrary, the recognition of African ownership by Europeans was half-hearted. The truth is that the authorities never at any time intended that the provisions so enacted should receive their due and proper interpretation.

In elaboration of the ordinance, there was further requirement that any exclusion made from the reserve should be given prompt compensation. The procedure for compensating

those disturbed was laid down, together with that of disposal of land in the Native Reserve under section 7 of the ordinance.<sup>(31)</sup> To some extent, the authorities seemed to compromise that Africans possessed proprietary rights in the land, but their greed and selfishness could not give them the opportunity.

One incident which illustrates that greed and contradiction in the colonial authorities and their policies is the discovery of the Kakamega Gold fields 1932. The authorities rushed into proposals for an amendment of the 1930 Native Lands Trust Ordinance. In so doing, campaigns against its amendment were aroused. These campaigns began in England in 1933 and were spear headed by Lord Lugard (incidentally one of the leading British imperialists in Africa). The objections as to the amendment of the ordinance were mainly geared at the proposals that compensation for any land acquired compulsorily from the native reserve and for the development of mineral resources should not be given. This was against the provision of the ordinance, because it provided that compensation should be given in full. Also the ordinance provided that where such land was temporarily excluded for the governor should provide another land to the reserve as compensation.

Thus amendment proposed intended to remove this provision, holding that it should not be obligatory on the governor during the period of mining to add land to the reserve. The provision

that allowed consultation with the Local Native Council before 'setting apart' would also be dispensed with, on grounds that such a clause retarded the progress on the mining operations. The whole procedure was seen as cumbersome and waste of time. It was thought the requirement for consultation with the Local Natives gave them more power than they actually merited. On the other hand, the Natives saw this consultation with the Local Boards as the only way through which the government respected their rights in land so called 'Native Reserves'.  
Refusal to compensate <sup>them for land temporarily acquired</sup> by 'setting apart' amounted to a denial of their bona fide claims over the land. On the whole, the amendment proposal was seen as a rejection against the mutual trust that had begun to prevail between the Natives and the colonial government especially after the enactment of the Native Lands Trust Ordinance of 1930. From the liberals point of view, such an act was tantamount to a repudiation of an Imperial pledge and would cause more damage to Native confidence than any amount of gold secured because of the change. (32)

The government was fully aware of the impopularity it was about to cause by the amendment. This awareness is found in the speech of the Chief Native Commissioner in the Legislative Council who spear-headed the moving of the British, He said:

"I am afraid that we have got to hurt their (Natives) feelings, we have got to wound their susceptibilities and in some case..... We may even have to violate some of their most cherished and sacred traditions if we have to move Natives from land on which according to their own inalienable law they have a right to live, and settle them on land from which the owner has indisputable right to eject them." (33)

It is incredible how the government could have ignored all the peoples' feelings in a bid to gratify their own self-interests. They knew that Africans had cherished sacred traditions, but this did not bar them. The pressure against the amendments' implementation was so strongly mounted that the government gave in, and subsequently appointed the Carter Commission early 1932. One of its terms of reference was to consider ways of remedying the situation once and for all. (34)

Having observed that the 1930 ordinance had properly provided for compensation for land permanently excluded for mining purposes, by another land equal in extent, and as far as possible in value to that excluded land, the commission recommended that land should also be provided as compensation for any land temporary excluded for mining purposes. (35) This recommendation was given legal effect in 1934 by the Native Lands Trust (Amendment) Ordinance (1934). (36) The commissioners

in this case should be commended for their guinuine view, as regards African rights in the Native reserves.

A further amendment of the ordinance was carried out in 1938. (37) Under this Native Lands Trust Amendment Ordinance, "Native Reserves" were re-designated "Native Land" and were henceforth removed from the operation of 1915 Crown Lands Ordinance. Native Lands so created were vested in the Native Lands Trust Board, which consisted of a Chief Native Commissioner as the Chairman. One elected European and three Africans. Under Section 70 of Native Lands Trust (Amendment) Ordinance 1938, all Native rights of whatever nature outside these areas were declared to be extinguished. The Trust Board created, was vested with powers to preside over all land matters in Native Lands.

It has been indicated elsewhere in this dissertation that the judiciary was not isolated from the colonial administration. Even after the attempt by the 1930 Native Lands Trust Ordinance and its following amendments to recognise the existence of Native rights in the resereves, the courts attitude remained hostile and negative. The court only recognized a form of occupancy. This was illustrated by the judgement of Thacker J.Min the case of Stanley Kahahu and others V Attorney General. (38) Following Barth's judgement, the Judge held that:

"The effect of the Native Tribunals Ordinance (1930) is recognize in law any rights to land in a Reserve which an occupier may have by Native law and sustom, with the exception

of the right to alienate such land."

The above decision reveals that although the colonial administration recognized that the African had some rights in land, these rights were only limited to rights of occupancy and he could not alienate that land. This was a lesser right than even what a European buyer obtained after receiving a certificate of title which conferred the holder indefeasible freehold ownership.

While the legislations after 1930 may be commended for attempting to provide some form of security in the reserves and securing the boundaries of Native Lands, security against their reduction depended very much on the decisions made by the Administrative Officer who were in no way accountable to those on whose behalf they made the decisions. It has been argued in this discussion that the sole purpose for the legislations made regarding either land acquisition use or development, was to protect and promote the interests of the Europeans. This was the major objective for the authorities. Therefore, it did not matter to what extent these legislations affected the Africans.

We note that other than denying the African his right to land, the legal instruments also had adverse effects on the land tenure system practiced by Africans and their land use. The government introduced new Agricultural methods and especially soil erosion measures among African occupied areas. It was declared that shifting cultivation, keeping of large stocks,

and growing subsistence crops was aiding the deterioration of the soil, instead of enhancing development<sup>o d</sup>. But because the African lacked faith in the European soil<sup>N</sup> erosion measures introduced were reluctantly accepted by the African who saw these as further inroads into their rights in land. (39)

The end result was that land was misused, not to mention the fact that there was over-population in the African reserves. Hence the insecurity and restlessness growing among the Africans increased as problems relating to land also increased. At the same period, the world was undergoing a serious economic depression, which started taking grounds immediately after the first world war.

In practise then, problems tended to arise more over land use<sup>and conservation</sup> rules than ever setting use and conservation rules than ever setting apart. By the end of the second world war, the problems of the Africans had multiplied tremendously. One would have been tempted to think that the inter-war period had removed most of these problems, but this was not so. The squatters and the resident labourers in particular posed a a major problem to the colonial authorities. Those who had been working on European farms had increased their stocks so much that the European settler no longer wanted them on their land. The government on the other hand did not want to encourage them to stay on these lands, nor did it want them to keep large stocks. The main problem was

that they (squatters) and resident labourers had been dispossessed of their land. The reserves were already over-populated and the highlands boundaries were now fixed. Where would they be settled?

Faced with this problem, the government embarked on a scheme of settling these Africans in 1945. To do this best, the government introduced a land tenure reform. By 1950, the responsibility of co-ordinating land tenure proposals fell on M N Evans, African Courts Officer and K.M. Cowley, the Assistant Secretary for Native affairs. (40)

The scheme involved the granting of credits facilities to owners of land in order to facilitate development on land. This being the case, the colonial government was left with no alternative other than to recognise the fact that Africans land, and their rights could be registered. In that case, the title deeds issued would serve as securities to the Banks for the advanced credits.

Despite the government's effort to solve the problems of the Africans, very little achievements were made to appease the African. The land issue was not easy to discuss. The Africans needed land more than anything else. Ultimately there was an outbreak of the land hunder revolt in 1952. The government's measure of declaring emergency in the same year was but a mere weapon which was strongly resisted by the Africans.

In due course, the government surrendered and introduced

a new land tenure reform which involved registration of individual proprietary rights in land. Under Section 27 of R.L.A. (41) Such absolute proprietorship in the interests so registered. The first registration is thus indefeasible and the holder does not have any restrictions as to the use or alienation of that land. Further safeguards of private property are laid down in Section 75 of the constitution where it is provided that every person has got a right to his own property and any compulsory acquisition by the state of such private property must receive prompt and adequate compensation. (42)

In conclusion, I submit that the colonial state, like any other state, used law to protect the settlers, who were the dominant ruling class. Land was compulsorily acquired in furtherance of this class role, and it is seen even in the Independent State, where the Constitution S. 75<sup>3 is</sup> Supreme Law of the Land protects the sanctity of private property. The result was a complete denial and dispossession of African land by the Europeans. Some of the Europeans became holder of large farms in the Highlands, whereas some Africans were left completely without land. African traditional land tenure system was disrupted by the imposed English property Law.

15. *Chal and Distribution of the P. (19) European Rights, Chapter 108. 1941*

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16. No. 38 of 1948

17. No. 22 of 1948

FOOTNOTES:CHAPTER THREE:

1. Kenya (Annexation) Order in Council 1920
2. Ghai and McAusland Pg. 51
3. No I of 1921
4. Discharged Soldiers Settlement Ordinance of 1919 No. 13 as amended by No. 13 of 1920.
5. Ghai and McAuslan: Pg 81
6. Registration of titles Ordinance No. 26 of 1919.
7. No. 29 of 1922
8. Recommendation 45 56 (1934)
9. Recommendation 1922 (1923) Indians in Kenya.
10. No. 28 of 1938
11. No 27 of 1938
12. No. 516 of 1939
13. No. 517 of 1939
14. Crown Lands (Amendment) Ordinances 1942 and 1944: Nos. 19 and 23 respectively.
15. Ghai and McAuslan op cit P. 123 Sorrenson: Origins, Chapter one. Squatters.
16. No. 38 of 1948
17. No 22 of 1944

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- 18. S. 54 of Part VI 1915
- 19. See para. 13 of the committee's report presented to the legislative council August 4th 1914.
- 20. Op. cit. P. 102
- 21. Sorrenson: Land Reform in Kikuyu Country, Rosberg C.G. and Nottingham. The Myth of the Mau Mau ( New York Praeger 1966)
- 22. IBID
- 23. See report of East Africa Commission 28838 7 (1925)
- 24. Supreme Courts decision (NO 113 of 1925)
- 25. GN 354/1926
- 26. Ghai and McAuslan Op. cit. P. 90.
- 27. Cmd. 32 34/1929
- 28. No. 9 of 1930
- 29. Legislative Council debates Vol 1. 1928. 2nd reading at pp. 321-22.
- 30. IBID Pg 318.
- 31. See sec. 7 of 1930 ordinance (Native Lands Trust Ordinance).
- 32. See Dilley: Op. cit. 268-69
- 33. Legislative Council Debates, 20th Dec. 1932. P. 209

**FOOTNOTES:**

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34. Kenya Land (Carter) Commission established under government notice. No 418 of 1932. (dated June, 11, 1932)
35. See Kenya Land Commission 1934 p. 299-301. Sec. 15 A of Amendment Ordinance.
36. No. 36 of 1934
37. No 28 of 1938 Native Lands Trust (Amendment) Ordinance.
38. (1938) 18 K.L.R 5
39. Dr Okoth Ogando H.W.O. Political economy.
40. Rhai and McAuslan op. cit.
- 41.A Cap. 300 Laws of Kenya
42. Constitution of Kenya. (Revised version 1979)

## CONCLUSION:

The entire discussion has revolved around a critical observation of the legal instruments and mechanisms through which the colonial state alienated land for purposes of European settlement. The discussion has deliberately covered the period between 1895 - 1952. This period saw the incoming of settlers and their consequent establishment in Kenya. Beyond that period was outside the scope of this study.

For a successful implementation of legal mechanisms and instruments for the purpose of land acquisition, the colonial authorities found it inevitable to import the basic doctrines and principles of English land law. The importation of these doctrines at the beginning of this century was therefore in response to the needs of the settler economy then in the process of establishment. That the substantive rules and organisational structure <sup>were</sup> determined essentially by the demands of the colonial<sup>s</sup> economy, that being the object, African property law system had to be remodelled on European lines in order to promote and protect the settler interests.

It has been established in Chapter One of this dissertation that the declaration of a protectorate over Kenya in 1895 was a major landmark in the colonial state. This declaration was an indication that British administration and jurisdiction had been legally established over the country and over inhabitants. Although the legal implications of a protectorate are that the inhabitants are not subjects of the protecting

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power, this was not so with Kenya. Even the declaration of a colony 1920 was a mere formality for Kenya, <sup>and</sup> its inhabitants in that they had long been made subjects by the administration.

The legal instruments and mechanisms relating to land during this period had one major objective: To secure land for European settlers at the expense of the Africans.

The enactment of the East African <sup>er</sup> order-in-council 1897, which was established under the Foreign Jurisdiction Act 1890 was probably the most coercive legal mechanism ever introduced into Kenya by the imperialists. It marked the first attempt to transform the legal framework of Kenya to meet the needs and requirements of a capitalist mode of production.

For the purpose of providing land to settlers, the administration first promulgated the 1897 Regulations. As we have seen, these regulations did not find favour among the settler population. In disgust, one of the settlers referred to these regulations as "the most idiotic land laws that were ever seen."

The settlers found them too cumbersome and laying down so many conditions for land settlement. Hence, their persistent demand for better land legislations saw the enactment of the 1902

Crown Land Ordinance. This ordinance repeated the East Africa order-in-council 1901, which had replaced the 1897, <sup>E.A. order in council</sup> all public <sup>Under this ordinance, all public</sup> land was Crown Land. The legislation was drafted on the assumption that the Africans had no title to 'waste and unoccupied'

land and accordingly the Crown Land assumed a title over such land.

This meant that the crown had asserted sovereignty over land. This view was reinforced by the admission made by appellant's counsel in the infamous Maasai case that the protectorate authorities were under no legal obligations to make an agreement with the Maasai, that they could have taken away land by legislation. Ghai and McAuslan asserts that there can be no fuller exercise of sovereignty over land than to compel by legislation, a people to vacate their traditional land.

This discussion has revealed that the Masai case was just but a mention. The effects of the 1915 Crown Lands ordinance were more disastrous. The interpretation given to this ordinance and particularly sections 54 and 86 show that colonialists were ready to go to all pains in getting control over land, not putting <sup>into consideration any proprietary</sup> rights held by the Africans over the same land.

A most notorious interpretation of the ordinance is that made by Barth C.J. IN Wainaina Murito case. The 'learned' Judge held that the effect of the 1915 crown lands ordinance, the Kenya (Annexation) order in council 1920 by which no native private rights were reserved, and the Kenya colony order in council 1921, was 'inter alia' to vest land reserved for the <sup>use</sup> rise of a Native tribes in the crown. This, he said, subsequently extinguished all native rights in such reserved land, whatever they were and that natives in occupation of such crown land became 'tenants at will of the crown.'

It has been noted elsewhere in the dissertation, that, that

case seems to have over-ruled a more rational decision of <sup>the</sup> earlier case of Kimani wa Kabato V Kioi. Maxwell J. had held that a member of the Kikuyu tribe could acquire and retain tracts of land within the reserve and that such rights could be enforced by a <sup>suit</sup> unit for damages for trespass and <sup>by</sup> for an injunction.

In furtherance of settlers interests, the judiciary (colonial) upheld Barth C.J.) judgement for long, as illustrated by two later cases. These were Douglas Mwangi V R and Stanley Kahahu V.A.G. In the former case, Stephen J, held that the natives owned not even those alleged occupational rights, while in later case, Thacker J held Natives Land Trust Ordinance was to recognise by law the occupational rights of natives in the reserves in exclusion of any rights of alienation.

While it may well be said that the 1930 Native Lands Trust Ordinance aimed at guaranteeing security in Native Reserves, this was in the true sense a mere falacy, for not long after <sup>its</sup> As enactment, that serious government campaign for its amendment was lodged. This occurred in 1932, after the Kakamega Gold fields were discovered. The amendment was aimed at abrogating the compensation clause, and doing away with the procedure for disposal of such land, which the authorities alleged that they were cumbersome and long, and that they delayed the development of the gold resources. This <sup>^</sup>opely portrays that

where African interests conflicted with European settler interests, the law was at hand to remove the conflict but not without adversely affecting the indigenous interests. The settler interests had always to come first.

Like all colonial legislations, the 1926 gazettment of reserves, the 1930 ordinance (Native Lands Trust Ordinance) Kenya (Native areas) orders in council of 1939, and the Kenya Highlands orders in council of 1939, all aimed at safe-guarding and promoting the security and interests of the colonial masters. As an attempt to provide security for Africans, the legislations were all broken reeds, The basic reason for this was that in the final analysis, neither the colonial officer, nor the administration in Kenya was prepared to support any ordinance which tended to protect the African rights. Even the famous Kenya Land Commission 1933, which was supposed to settle once and for all the Native problem of security <sup>in</sup> land did not finally come out with fruitful recommendations.

All it did was to mark the reserve boundaries, but never guaranteed against their reduction. It achieved the complete exclusion and reservation of Highlands from the interference of Africans.

Ghai and McAuslan cite as a classic.

Example the 1930 ordinance, of the futility of colonial legislation when those who have to administer it do not believe in it, and those for whose benefit it has been passed have <sup>no</sup> effective means for ensuring its proper administration.

Although during the colonial administration, the Africans had strongly felt the pressures laid on them in regard to denial of their land. This culminated and manifested itself in the 1952 land hunger revolt. Law was used at this time as an instrument of coercion and state of emergency was declared. This was all because the Administration had miscalculated and under estimated the effect of African agitation which must be said to have been part and parcel of African response against the colonial policy.

Ultimately we observed that the Administration succumbed, and had to recognize African individual rights to land. These were similar to those rights registered under the Registration of Titles Ordinance 1908, and Registration of Titles Ordinance 1919. These ordinances conferred private ownership held through certificates issued thereunder. The holders were indefeasible proprietors of the interests secured. Also the Crown Lands Ordinance 1915, introduced a system of Registration for government lands.

These were similar titles to those which the swynnerton plan recommended. The <sup>plan</sup> ~~pal~~ suggested that a new land tenure and reform system was necessary. This provided for registration of

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individual titles of land, and amounted to absolute proprietorship. Section 27 of the Registered Land Act Cap 300, enumerates the rights and interests of such an absolute proprietor. The same rights which the Africans claimed during the colonial period, were safe-guarded in the Independence Constitution under Section 75 of the Kenya Constitution. The Section provides that every person has a right to own property and in case of compulsory acquisition, the government shall provide adequate and prompt compensation. Thus Section 75 guarantees the sanctity of private property without interference, and since the constitution is the supreme <sup>law</sup> of the land as is provided in Section 3 of the Kenya Constitution, such a requirement can stand.

In my humble submission, I would say that, the Imperial government did not have an alternative other than to compromise with the Africans immediately before and after Independence. However, the so called Independence was simply negotiated between the African leaders and the Europeans. Therefore the European settlers interests were also safe-guarded under the same Section 75 of the Kenya Constitution. Thus Law was used by the imperial Government to protect and promote the interests of the European settlers. In so doing, African proprietary interests were ignored and it did not matter what effects the colonial administration policies would have on African land rights. I contend that the legal instruments and mechanisms for land acquisition in colonial Kenya were used as a tool of exploitation by the dominant European ruling class to acquire land, without taking into consideration African proprietary rights.