

PRESIDENTIAL DIRECTIVES IN THE REALM OF PRESIDENTIAL  
POWER IN KENYA'S LEGAL SYSTEM: THE KENYATTA ERA.

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BY

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ABBREVIATIONS

## BOOKS AND PERIODICALS

E.A.L.J	East Africa Law Journal
E.A.P.H.	East African Publishing House
O.U.P.	Oxford University Press

CASES

A.C.	Appeal Cases
A.I.R.	All India Reporter
All E.R.	All England Law Reports
App. Cas.	Appeal Cases
E.A.	East African Law Reports
E.A.L.R.	Eastern African Law Reports
K.B.	King's Bench
Q.B	Queen's Bench
W.L.R.	Weekly Law Reports

STATUTES

S.I.	Statutory Instruments
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OTHERS

KANU	Kenya African National Union
MP	Member of Parliament

INTRODUCTION

Presidential directives are issued by the President pursuant to powers he thinks he has - a full discussion of this is centred mainly in Chapters 1 and 4. Evidently then, there is an inextricable link between Presidential directives and Presidential power hence our discussing the two simultaneously. The Presidential powers have, in some instances, to be subject to certain procedures and/or are conditioned by the powers of other governmental Organizations like the Legislature and the Judiciary. Therefore in examining Presidential directives and Presidential power generally, we shall posit it against the separation of powers doctrine and the rule of law, both of which principles purportedly gain currency in Kenya.

As regards the separation of powers doctrine, we note that the three organs of government formed under it are creatures of the state. That being so then, we have found it imperative to enter into a discussion of the state. The general discussion on the state is set out in Chapter one but ensues in Chapter 2 and 3, where we particularize it to the formation of the colonial and neo-colonial state in Kenya.

Kenya's post-colonial history has borne testimony to the issuance of a maelstrom of Presidential directives. These directives have generally been seen as being of Legislative nature and are consequently implemented, albeit

with zealous fervour, by those bestowed with execution duties. Suffice to say, many of these Presidential directives are of doubtful legality, an issue we shall put to examination in Chapter 3.

This dissertation will limit its post-colonial analysis of Presidential power generally and Presidential directives in particular to the Kenyatta era which ran from 1963, when Kenya attained token independence to 1978 when Jomo Kenyatta relinquished his position of President by virtue of his demise.

We propose to divide the thesis into four Chapters. Chapter 1 will be devoted to the skeletal basis of governmental organization.

In order to understand Presidential power and Presidential directives, it is necessary to examine the Presidency in its historical perspective dating back to the colonial era when the Commissioner, and later, Governor, occupied approximately the same status as the post-colonial President or the Head of the Executive. That will be the main thrust of Chapter 2.

In Chapter 3, the discussion will centre upon Kenya's post-colonial experience limiting it to the period of Kenyatta's tenure of office as President. It is in this Chapter that the content of Presidential power and Presidential directives will be examined in relation to Kenya's stratified society.

In Chapter 4, we shall present the conclusion.

CHAPTER ONE

1:1 DEFINITION

The hurdles besetting a scholar attempting to write on a subject touching on the Presidency in Kenya are multifarious. Firstly, the topic is undeniably sensitive, and secondly, because of that sensitivity, little treatment has been given to this topic in legal texts. Thirdly, case law on this specific topic is virtually non-existent. The cumulative effect is that I am venturing, ill-armed, into a twilight zone hence making my task unenviable.

It would be rational to commence this essay by defining Presidential directives against the background of Presidential power. But this would be to give an unfair treatment to the subject for the contemporary nature of the Presidential directives can only be fully understood in the light of the historical antecedents that influenced their development and their present characteristics. It is only after noting and taking cognisance of these historical phenomena that a definition of presidential directives can best be made.

On the other hand, there is the danger, which is fatal, of assuming that the reader has an idea, however hazy it may be, of what Presidential directives are, and from that premise submerge ourselves into the discussion only supplying their definition as a conclusion to the discourse.

I will adopt neither of these two methods. I shall initially hazard a working definition which will strictly be tentative and provisional pending a complete exposé, the gist of which will comprise the conclusion to this dissertation.

Presidential directives are rule-like promulgations issued by the President pursuant to authority which he thinks he has, derived wholly or partly or simultaneously from the Constitution and the Acts of Parliament. These directives can therefore be either legal or extra-legal - when they are extra-legal, the President acts on the illusion that he has power to issue the directive such as he has. To the extent that these directives impose legally binding requirements, they are formulations of law. Thus the legal validity of these directives can be tested in a court of law.<sup>1</sup> It is immediately noticeable that the working definition is such as would be given by a subscriber to the Positivist School of Jurisprudence; that law is that which is contained in the statutebooks.<sup>2</sup> Thus this school gives emphasis to the form rather than the substance of Law. In the following chapters, we shall not only show that in Kenya the form prescribed is not only departed from, but we shall also examine the substance of presidential directives.

Other than the term "Presidential directives,"<sup>3</sup> an assortment of nomenclature have been ascribed to these formulations and so they have variously been known as Presidential decrees"<sup>4</sup>, "presidential orders", presidential proclamations"<sup>5</sup>, "presidential regulations"<sup>6</sup> and an array of other designations. In Kenya, no legal definition nor distinction has been attempted<sup>7</sup>, but the evident thread traversing all these rule-like promulgations, whatever their names, is that there is no functional difference between them. They are all adhered to as legally binding promulgations of Law and are executed with much zeal and enthusiasm. I have preferred the use of the rubric "Presidential directives" because it is the most predominantly utilized term today.

#### PRESIDENTIAL DIRECTIVES AND THE DOCTRINE OF SEPARATION OF POWERS

The earliest articulate exponent of the doctrine of separation of powers was Baron de Montesquieu<sup>8</sup>, who based his exposition on the British Constitution of the first part of the eighteenth century as he understood it. The concept posits that the monopolization of governmental power in a single organ would give rise to despotic and arbitrary regimes. Therefore in order to avert such an eventuality, he contends, governmental power ought to be divided into three components each being exercised by a

Separate organ, namely, the legislature, the executive and the judiciary. In setting the groundwork for his theory Montesquieu asserts;

".... everyman invested with powers is apt to abuse it, and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."<sup>9</sup>

Thus Montesquieu postulates a crucial aspect of this doctrine, that of setting checks and balances to the powers of the government.

He continues;

"In every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the Law of nations; and the executive in regard to matters that depend on civil Law (He latter calls this the judicial power)."<sup>10</sup>

Montesquieu then proceeds to outline the functions of each organ, and says of the legislature;

"(It) enacts temporary or perpetual laws and amends or abrogates those that have been already enacted." <sup>11</sup>

The functions of the executive have come to be understood as simply being those of implementing the law enacted by the legislature. Any disputes arising in regard to that law will be adjudicated conclusively by the judicial organ - that being their primary function. Montesquieu proceeds to predict that;

"When the legislative and executive powers are united in the same person... there can be no liberty; because apprehensions may arise, lest the same (twin body) should enact tyrannical laws to execute them in a tyrannical manner.

Again there is no liberty, if the judiciary power be not separated from the legislature and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end to everything, were the same man or the same body ... to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." <sup>12</sup>

From the foregoing, the important question to pose is, did Montesquieu envisage a rigid separation of powers strictu sensu whereby none of the organs exercises any or all the functions of the other? Legal pundits have answered this in the negative asserting that Montesquieu did not mean that the legislature and the executive ought not to have any influence or control over the acts of each other, but only that neither should exercise the whole ensemble of powers of the other.<sup>13</sup> Without seeming to extol the doctrine of separation of powers, it is submitted that this reasoning has been the most potent escapist tool to justify aggrandisement of legislative power by the executive, yet slotting the resultant arrangement, despite its alien nature, under the banner of the doctrine of separation of powers. Apart from lacking in plausibility the argument proffered by these legal writers is inherently weak and does not submit to, nor withstand, rigid cross-examination. Indeed the executive may not itself exercise the whole of the legislative power but the fact that executive has, to use Wade and Phillips' words,<sup>14</sup> "influence or control" <sup>over</sup> the legislature, necessarily means that that legislature acts on the motion of the executive, thereby reducing it to an appendage, or even a worse, a department of the executive. The members of the legislature may not be members of the executive but the fact that they are tied to the apron - strings of mother-executive, they lose their so-called independence and may just as well be members of the executive. If the doctrine of separation of powers is

to be the litmus test, and I am not saying it is, of whether or not despotic rule exists, then it must be applied in the reality of the exercise of governmental power and not in relation to the spectacular categorizations eminent in the constitution. This accretion of legislative power by the executive is in my view not accidental, but shall be delved into in the latter chapter.

The same legal writers further contend that the significance of the doctrine lies not in the rigid demarcation of the three functions, but in the emphasis placed upon the checks and balances so that the three different organs can act in mutual restraint inter se to prevent concentration of power in a single organ.<sup>15</sup>

The doctrine of separation of powers is untenable in a society manifestly dissected by classes, and as we shall later show in chapter 2 and 3, Kenya is roundly included in that category. The three organs of government are creatures of the state and in turn, the state's existence was precipitated by class conflicts; for this we quote in extenso and with approval Engel's works of historical precision on the origin of the state;

"The state is ... by no means a power imposed on society from without ... it is a product of society at a particular stage in development; it is the admission that ... society has involved

itself in insoluble self-contradiction and is cleft into irreconcilable antagonisms which it is powerless to exorcise. But in order that these antagonism, classes with conflicting interests shall not consume themselves and society in fruitless struggle, a power, apparently standing above society, has become necessary to moderate the conflict and keep it within the bounds of 'order', and this power, arisen out of society but placing itself above it and increasingly alienating itself from it, is the state."<sup>16</sup>

Engels then proceeds to elucidate on the role of the state;

"As the state arose from the need to keep class antagonisms in check, but also arose in the thick of the fight between the classes, it is normally the state of the most powerful, economically dominant class, which by its means becomes also the politically dominant class and so acquires new means of holding down and exploiting the oppressed class.

The ancient state was ... the state of slaveowners for holding down slaves, just as the feudal state was the organ of the

nobility for holding down the peasant serfs and bondsmen, and the modern representative state is an instrument for exploiting wage labour, by capital."<sup>17</sup>

Engels preposition holds sway today in both the modern industrial capitalist states<sup>18</sup> and the ex-colonial (now neo-colonial) states that have been bequethed the structures (of which include the doctrine of separation of powers) of their former colonial masters.<sup>19</sup> One thing that must not elude us is that so long as there are social classes which are,

"Large groups of people differing from each other by the place they occupy in the historically determined system of social production, by their relation to the means of production, by their role in the social organization of labour, and, consequently by the dimensions and mode of acquiring the share of social wealth of which they dispose,"<sup>20</sup>

the state will subsist and is in that respect, sine qua non.

Thus, the state being a device of the most powerful economically dominant class, its affairs will be directed primarily towards realizing the interests of that class, and to that extent then, it is a partial political edifice. The state, pursuant to its role as outlined in the preceding paragraphs, has constructed the three institutions of governing which function not in mutual restraint but in mutual interest to contain power within the ruling class.

The theme that will be developed and harped recurrently in this thesis is that Montesquieu's seemingly delicate and subtle polarity of powers is more apparent than real and provides not only a licence for, but is also an apologia of, the existing social order.

The Kenyan government is structured along the lines of the concept of separation of powers,<sup>21</sup> hence there are three organs of government, namely the executive, the legislature and the judiciary.<sup>22</sup> The legislative power of the Republic vests in parliament,<sup>23</sup> the executive authority of the government reposes in the President<sup>24</sup> and the judicial power is impliedly conferred on the judiciary.<sup>25</sup>

The President in Kenya has his feet in two organs; one foot is in the legislature<sup>26</sup> whilst the other is in the executive.<sup>27</sup> When he issues directives, the President, albeit acting legislatively, he operates within the aura of the executive and relies on power derived from the Constitution and Acts of

Parliament. This therefore is one of instances where the executive, of which the President is a subset of, has been bestowed legislative powers which in traditional categorization of governmental powers vests in the legislature. This is a departure from the strict application of the doctrine of separation of powers.

3 JUSTIFICATIONS FOR EXECUTIVE, and by analogy Presidential, ACQUISITION OF LEGISLATIVE POWERS:

As earlier stated, Executive authority in the Government of Kenya constitutionally vests in the President<sup>28</sup>, and he may exercise it either directly or through officers subordinate to him. Thus any power granted to the Executive generally can be exercised by the President. The executive, as already stated in chapter 1:2, is sometimes conferred legislative power, which traditionally reposes in the legislature as per Montesquieu's doctrine. When legislative power is bestowed upon the Executive, such grant is deemed a necessity in the modern state and is justified on the reasons following. Firstly, because of pressure on Parliamentary time, Parliament cannot possibly deliberate on all issues pertaining to legislation. Secondly, the subject-matter may involve a high level of speciality, the expertise of which Parliament generally lacks to effectively solve the issues. Such technical issues of national importance are

better handled by experts supplied by the Executive. And thirdly, there is need for flexibility and the argument runs thus; an Act of Parliament or the Constitution when enacted cannot possibly be suitable for all contingencies, foreseen or unforeseen. Therefore Parliament should enact in general terms outlining the policy, leaving the executive to legislate as per the demands of the times.

The Executive, where it has been allocated legislative or judicial powers, must submit, in case of the former, to Parliamentary control, and in both cases, unless otherwise stated, to judicial review. These are the checks and balances which are supposedly the cornerstone of the doctrine of separation of powers. Their extent and workability in Kenya will be examined in chapter three.

Having examined in general terms the justifications proffered for executive acquisition of legislative powers, it now remains to chart out the historical development, not only of presidential power, but also of presidential directives.

CHAPTER TWO

PRESIDENTIAL POWER AND PRESIDENTIAL DIRECTIVES:  
EXHUMATION OF HISTORY

2:1 PROLEGOMENON

Presidential directives, as we saw in chapter 1:1, are issued upon powers which the President thinks repose in the Presidency, powers which in some instances have to be subject to certain procedures and/or are conditioned by the powers of other governmental organizations like the legislature and the judiciary. Therefore in examining Presidential power, pertinence invokes that we delve into the discussion by relating presidential power to the whole political framework of the governmental organization.

Further, presidential power or more correctly, power wielded by the Head of the Executive is not a phenomenon that unravelled itself at the threshold of independence. Presidential power is a hereditary gene derived from our colonial experience. Therefore in order to understand presidential directives, we need to submerge ourselves into a study of the powers of the Head of the Executive in Kenya (formerly forming part of the East Africa Protectorate) as it has

snowballed through the course of history, for we contend that its present features have been moulded and influenced by its history.

The Head of the Executive in Kenya, from whom the directives under discussion emanate, is as stated earlier, the President. However, since the establishment of the colonial and neo-colonial state, the Head of the Executive has operated under a myriad of designations. When Kenya formed part of the East Africa Protectorate in 1895, the Head of the Local Executive carried the title of Consul - General of Zanzibar<sup>1</sup>, which was later changed in 1897 to that of Commissioner and Consul General<sup>2</sup>. In 1906, the Commissioner and Consul General assumed the title of Governor<sup>3</sup>, which he retained until 1963 when Kenya attained token independence<sup>4</sup>. The Head of the local Executive thereafter became the Governor General who was to exercise his powers according to the advice of the cabinet under the dominion status Kenya had acquired<sup>5</sup>. In 1964, Kenya extricated itself from the British Dominions, thereby becoming a Republic<sup>6</sup>. From thenceforth, the Head of the Executive was <sup>styled</sup> "President", an address he maintains upto today<sup>7</sup>. The then Prime Minister, Jomo Kenyatta, was to be automatically declared the President from 12th December, 1964.<sup>8</sup> It is therefore evident that the precursor of the modern President in Kenya was the Governor hence pertinence exhorts that we begin our study from the time that Kenya was

declared a protectorate, a time that marked the inchoate beginnings of a government such as we know today.

## 2 LEGAL ORIGINS OF COLONIAL RULE

Kenya was declared a protectorate under the aegis of the East Africa Protectorate on 15th June, 1895. This marked the earnest commencement of direct British Government administration in the area hitherto managed and controlled by the Imperial British East Africa Company, for and on behalf of the Imperial government. From thenceforth, the East Africa Protectorate was to be administered under the provisions of Order in Council issued by virtue of powers conferred upon His Majesty by the Foreign Jurisdictions Act, 1890 "or otherwise vested in His Majesty."

Halsbury says of this latter phrase;

"(it) may be taken to be intended to bring in aid any exercise of the royal prerogative that may be necessary in the protectorates to supplement His Majesty's statutory powers."<sup>10</sup>

Thus the overall effect of the Foreign Jurisdictions Act of 1890 was to import, in extenso, jurisdiction by Her Majesty over the East Africa Protectorate, of which jurisdiction did not preclude the United Kingdom Parliament from legislating for the protectorate.

It was not until 1897 that a specific legislation to apply to East Africa Protectorate was enacted by Her Majesty's government, namely, the East Africa Order in Council, 1897, which in a nascent form, provided the administrative structure and modus operandi for the area, and more so elaborated on the position and powers of the Commissioner.

### GUBERNATORIAL<sup>11</sup> POWERS 1897 - 1902

As per the 1897 East Africa Order in Council, the Commissioner was an appointee of the Crown and was the Chief Executive Officer of the region. The Commissioner was bestowed with the preponderant task of designing and establishing a machinery of administration. Coeval to this enormous responsibility was the exuberant powers granted him. The most important for our immediate purpose was the power in him to legislate,<sup>12</sup> and that of establishing courts,<sup>13</sup> of whose officers were to hold office at the pleasure of Her Majesty.<sup>14</sup> At this juncture it is evident that the doctrine of separation of powers did not even infinitesimally apply, but instead the three organs of government namely the executive, the legislature and the judiciary were intimately wed together.

The Commissioner was empowered to legislate by Queen's Regulations and could make laws for the following purposes, that is to say,

- i) on matters relating to customs, inland revenue, post offices land highways, railways, money, agriculture and public health;
- ii) for the establishment of a constabulary or other force to be employed in the maintenance of order or (either within or without limits of this order) in defence of the Protectorate;
- iii) for securing the observance of any Treaty for the time being in force relating to the protectorate, or of any native or local laws or customs; and
- iv) generally for the peace, order and good government of the protectorate in relation to matters not provided for in this order.

Ghai and McAuslan argue, and quite sanely too, that the detailed specification of the purposes for which the regulations could be made was redundant since the last category would comprehend the rest.<sup>15</sup> Further, it has been held by the Privy Council that the expression "to make laws for peace, order and good government" confers a plenitude of legislative competence (see Craft V Dunphy (1933) AC 156; Ibralebbe VR (1946) AC 900).<sup>16</sup>

Incremental powers reposed in the Commissioner to promulgate a legal system for the Africans, and, by a later Order in Council he possessed competence to legislate for the Africans on other issues.<sup>17</sup>

From the foregoing, we can extract that the Commissioner wielded overwhelming clout. As if to bolster his authority even further, the 1897 order in Council insulated the Commissioner from Judicial Review such that no protectorate or provincial court could exercise any jurisdiction in any proceeding over him or his official or other residences, or his official or his property.<sup>18</sup>

However, the Commissioner was said to be subject to several limitations which rarely manifested themselves, a point that will be rivetted home more piercingly in chapter 2:5. At this juncture, we note the Commissioner had substantial leeway.

Before immersing ourselves into the discussion of how these extremely wide powers were actually exercised, mention must be made of the 1902 East Africa Order in Council which repealed the 1897 one.<sup>19</sup> Apart from restoring most of the Commissioner's powers as contained in the 1897 Order, the 1902 Order accorded detailed attention to and inflated the Commissioner's legislative powers. He retained the power to promulgate Ordinances (formerly Queen's Regulations) for

the administration of justice and generally for the peace, order and good government of all persons in East Africa.<sup>20</sup>

This 1902 legislation removed the requirement of advance submission of draft ordinances by the Commissioner to the Secretary of state for consent, and instead reserved it only insofar as was specifically directed for ordinances of particular purposes.<sup>21</sup> Article, 12(3) provided that in making ordinances, the Commissioner was to respect existing native laws and customs, except so far as the same may be "opposed to justice and morality." This clause is what has come to be notoriously known as the repugnancy clause. The Commissioner was still required to submit all legislations to the Secretary of state who had the power to disallow them ex-post facto.<sup>22</sup>

Evident therefore is the extensive grant of power to the Commissioner to found an administrative state. What was the reason for this? This can be gathered from the real purpose and content of colonialism. Colonialism attained its adult features during the transition of capitalism from laissez faire to its monopoly stage, imperialism,<sup>23</sup> where the power of the monopolies fuses with that of the state.<sup>24</sup> Colonialism is the exploitation and oppression of a dependent people by a ruling class of another nation by utilizing the differences in the levels of economic and social development.<sup>25</sup> The ruling class in our present instant was the monopoly capitalist unto whom statepower in the metropolis, i.e England, reposed, and they utilized the different levels of economic and social development,

namely, monopoly capitalism in Europe as against Communalism and Feudalism (which are pre-capitalist) in most of Africa, to exploit the colonies.<sup>26</sup> The reason colonialism arose at the stage of monopoly capitalism is due to the fact that in the metropolis, the accumulation of capital has reached gigantic proportions thus creating "surplus of capital." In these metropolitan countries, capitalism becomes "overripe" due to the rapid industrial growth, such that capital can no longer find a field for profitable investment therein. The need to create colonies where this excess capital can be exported to clinch extraordinary profits then arises.<sup>27</sup> As Lenin says of these colonies;

" In these backward countries profits are usually high, for capital is scarce, the price of land is relatively low, wages are low, raw materials are cheap."<sup>28</sup>

The prime purpose of the capitalist mode of production is then patently seen to be the production of surplus-value which is ultimately appropriated by the monopoly capitalist<sup>29</sup> and this major aim of capitalism is not in any way confined to the national boundaries, hence its overspilling from England to Africa. The monopoly capitalists operating through the machinery of the Imperial state ensured that its agents in East Africa represented by the Commissioner, were possessed of wide legal authority to not only form a state, but also transform that protectorate state into a capitalist mode of production from

which they (the monopoly capitalists) would benefit by extorting surplus-value. The law is here seen to dialectically influence and is reciprocally, but to a greater degree, influenced by the economic base,<sup>30</sup> that of embryonic capitalism.

Thus the proliferation of the powers of the Commissioner served to make him the nerve-centre of the colonial administration, especially as it was in him that the not-so-strange bedfellows, the executive, the judiciary and the legislature, consorted thereby emphasizing the mutual roles they played in that epoch. Whilst admitting that the powers conferred by the letter of the law to the Commissioner were extensive and carte blanche, these were microscopic to the authority exercised in fact, authority which strayed well beyond the legal confines. So the real impact of the exercise of the Commissioner's powers cannot be extracted by merely charting out the powers bestowed by the letter of the law.

#### 4 EXTRA-LEGAL ADMINISTRATIVE ACTION:

##### 4:A DIAGNOSIS OF THE MAASAI CASE AND SUCH OTHER SIMILAR INSTANCES

The Maasai case alias Ol le Njogo and Others v. AG of the E.A.P.<sup>31</sup> marks the brunt revelation of the brazen employment of state powers far beyond the very legal bounds purportedly imposed by the same state upon itself. It is a case that reveals the mutual interplay of the three organs of government in a conspirational fashion for the benefit of the dominant class in control of state apparatus.

The Maasai issue first arose during the tenure of office of Commissioner Charles Eliot who on realizing, like the Imperial government, that the traditional grazing grounds of the Maasai comprised fertile agricultural terrain seductively suitable for settlers, decided to allocate it to them. Eliot gave the land to two South African whites<sup>32</sup> so the Maasai had to be defrauded of their land.<sup>33</sup> Even worse is that Eliot granted larger chunks of land than he had authority to.<sup>34</sup>

An even more devious and unscrupulous scheme mooted by the Imperial government and acted on by Eliot and his successors was to follow; they coerced the Maasai Laibon and his adjutants to sign an agreement on behalf of the Maasai, that the Maasai were "ready" to shift to a reserve in Laikipia on condition inter alia that the Agreement "shall be enduring so long as the Maasai as a race shall exist, and that the Europeans or other settlers shall not be allowed to take up land in the settlements (newly allocated to the Maasai)."<sup>35</sup> However by settler pressure, this agreement was abrogated by the protectorate government in 1911 and a new one was signed between the Governor (now Donald Stewart) and the Maasai Laibon, his regents and senior Elders indicating the Maasai's "acceptance" to shift even further. The plaintiffs, on behalf of some of the Maasai's who had been compelled to move in 1911, brought an action for breach of the 1904 agreement on the ground that the agreement was a civil contract which was still subsisting, and further that the signatories to the 1911 agreement were not capable of

binding the Maasai. Damages were also sought in tort for the wrongful confiscation of some cattle. At this juncture, note must be made of the fact that the Crown was behind the 1904 and 1911 agreements as was admitted in the court of first instance.<sup>36</sup> Preliminary objections were raised by the government that the court had no jurisdiction, since the agreements of 1904 and 1911 were treaties and not contracts and the alleged confiscation was an Act of state and neither were therefore cognisable in a Municipal Court. The government succeeded in the Court of first instance, Hamilton C.J. adopting the words of Lord Kingsdown<sup>37</sup> said

"It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which the court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy (emphasis mine)."<sup>38</sup>

On appeal, the judgement of the High Court in favour of the government was upheld.

The court of appeal for Eastern Africa held that the Maasai were competent to transact a treaty for they were a sovereign by virtue of the fact that they belonged to a protectorate. And by strict definition, of which definition was not borne out in practice, a protectorate is a foreign country. But the very fact of declaring a protectorate over Maasai land meant that the Maasai had been deprived of all sovereignty. It was admitted in the case that the Maasai were entirely subject to,

and had to succumb to, the administrative and judicial control of the protectorate government. This would obviously tend to make their subjugation complete for evidently, no sovereignty would repose in them.<sup>39</sup>

The Maasai case was one of the few instances where gubernatorial action was questioned in court. Other violent evictions of African landowners were also carried out. In the Giriama area in the coast, the protectorate government in 1913 attempted to remove the Giriamas from the north bank of the Sabaki River where they had large cultivations.<sup>40</sup> The move was intended to free 100,000 acres of Land for the incoming European settlers.

The Giriamas refused to budge and the coercive apparatus of the colonial state armed with instruments of violence were imported into the area to quell the uprising or revolt. The Giriama were thereafter fined £100 and suffered the deportation to Kisii of their two leaders.<sup>41</sup> However, the resistance of the Giriamas persisted well into 1914. Again the coercive organs of the state were deployed to put an end to it all. This punitive expedition culminated in the massacre of hundreds of Giriamas, the burning of numerous villages, and the confiscation of thousands of goats. To add to this, a new capital levy of £7,500 was imposed recoverable by the seizure of the Giriamas property. The Giriamas were also forced to provide labour, namely, the enlistment of 1,000 of them in the carrier corps to fight alongside the British army against the Germans in the World War. Thus we see the brutal utilization of force that was not itself legalized.

The occurrence of the Maasai case and incidencies such as were suffered by the Giriama, were, it is submitted, not unusual nor unexpected events in the circumstances the East Africa Protectorate (then encompassing Kenya) found itself, and they cannot be quarantined from the political symptoms of colonialism. Apologists for colonialism contend that British policy in Kenya and elsewhere was to "reconcile white ideals of trusteeship of natives with self-interest, on the one hand, and on the other, the responsibility which the imperial and local governments share to develop the natural resources of a sparsely peopled territory encompassing some of the richest agricultural soils in the world, mostly in districts where the elevation and climate make it possible for Europeans to reside permanently."<sup>12</sup> This is what Lord Lugard calls the dual mandate of the British in Tropical Africa.<sup>43</sup> If indeed the British held any trifling obligation of trusteeship for the benefit of the natives, instances like the Maasai case and the Giriama incidence, could not have occurred for these were of detrimental and devastating effect to the natives. Stripped of its pseudo-moralistic and pseudo-philanthropic allurements, the main purpose for the presence of the British is entirely in the second reason advanced, namely the exploitation of the resources resident in Kenya, and the repatriation of the surplus profit derived therefrom to the metropolis, in this case England.<sup>44</sup> And this process could only be carried out with the steady inculcation of Kenya into the capitalist mode of production where production is a social affair

but appropriation of the surplus-value is restricted to the monopoly capitalists.

Kenya's economy prior to the advent of the white man was pre-capitalist and agriculturally based because the bulk of production was subsistence and not for the market. Further, the means of production, namely, labour and land, were not exchanged on the market for money. When colonialism lurched at Kenya, the preliminary initiation "ceremonies" into capitalism began in earnest. Ernest Mandel identifies tripartite characteristics of the pre-capitalist formation that lays a springboard for capitalism.<sup>45</sup> The first aspect is the separation of the producer from his means of production. The producer in the Kenyan context was the indigenous person who basked in relative abundance of productive land. And since the land produced sufficiently to sustain his life, there was no economic compulsion to work beyond subsistence level. In order to introduce the capitalist mode of production, the producer had to be forcefully extricated from his means of production to non-productive or fairly marginal areas. This is exactly what happened in the Maasai and Giriama cases already discussed. As if to bolster this, the Crown Lands Ordinance of 1915 was enacted by the Governor and re-defined 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, of which reservation should not be deemed to have conferred unto any tribe or its members any right to

alienate the land so reserved or any part thereof.<sup>46</sup> The expurgation of the Africans from their lands was now complete.

Judicial recognition of this process was given in the case of Wainana v Murito (1923)<sup>47</sup> where it was held that the effect of the 1915 ordinance and the orders in Council<sup>48</sup> that transmogrified the protectorate into a colony was to take away all native rights in the land, vest all land in the Crown and leave Africans as tenants at will of the Crown in the land actually occupied.

Karl Marx says of this process of casting asunder the producer from the means of production;

"The so-called primitive accumulation .. is nothing else than the historical process of divorcing the producer from the means of production. It appears as primitive, because it forms the prehistoric stage of capital and of the mode of production corresponding with it."<sup>49</sup>

We thus see that the role of the state through the media of law and para-legal authority as exercised by the Governor and the courts was to assist in this process, and where the law came into direct contradiction with gubernatorial action and had to be adjudicated upon by the courts, the law was cunningly interpreted to render the actions of the governor "legal." Noticeable therefore is a reciprocal interplay between the law in its widest understanding, and the pre-capitalist economic base build-up.

The second characteristic of the prehistoric stage of capitalism that lays a launching pad for the capitalistic mode of production is the concentration of the means of production in monopoly form and in the hands of a single social class, the bourgeoisie.<sup>50</sup> Again we revert to the Maasai case and the Giriama incident which present a fitting illustration to this assertion. In both cases, the land that the indigenous people were denied of was to devolve to the settlers. Illegal actions also arose from the administration of the Crown Lands Ordinance of 1902<sup>51</sup> which provided for disposition of lands to individuals. Its administration meticulously distinguished between the European (settlers), Asians and Africans, though there was nothing in the ordinance which directly permitted it, and the land was alienated to settlers. These examples show that it is these European settlers that the means of production was, by legal and extra legal methods, being concentrated. What class did these settlers belong to?

The settlers who came to Kenya were selectively picked from Britain so as to exclude lower classes because the subordinate classes were not possessed of the pecuniary might to develop the means of production in Kenya. Dilley writes,

"Kenya was not settled by the 'lower class' from the Home Country (namely Great Britain). From the first, it was emphasized that, to make a success, a prospective colonist must be equipped with capital and/or backing."<sup>52</sup>

For those who did not possess much capital,<sup>53</sup> a mass of legislations were promulgated to provide them with financial backing,<sup>54</sup> of which financial support was derived from the financial oligarchies or monopoly capitalists in the metropolis,<sup>55</sup> hence making the recipients robots of these monopoly capitalists. Evidently therefore, the settlers were extracted from amongst the ranks of the International bourgeoisie (or monopoly capitalists- these were however very few) and mainly the petty bourgeoisie (who were mere agents of the former). On arrival in Kenya, the Governor, using the coercive machinery of the state obtained land, the means of production, for them, by both legal and extra legal avenues as revealed by instances hitherto mentioned. It is here that we note that the powers of the Governor were not inflated merely because of the obsession for power, but had to be avaricious so as to aid in the exploitation of the colony and repatriate the proceeds to benefit the monopoly capitalist in the "mother-country," and such was only possible with the steady inculcation of Kenya into the capitalist mode of production. It must be noted at this juncture that during the period prior to 1955 in Kenya, classes coincided with race with the white settlers being hierarchically in the apex point, Africans being indecently low placed, and Asians sandwiched there between.

The third characteristic of prehistoric capitalistic build up is the appearance of a social class which has little or no possessions save its own hands and no sufficient means of subsistence other than the sale of its labour power, but at

the same time is "free to sell" this labour power and does so to the capitalist owners of the means of production.<sup>56</sup>

In Kenya, this class strays between proletarianism proper and lumpen proletarianism. The Lumpen class encompasses the group that has come to be known as the squatters, whose existence persists till today if not in increasing numbers. This discussion ensues in the following topic.

:B LEGAL AND EXTRA LEGAL AUTHORITY: THE PROBLEM OF LABOUR AND ITS SUPPLY:

1) Legal Authority:

In a mature capitalist system, the actual use of state power for the obtainance of labour is rarely made resort to, for once capital has been monopolized by a minority, the reciprocal inability of the majority to produce encumberances them to the owners and ensures that they will always sell their labour at a price determined by the monopolists. But Kenya in the colonial period, and even today, was yet to attain capitalistic adulthood, and the monopoly capitalists had to compete with much difficulty against the peasant sector in recruiting labour, but since the monopoly capitalists had in their employ state power they made recourse to its coercive machinery to purge labourers out of the reserves and onto settler forms.

Pursuant to this, the Governor promulgated several ordinances, the first of which was the introduction of the Hut tax in 1901 providing financial compulsion for the African to seek work on settler farms. In 1906, The Master and Servant Ordinance <sup>57</sup>

was enacted and imposed penalties of imprisonment and/or fine for those who negligently performed their duties. The shortage of labour necessitated the introduction of "kaffir farming" where natives were allowed to squat or reside in farms in exchange for labour which they would make available to the settler. Though prohibited in 1918 by the Resident Native (Squatters) Ordinance,<sup>58</sup> The same ordinance introduced a system quite akin to "kaffir farming" namely, publicly supervised contract of labour where the labour had to work for 180 days annually on a farm in return for which his family could live there, and have an area for cultivation. These legal endeavours of the Governor had to be supplemented by resort to extra legal means;

i) LABOUR CIRCULAR, 1919

By 1919 however, the labour crisis was acute because of the war and the increase in European plantations.<sup>59</sup> Governor Northey then issued a labour circular<sup>60</sup> in October which stated inter alia, firstly that native labour was required for non-native farms and other developments, secondly that the shortage of labour was due to the reluctance of natives to work, and thirdly that it was the wish of the government that they work. The Provincial Commissioners, the District Commissioners and District Officers were thus mobilized to ensure that there was an increase in the supply of labour. The Governor instructed the officials to;

- a) exercise "every possible lawful influence" to get labour, including women and children,
- b) to remind native chiefs and elders that they "must... render all possible lawful assistance" and that it was their duty to encourage unemployed youngmen to go to work,
- c) to keep a record of chiefs and Headmen who were helpful (for rewards?) and those who were not, were to be reported to the Governor (for reprisals?).
- d) to invite employers and their agents to enter freely into the Reserves to get in touch with chiefs or Headmen and natives, and,
- e) to provide requirements of government departments from the more remote areas not providing much plantation labour.

Much as the wording of the circular may give the impression that the contents were to be vigorously implemented within the letter of the law, this was not the case. The same circular infact contained what amounted to a threat to use extra-legal powers as it said, though with select use of benign language;

"... the larger and more continuous the flow of labour is from the reserves, the more satisfactory will the relations as between the native people and the settlers and between the latter and the government," and concluded that; " should the labour difficulties continue it may be necessary to bring in order special measures to meet the case, it is hoped, however, that insistence on the foregoing lines will have appreciable effect."<sup>61</sup>

Even the Bishops of East Africa managed to notice the impropriety of the labour circular and appealed for its revocation, saying it established a system of compulsory labour that was not legalized.<sup>62</sup> The same was argued in the House of Commons in Britain.<sup>63</sup>

We then see gubernatorial powers, both of legal and extra-legal nature, being utilized to create a class of persons whose only means of survival is his hands which he has to offer for sale in form of labour to the owners of the means of production. This is, as previously mentioned, one of the three characteristics of pre-capitalist accumulation.

The foregoing discussion dwelt heavily on the powers of the Governor as bestowed on him by the law. We noticed that these powers were proliferated and extensive. However, we went further to examine the exercise of these powers and noticed further that their exercise tended to avariciously increase the powers of the Governor beyond the limits set by the law.

A deeper excavation also revealed that the powers exercised by the Governor were designed to bring about certain social changes consistent with a capitalistic economy into Kenya.

The quintessence of our submission is that gubernatorial powers were, as prescribed by law, very wide and even wider was the exercise of this carté blanche authority in order to aid in the fulfillment of the primary aim of colonialism. The colonial state was established so as to provide a ground for exploitative overtures of the natural and labour resources, the surplus of which was to repose in the ruling class in the

United Kingdom. Thus the role of the state as explained in chapter 1:2 is amply bailed out, hence the Commissioner and later the Governor who superintended over state machinery, had to ensure the existence of favourable conditions that would encourage optimum extortion of surplus - value.

#### CONTROL MECHANISMS OF GUBERNATORIAL POWERS:

Theoretically, the Governor's powers were subject to various controls.

#### 5:A IMPERIAL CONTROL

The Commissioner/Governor was subject to imperial control emitted through Royal Instructions by the Secretary of state, to whom he was accountable. Therefore in so far as legislations promulgated by the Commissioner/Governor (namely Queen's Regulations, later called ordinances) were concerned, they only attained legal force after being confirmed by the Secretary of state. Even then, this curtailment of his power was whittled down by an offsetting proviso which stated that the Commissioner could, necessity provoking, promulgate the regulations without prior reference to nor consultation with the Secretary of state, albeit the latter could disallow them ex post facto.

The Commissioner was also subject to the superintendence of the crown as he was required to file annual reports with the Secretary of state. But suffice to say, annual reports were submitted ex post facto thus in the unlikely event of their

invoking displeasure amongst the bureaucrats in England, the fact would still be that the power has been exercised, and even if that wrongful exercise of power adversely affected the person or property of an individual, he would still not have recourse to the protectorate court because the Commissioner enjoyed immunity. Thus that which the law purported to give with one hand it unabashedly took with the other. This control by virtue of being ex post facto, was inconsequential.

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The Commissioner had also to succumb to the Crown's power to legislate whether under prerogative or statute. The crown was in turn subordinate in this respect to the United Kingdom Parliament.

The legislative competence of the Commissioner or Governor was further purportedly curtailed such that;

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament (UK) extending to the colony to which such law may relate, or repugnant to any order or Regulation made under authority of such Act of Parliament or having in the colony the force and effect of such Act, shall be read subject to such Act, Order or Regulations and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative (emphasis mine)."

Thus runs the Colonial Laws Validity Act 1865, S.2 which applied to colonies and protectorates.<sup>64</sup> An analogous provision existed for protectorates only, of which the East African Protectorate was one, in the Foreign Jurisdictions Act, 1890, S.12.<sup>65</sup>

But S.3 of the Colonial Laws Validity Act, 1865 stated that repugnancy of a colonial law to the common law of England was not a ground for invalidity. And as if to erode S.2 of the same Act (as quoted above), S.4 provided that a colonial law passed with the concurrence of the Commissioner (or Governor as the case may be) of a colony or protectorate, or assented to by him is not invalidated by inconsistency with Royal Instructions, except where such instructions are for instruments authorising the Commissioner (or Governor) to concur in or assent to laws for peace, order and good government of the colony.

The cumulative effect of all these provisions was that while on the one hand they purported to limit the Commissioners'/Governors powers, provisos were simultaneously inserted to virtually nullify those restraints hence leaving the Commissioner/Governor with abundant power. Further, the 1902 order in council removed the requirement of advance submission of draft ordinances by the Commissioner to the Secretary of state for consent, and instead reserved it only in so far as was specifically directed for ordinances of particular purposes.<sup>66</sup>

In practice also, imperial control was abundantly conspicuous

by its rarity.<sup>67</sup> The rarity of imperial control was not accidental but wantonly deliberate, for the imperial government's policy was to leave responsibility with the local authorities and is what Dilley Christens "trusting the man on the spot"<sup>68</sup> for these were the men with first hand acquaintance with the facts peculiar to their colonies.

We submit also that imperial control only manifested itself when the primary purpose of colonialism was at stake and was called in to quell any threat to colonialism. Infact it is a misnomer to call it imperial control of gubernatorial action for it was no control at all. We would like to shove into the dock, the statements of writers like G. Benett<sup>69</sup> and Ghai and McAuslan<sup>70</sup> who assert that the illegality perpetrated by the colonial government was not sactioned by the imperial government, Ghai and McAuslan state and I quote,

"An obvious question which arises then is whether we should regard the legal framework created for the assumption of power in East Africa as an elaborate sham designed to disguise what was really planned to be done. This would be going too far. The politicians, civil servants and lawyers in whitehall (i.e. the Imprial Government) were no doubt sincerely convinced of the importance of getting things legally right, both because that was how they were accustomed to governing in England and because they had incurred international obligations in respect of East Africa which good faith required them to make an effort to discharge."

This is an indecently calamitous statement! What "international obligations" does any country have to colonize for exploitative purposes, another country? And how can these "duties" of exploitation be discharged with "good faith" when exploitation itself is detestable? Moreover, the imperial government cannot be acquitted as having been interested in things being done with legal finesse. Without seeming to suggest that what was legal was necessarily just and right, we contend that the imperial government was least concerned with the legality or non-legality of gubernatorial actions so long as that which was done was for the interest of the ruling class that controlled the imperial government and so long as these actions did not threaten their position as the exclusive exploiters of the indigenous resources. And this kind of attitude is abundantly exhibited throughout the entire operation of the colonial regime. In the Maasai case, it was stated by Hamilton, C.J., in the court of first instance that,

"Both these agreements (namely the 1904 and the other of 1911) were made by the government acting on instructions from and with the sanction of the secretary of state.

(emphasis mine).<sup>72</sup>

Even the labour circulars of 1919 were not issued in ignorance of, but with approval of the imperial government yet they were patently illegal.<sup>73</sup>

All the schemes were carried out with the concoction, connivance and contrivance of the imperial government which must rightly be indicted for having been privy to all these machinations replete with illegality. Thus imperial "control" in no way served as a control-device of gubernatorial actions.

5 CONTROL MECHANISMS OF GUBERNATORIAL POWER (cont.d.):

3 SEPARATION OF POWERS:

JUDICIAL REVIEW:

Under the doctrine of separation of powers, the three organs of government are supposed to act to balance and check one another's powers. Hence, for example, the courts are supposed to be control devices as against either the executive or the legislature.

During the colonial period however, the Commissioner and later government, was insulated from Judicial Review such that no protectorate or Provincial court could exercise any jurisdiction in any proceeding over him or his official or other residences, or his official or his property.<sup>74</sup>

Evidently the control valves suggested by the separation of powers doctrine were non-existent.

However, one case did arise which touched only tangentially on the powers of the Commissioner and the succeeding Governor.

That was the ad nauseum case of Ole Njogo V A G<sup>75</sup>. That decision reached therein only served to bolster the already proliferated powers of the Governor hence emphasizing the mutual roles played by the legislature and the executive, both of which constituted the Governor and his officials, and the judiciary.

Why was it that there was no provisions for Judicial Review of Gubernatorial action in the Municipal Court? I venture that by then the government was bold enough to overtly reveal that the functions of the courts were quite complementary with those of the executive both of which were class institutions, and cases like the Maasai case only serve to stress that point.

However the provision ousting the courts jurisdiction over the Governor was not re-inserted in the 1920 Letters Patent constituting his office. It can therefore be inferred that from thenceforth, the Governor was to be subject to the Municipal courts' authority. In the case of Musgrave V Pulido<sup>75</sup> it was held by the Privy Council that it is within the province of Municipal courts to determine whether any act of power done by a Governor is within the limits of his authority and therefore an act of state.

The Governor had the powers of appointing Judicial officers for the Municipal courts of which officers held office at the pleasure of the crown hence had no security of tenure - see

Terrell V Secretary of state for The Colonies.<sup>77</sup> Therefore they were open to the manipulation of the Governor, hence could not effectively be a control device on gubernatorial powers.

However throughout the tenure of colonialism, the Governor was subject to authority of the Privy Council which was not a municipal but an international court serving British Dependencies.<sup>78</sup> But even the Privy Council was wary to question the basis of colonialism or any exercise of power to abbet colonialism, thus again overtly revealing the mutual roles played by the courts and the executive. In the case before the Privy Council of Nyali Ltd. V Attorney General<sup>79</sup> a case dealing with the prerogative of pontage in Kenya, Denning L.J. (as he then was) had this to say;

"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 our the limits .... 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 the Courts will not permit it to be challenged (emphasis mine)."

:5 CONTROL MECHANISMS OF GUBERNATORIAL ACTION (cont.d):

:B SEPARATION OF POWER (Cont.d.):

ii) DEVELOPMENT OF THE LEGISLATURE AND THE EXECUTIVE  
1902 - 1920:

The 1920 Order in Council which has already been discussed (see topic 2:3) was beefed up by the 1905 one. The 1905 Order in council cosmetically touched on the Governor's powers due to the establishment of two major institutions, namely, the Legislative Council and the Executive Council. Settler pressure had seen to the formation of the Legislative Council which in its inceptive form was government controlled for it comprised of the Governor, and not less than two other persons appointed by the Crown who would hold office during the pleasure of the Crown. Being thus appointees of the Crown, they could not be expected to digress from British colonial policy as trumpeted by the Governor, who in any case was quintessential to the whole organization for he acquired veto powers - therefore there was no real diminution of the Governor's powers for the legislative council was to work under his wing.

Also established by the 1905 Order in Council was the purely advisory Executive Council but the Order supplied very little in way of elaboration of the composition and functions of the council. The import of the 1905 Order-in-Council was really in what it portended; the Executive Council

it set up developed to be the cabinet as we know it today (the cabinet is an advisory body to the President),<sup>80</sup> whilst the Legislative council was to be a distant ancestor of present day Parliament.

It is pertinent to capture the reason for the emergence of the legislative council at the time if we are to gather whether indeed it could play a role of checking and balancing Executive, and by analogy gubernatorial, powers. The idea of the formation of the Legislative council was snowballed by the settlers under whose pressure the Imperial government succumbed in agreeing to establish the council.<sup>81</sup> The settlers, representing a class argued that they must play a role in the government of the region because they contributed greatly to governmental revenue in way of taxes, hence the catchphrase "no taxation/representation."<sup>82</sup> This argument was to say the least, erroneous in that the greatest portion of governmental revenue, though paid by the settlers, constituted the surplus-value wringed from the African labouring populace.<sup>83</sup> The settlers were arguing that they alone, and not all peoples in Kenya, should be represented. Their efforts bore fruit for in 1919, elective representation was introduced by the Legislative Council Ordinance<sup>84</sup> promulgated under an Order in Council<sup>85</sup> which provided for full adult white suffrage only (the settlers were all white). Thus we see that the Legislative Council was a Kindergarten for intra-class democracy where the settler class represented their own interests which did not differ with those of the imperial government, namely to facilitate the rapid

exploitation of East Africa and repatriate the proceeds to Britain. As Dilley says;

"It has been expected, more in Kenya perhaps than elsewhere in British Colonial settlement, that men could go out to make fortunes, then return to live in ease at Home ... (This type of settler) was more interested in securing control of the government machine at once so that, by his manipulation of it, his fortune may grow rapidly and allow him to leave more quickly."<sup>86</sup>

Being thus committed to the same objectives as the imperial government, the settlers were not destined to question nor check Imperial authority as reflected in gubernatorial exercise of power.

By 1920 therefore, the theoretical understanding derived from the doctrine of separation of powers by Montesquieu that the three organs of government were to act as checks and balances inter se were manifestly lacking and as between the Governor and the Legislative Council, the latter was significantly subordinate to the former.

#### DEVELOPMENT OF THE LEGISLATURE AND THE EXECUTIVE 1920-1963:

In 1920, part of Kenya became a Colony<sup>87</sup> whilst the rest remained a protectorate.<sup>88</sup> The skeletal organization of the government was set out in the Letters Patent made under the Great Seal whilst

the "flesh and blood" was contained in subsequent Royal Instructions made under the Sign manual and Signet. The 1920 Letters Patent<sup>89</sup> did not change the powers nor functions of either The Legislative Council or the Governor as contained in the 1905 Order in Council, read with the 1902 Order, both of which have already been discussed. The Legislative Council's composition was however altered so as to embrace representatives for Indians and Arabs,<sup>90</sup> whilst the Africans remained unrepresented until 1925.<sup>91</sup> The Governor was still a domineering figure and had ultimate authority in both the Legislative and the Executive Councils, which comprised mainly of settlers. Upto this period, no semblance of the doctrine of separation of powers was practised.

In any case, the government had a clear voting majority in the legislature after the Lyttleton constitution was introduced in 1954,<sup>92</sup> with 34 votes assured out of a total of 54.

As we stated earlier, the Legislative Council was a settler dominated body of which settlers comprised the propertied class. However the oppression the Africans were suffering under colonial rule provoked them to enter into armed resistance.<sup>93</sup> In order to mollify the Africans who in any case belonged to the oppressed class, the colonial power developed a system of co-option of Africans into higher social strata so that classes were no longer going to be coincidental with race.<sup>94</sup> The co-opted Africans would then maddeningly acquire property, step into positions of

bountiful political power hence have a stake in the economic system which they would fight to protect thereby ensuring the protection of the interests of the actual controllers of the economy, the monopoly capitalists. Some Africans were therefore encouraged to acquire property and property qualifications were introduced for those wanted to contest the newly created elective posts in the legislative council.<sup>95</sup> Thus the class nature of the legislative council was amply bailed out, a fact that still haunts the Kenyan Parliament today.

In 1958, the Lennox-Boyd Constitution was established by an order in Council and for the first time mention was made of "safeguards" in the constitution against arbitrary exercise of power against any one racial community. A council of state was to be the watchdog - the members were appointed by the Governor and held office at the pleasure of the Crown - hence were subject to the Governor's control and not the Governor to their control. The council of state was in any case advisory.

In the 1960 constitution hacked out at the 1960 Lancaster House conference, the Governor retained ultimate governmental control locally, to the same degree as the 1962 constitution arrived at in Lancaster but implemented on the granting of Internal self government on 1st June, 1963. He maintained his veto over legislation and his powers of disallowance were preserved<sup>96</sup> plus legislative authority over issues such as defence, external affairs and internal security.<sup>97</sup>

Kenya became independent on 12th December, 1963 with "Majimboism" (Regionalism) being the heart of the administrative and political organization of the country.

This historical excursus reveals that the formation of the legislature came up due to the insistence of a class of which class represented a race, the whites. However with time, the class content of the legislature remained but it became multiracial. The mutuality of roles between the legislature and the executive reduced the former to state of intra-class democracy hence it could not operate as a check unto the executive, hence gubernatorial, exercise of power.

The general tenour of our argument in this section has been that the separation of powers doctrine was introduced to camouflage where real power lay, with the international monopoly capitalists but superintended by its agents comprising the Governor and the settlers. It was introduced to give a semblance of democracy, but the legislature was highly incapable of controlling the Governor.

#### GUBERNATORIAL ACTION AND THE RULE OF LAW:

Dicey's formulation of the rule of law, despite its deficiencies,<sup>99</sup> contained three kindred conceptions. Firstly, no man shall suffer any punishment except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is distinguished from systems of government where officials exercise wide, arbitrary

or discretionary powers, which necessarily means insecurity for legal freedom on the part of the subject. We have in sections 2:3, 2:4 and 2:5 discussed the wide, arbitrary and discretionary powers exercised by the Governor which are evidently inconsistent with the existence of the rule of law.

Secondly, the rule of law in Dicey's understanding meant that no man was above the law and further that every man, whatever be his rank or condition, was subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.<sup>100</sup> As we saw earlier the Governor was immune from courts authority. Further the courts were very wary to examine exercise of power by the colonialists, therefore exempting these colonialists from Judicial Review (see Nyali Ltd. V. AG - discussed in chapter 2:5:B of this paper). These were evidently situations where the rule of law as per its second limb could not exist. The second limb embraces the idea of equality of all classes of persons to the law;<sup>101</sup> this obviously did not exist in the colonial period for as we have pointed out, settlers were accorded superior treatment than other peoples as revealed by the Maasai case, where the Maasai were moved so as to provide land for settlers. The labour circular of 1919 introduced forced labour and worse still for natives only, hence perpetuating inequality. Further for a long time Africans had no vote. The Rule of Law was, from the foregoing, totally lacking in colonial Kenya.

:7 CONCLUSION

The discussion traced historically, the powers bestowed upon, first the Commissioner and later the Governor (both of them being Heads of the Executive) by the letter of the law during the colonial period. These were seen to be enormous, and however detestable were necessary for the establishment of a colonial state intent on introducing and exposing Kenya to the exploitative system of capitalism for the benefit of the ruling class in Britain. However, legality sometimes stood in the way of the colonialists in their exploitative ventures; when this happened that law established by the same state, was overlooked with impunity. Thus the operation of the whole administrative machinery of the colonial regime was pelted with illegal action not consistent with the very legal framework established by the same state upon itself. Our contention therefore is that the law during the colonial period was a sham.

Thus that was the colonial bequest to an independent Kenya; a government where the executive was over-brimming with power and given to frequent orgasmic bursts of illegality; a government where executive power was centred around the head of the executive.

CHAPTER THREE

PRESIDENTIAL POWER AND PRESIDENTIAL DIRECTIVES:  
THE SUBSTANCE THEREOF: KENYATTA ERA

:1 PROLEGOMENON:

In the foregoing chapter, we consistently maintained that the powers, and the exercise thereof, of the colonial Head of the Executive were intimately intertwined with the political economy existent. Such a theme will be harped on in this chapter to show the coalescence between the exercise of Presidential power and the political economy. It is important to note here that the advent of independence did not itself introduce a diametrically different socio-econo-political system from that existing during the colonial period.<sup>1</sup> That being so, the reason for exuberant powers reposing in the Head of the Executive must be similar for both the colonial and post-colonial era.<sup>2</sup>

In this chapter, we shall examine the powers of the Head of the Executive as they have developed through the post-colonial era reflected by the numerous constitutional changes, this being in addition to the discussion of the Presidential directives which have been issued in purported exercise of those powers. We begin this examination with the Kenya Independence Constitution of 1963 which was scrapped and replaced by the Republican Constitution of 1964.

3:2 THE INDEPENDENCE CONSTITUTION AND EXECUTIVE POWER  
ALLOTMENT:

As already stated, Kenya inherited the colonial economic system - which though not entirely capitalist, was and still is a progression towards capitalism and can thus be called quasi-capitalist. Independence occurred as a result of Britain's belated realisation that she could not continue exploiting Kenya in the crudely overt forms of colonialism because Kenyans were beginning to rise against this colonial imposition.<sup>3</sup> Therefore, Britain cunningly devised a strategy<sup>4</sup> to grant nominal independence, whilst coincidentally ensuring the continuance of the economic system, which had hitherto mainly benefited the ruling class in Britain<sup>5</sup> (as divulged in Chapter 2 of this dissertation). Hence Britain feverishly clamoured for protection of its vested interests when it was realised that independence was inevitable. Thus the greatest danger to British interests was thought to be governmental power<sup>6</sup> hence there was an attempt to prune it excessively to obviate the likelihood of a strong central government. The result was the Independence Constitution established by an Order in Council with its provisions running into a marathonic 247 sections in 300 pages.

Other than the protection of property and rights of the minorities<sup>8</sup> advantaged by the colonial system, the

constitution provided for a federal structure or "Majimboism."<sup>9</sup> The major law manufacturing body was Parliament, which was bicameral but had to share in that responsibility with six Regional Assemblies. The Executive was to obtain the Co-operation of both Parliament and the Assemblies in the exercise of some important powers e.g. Emergency.

Governmental structure, insofar as it concerned the Executive, was provided for in S.72. Executive authority was vested in Her Majesty the Queen and exercisable on her behalf by the Governor General "either directly or by officers subordinate to him." Therefore the real Head of the local executive was in effect the Governor-General, who had authority of appointing and dismissing ministers even the Prime Minister.<sup>10</sup> This power was not discretionary in that the Prime Minister had to be a member of the House of Representatives who commanded the greatest support in the House,<sup>11</sup> and could only be removed upon satisfaction of certain conditions.<sup>12</sup> In both appointment and dismissal of Ministers, the Governor-General was required to act in consultation with the Prime Minister,<sup>13</sup> but S.79(2) provided that where there was a requirement of consultation by the Governor-General with someone else,

"the question whether he has received, or acted in accordance with, such advice .... shall not be inquired into<sup>in</sup> any court."

This in law meant that the Governor-General could not be obliged to consult nor act in accordance with the advice of the Prime Minister.

The function of the Cabinet<sup>14</sup> was to advise the Governor-General on matters of government<sup>15</sup> and was collectively responsible to Parliament for any advice given to the Governor-General,<sup>16</sup> and for all things done by or under the authority of any Minister in the execution of his office.<sup>17</sup> But as already pointed out, by virtue of S.79(2), the Governor-General was not bound to act in accordance with the advice of the Ministers, hence the Cabinet was relegated to an advisory capacity.

Notwithstanding the fact that executive authority was exercised on the Queen's behalf by the Governor-General, Parliament could confer functions on persons or authorities other than the Governor-General.<sup>18</sup> The Governor-General could prorogue Parliament at any time<sup>19</sup> and acting on the advice of the Prime Minister, he could dissolve it, but where there was a vote of no-confidence in the Government and within three days the government did not resign, the Governor-General could dissolve Parliament.<sup>20</sup> However upon the advise of the Prime Minister that the Parliament be dissolved, the Governor-General<sup>21</sup> could refuse so to do, if it was not in the "interests of Kenya."

Emergencies could be declared by either Parliament or, when Parliament is dissolved or prorogued, by the Governor-General. In either case, the emergency proclamation was to lapse after seven days unless renewed by Parliament.<sup>22</sup>

The theme therefore of Kenya's Seminal Constitution was dissipation of executive power to Regions hence diluting Central Government authority, an occurrence that was the antithesis of the colonial experience. But if the independence government was to rely on foundations established by the colonial rule, as they did, this constitution was destined to flop, as indeed it did, after an amazingly brief lifespan of 365 days. Ushered in thereafter, was the Republican Constitution of 1964.

3:3 THE REPUBLICAN CONSTITUTION OF 1964 AND SUBSEQUENT AMENDMENTS WITH REGARD TO PRESIDENTIAL POWER:

As stated earlier in the chapter, there was a continuity of the economic system from the colonial to the post colonial era, but with a few permutations. In Chapter 2 we showed the major beneficiaries of the colonial economic system to be the monopoly capitalists in Britain who shared in the spoils, whilst their agents locally, who were extracted from the ranks of white settlers and the colonial administration, as a class shared in the "crumbs." The continuity of the economic system into the independence era meant therefore that the prime beneficiaries were to remain the monopoly capitalists. The variance was that the agent class changed in pigmentation but not role (see chapter 2:6). It is to be remembered from Chapter two that before the departure of the colonialists, they created a middle class of Africans who would be propertied and therefore have a stake in the economic system, thus strive for its maintenance. It is this

class that ascended into power in Kenya for eligibility for membership of Parliament was determined by inter alia proficiency in the Queen's language. By then the only Africans who could master that language were the elite.<sup>23</sup> But at independence, the Imperial government was wary to grant carte blanche power to this social group for they feared that the group may use that strong governmental power to wrest control of the economy from the monopoly capitalists,<sup>24</sup> hence the 1963 constitution was tailored so that it,

"...incorporated provisions that gave institutional form to the forces of distrust and disunity which had been fostered."<sup>25</sup>

The Imperial government therefore placed this class of African leaders on a one year probation with limited executive power. Their performance having proved satisfactory by being unprejudicial to, but in fact abetting the dominance of monopoly capitalists, the African leaders were now permitted to assume full control of a strong central government committed to inculcating Kenya into the International capitalist intercourse. This was the prelude to both the Republican constitution of 1964 and the subsequent constitutional amendments, all of which numbered ten before 1969, and had one underlying feature, the proliferation of executive, and especially Presidential, powers at the expense of the other organs of government,

namely the judiciary and parliament, a trend which though existent during the colonial period,<sup>26</sup> had lain in abeyance for one year between 12th December, 1963 to the same date in 1964.

The Republican Constitution<sup>27</sup> ranked amongst one of the milestones in Kenya's constitutional history. Kenya extricated itself from Her Majesty's Dominions whilst the Constitution abolished the position of Governor-General and in its stead created the Presidency, the incumbent being the Head of State, Head of Government and the Commander-In-Chief of the Armed Forces.<sup>28</sup> It was an elective post, the prerequisite being inter-alia that a contestant for Presidency had to be a member of the House of Representatives.<sup>29</sup> There were two methods of election, namely, a general election after the dissolution of Parliament, or where a vacancy arose in the office after the general election, election was to be by an electoral college consisting of the elected members of the House of Representatives. However, the first President was to be the "person who immediately before 12th December, 1964 holds the office of Prime Minister under the Constitution."<sup>30</sup> He could appoint a Vice-President, Ministers and could make any other appointments to give effect to the Constitution.<sup>31</sup> Unlike the Governor-General (see Chapter 3:2) who was not free to appoint or dismiss Ministers without consultation (though the consultation was not legally obligatory), the President had brimming latitude.<sup>32</sup> Appointments to the civil service were the discretion of

the President acting through the Public Service Commission<sup>33</sup> unlike previously where the Governor-General could only appoint after consultation with the Public Service Commission.

As Head of State, the President was entitled to address either House of the National Assembly or both sitting together,<sup>34</sup> and as Head of the Cabinet and member of the House of Representatives, he was entitled to attend all meetings of the House and to take part in all proceedings thereof, and to vote on any question before the House.<sup>35</sup> As the Head of the Cabinet, he was entitled in a like manner to attend all the meetings of the senate and to take part in proceedings thereof.<sup>36</sup>

Like the colonial Commissioner and later Governor, the President was insulated from legal proceedings during his tenure of office.<sup>37</sup>

Manifestly, the Republican Constitution had the effect of reinstating to the Head of the Executive, powers such as were extravagantly conferred to the Head of the Executive during the colonial era.

The second amendment came in 1964<sup>38</sup> and affected Chapter X of the constitution which had specially entrenched provisions but was amended giving the President wider powers with regard to the judiciary such that he was no longer obliged to consult Regions in appointments of the Chief Justice.

The third amendment<sup>39</sup> was comprehensive in that it abolished all provisions in the Constitution which were specially entrenched and instead provided for less stringent procedures for amending those particular sections of the constitution. The most important power affected was that of emergency. The period within which Parliament was required to approve a declaration of emergency by the President was extended from one to three weeks and the period the emergency, once approved, could last was extended from two to three months.

The fourth amendment<sup>40</sup> gave the President greater clout in regard to Parliament and the civil service for it was to introduce into Kenyan politics what has now become a linchpin in the entire political framework, namely patronage towards the President. S.41 (1)A read that any member of Parliament who defaulted in attending Parliamentary sessions on eight consecutive sittings without the Speaker's permission would lose his seat, unless excused by the President. The President had wholesome discretion in this regard hence it is not unwise to imagine that this power to excuse would be utilized selectively to benefit "loyal" Members of Parliament.

The <sup>fifth</sup>~~fourth~~ amendment further gave the President power as against the Judicial Service Commission and the Public Service Commission, "of constituting and abolishing offices in the Republic" and "of making appointments to any such office and terminating any such appointment."<sup>41</sup> Incrementally, all persons holding office in the service of the Republic were to do so during the pleasure of the President.<sup>42</sup>

The sixth amendment<sup>43</sup> came in 1966 its effect being to relax emergency powers even more than was achieved in the third amendment already discussed. S.29(1) of the Constitution now read,<sup>44</sup>

"Subject to provisions of this section, the President may at any time, by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any provision of that Act."

Part III of the Preservation of Public Security Act contains the most frightening provisions under the title "Special Public Security Measures" under which the President may make special public security regulations for certain matters, for example, detention of persons,<sup>45</sup> restriction of movement,<sup>46</sup> imposition of curfews,<sup>47</sup> etc.<sup>48</sup> This Act was to be read simultaneously with S.29 of the constitution as it (the Act) operates within it. Parliament, by this amendment, ceded more powers of control over emergencies to the President. Further the emergency provisions were no longer in the constitution but in an ordinary Act, therefore it could be altered with the ease of a simple majority unlike if it was a constitutional provision.

The next important amendment in the Presidential power was the tenth amendment<sup>49</sup> which altered the manner of Presidential election. Like the fourth amendment, this tenth one has been described as one which was predicated to

foster loyalty towards the President.<sup>50</sup> It introduced the "pairing system" where all contestants vying for parliamentary seats were paired to the presidential candidate of their respective party, and only one ballot was cast for the twin candidates.<sup>51</sup> Much as it may prima facie appear to be an innocuous provision, the amendment "carried the greatest implications for the relationship between the Executive and the legislature"<sup>52</sup>, for the President was now to be elected in a national poll and was no longer dependant upon Parliament. Further, the election of the Member of Parliament during the general elections became even more dependant upon that of the President, for a prospective member of Parliament was required to endorse the Presidential candidate from his party and both names were paired together and only one vote could be cast for the paired candidates.

By the tenth amendment also, independent candidates were abolished, so were the twelve positions of specially elected Members of Parliament who were now to be nominated by the President.<sup>53</sup> This meant that the President was now able to control even more Parliamentarians thus diminishing the concept of supremacy of Parliament.

It is to be remembered that by the sixth amendment, a Presidential order bringing into operation the Preservation of Public Security Act lasted for eight months, once approved by Parliament. This section was repealed,<sup>54</sup> such that once Parliament had sanctioned the President's invocation of the

Act within one month of its coming into effect, it stood for so long as the President wished, subject to the revocation powers of Parliament. Evidently greater latitude was bestowed upon the President much to the detriment of Parliament.

In 1969, the constitution was rewritten<sup>55</sup> to consolidate all these amendments into one document. The extractable streak traversing all the post-colonial amendments hitherto mentioned was the resumption of the Head of the Executive, namely President, to a position of bountiful power reminiscent and akin to those of his colonial counterpart, the Governor. Further we note that the authority so vested by the myriad of amendments lavished the President with carte blanche powers to be exercised at his discretion.

Other than these amendments inserted in the 1969 constitution, other provisions existed that had a bearing on Presidential power and reflected the exuberance thereof. S.23 of the constitution vests executive authority in the President of which executive authority he can himself exercise or delegate to the other officials. The President retained his powers of appointment<sup>56</sup> and dismissal<sup>57</sup> of the Vice-President and appointment<sup>58</sup> and dismissal<sup>59</sup> of the Ministers.

The constitution also establishes a cabinet to consist of the President, the Vice-President and the other Ministers.<sup>60</sup> The function of the cabinet is outlined as being to

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The constitution also establishes a cabinet to consist of the President, the Vice-President and the other Ministers.<sup>60</sup> The function of the cabinet is outlined as being to

"aid and advise the President in the government of Kenya."<sup>61</sup>

Thus like the colonial Executive Council, the cabinet in independent Kenya languishes in an advisory capacity since the constitution places no obligation on the President to accept its decisions.

Curiously however, S.17 (3) of the constitution lays out that the cabinet is "collectively responsible to the National Assembly for all things done by or under the authority of the President or the Vice-President or any other Minister in the execution of his office." Thus even where there is no collective decision making, the cabinet would still be required to be collectively responsible for Presidential, Vice-Presidential or Ministerial action.<sup>62</sup> This solidifies Presidential power over the cabinet as they must support decisions which they did not necessarily assist in formulating.

The President retained his powers of prorogation<sup>63</sup> and dissolution<sup>64</sup> of Parliament which powers render the parliamentary congregation at the mercy of the President. The President also inherited the Queen's prerogative of mercy,<sup>65</sup> of which prerogative was expanded in 1975 when he was given power to pardon those guilty of election offences.<sup>66</sup>

This exposé exhibits the preponderant powers reposing in the President. We shall in a later part of this Chapter (Chapter 3:5) examine whether this extravagant grant of authority to the President is synonymous with the doctrine of

separation of powers, Having thus delved onto the legal prescriptions of power on the President, and having noted their proliferated nature, we intend to analyse its exercise which reveal a further extension beyond the already extensive legal limits.

#### CHOICE PRESIDENTIAL DIRECTIVES AND THEIR LEGAL IMPLICATIONS:

Recapitulating, in Chapter one,<sup>67</sup> we attempted a provisional or working definition of Presidential directives. It is that definition that will guide us in picking out the presidential directives.

In order for them to be valid, presidential directives are supposed to be issued pursuant to powers bestowed upon the President. However a peculiar problem in Kenya is that these directives are sometimes issued at public gatherings and immediately, frenzied enforcement of them begins before their legal tenacity is scrutinized. By legal tenacity or validity we mean, does the President have express or implied constitutional or statutory authority for the promulgation? If yes, have the appropriate procedures translating that directive into law been adhered to? In examining and analysing a selection of Presidential directives, our attempt will be to answer these questions whilst grounding the directives to the political economy in Kenya that gives rise to them. The political economy in Kenya reveals the contradictions in material life resulting from the conflict

existing between the social forces of production. The directives, being the result of, and to an extent influencing the material conditions will necessarily reflect those contradictions in the material base.

4:A LEGAL NOTICE 179 OF 1967

When Kenya obtained internal self-government on June 1st 1963, the legal provisions for this ascendancy were contained in the Kenya Order in Council 1963,<sup>68</sup> of which Order also contained the constitution. This Order provided inter alia that the Governor had power to make regulations during the transitory period, to bring the constitution into effect or he could make regulations adapting, modifying, qualifying or providing exceptions to the Constitution in order to avert administrative difficulties that may be incidental to the transition from the constitutional arrangements provided for by the existing Order<sup>s</sup> to those provided for by the Constituion.<sup>69</sup>

Pursuant to this power, the Governor enacted the Kenya (Land Control) (Transitional Provisions) Regulations, 1963<sup>70</sup> which granted certain powers to the Minister in charge of Lands and Settlements. S.8 of the Regulation ran as hereunder;

"Until Provision is made by a law made by a Regional Assembly under S.211 (2) (b) of the Constitution, the Minister may prohibit the giving of consent to

a) any particular land transaction or class of land transactions; or

b) all land transactions which would result in the creation of a separate parcel of land that would have a smaller area of a smaller frontage than a particular area of frontage specified by him."

Thereafter, the Kenya Independence Order in Council<sup>71</sup> was enacted and it revoked the Kenya Order in Council of 1963<sup>72</sup> but it however preserved the Kenya (Land Control) (Transitional Provisions) Regulations.<sup>73</sup> These same regulations were reinserted into Kenya Law, when Kenya became a Republic in 1964, by the Legislature through the constitution of Kenya (Amendment No.2) of that year.<sup>74</sup>

It is notable from the wording of the Regulations that the consignment of powers in Regulation 8 were conferred upon and were to be exercised by the Minister in charge of Lands and Settlement. However, in 1967, the President in issuing a directive, purported to exercise those powers. Legal Notice No.179 of 1967 reads, and I quote in extenso,

"In exercise of the powers conferred by regulation 8 of the Kenya (Land Control) (Transitional Provisions) Regulations 1963, the President and Commander in Chief of the Armed Forces of the Republic of Kenya hereby prohibits the giving of consent to land transactions in favour of persons who are not either

- a) a citizen of Kenya; or
- b) a person declared by the President to be an approved enterprise for the purpose of this notice."

The legal notice was dated 18th August, 1967 and signed by the then President, Jomo Kenyatta.

Thus the President acted ultra-vires in purporting to exercise powers expressly bestowed upon the Minister. As Bailey S.H. et al.<sup>75</sup> state,

"A person invoking the ultra vires principle may be able to attack one or more of four elements of the act challenged (inter alia): (1) the competence of the authority in question to perform the act."<sup>76</sup>

And in assessing whether the authority had competence to perform the act, two questions are asked, namely;

- " i) Have the preliminary requirements been fulfilled which give the authority jurisdiction (power to act)?
- ii) Is it the authority which has been required or empowered by statute to perform the act? Or has the performance of the act been delegated improperly?"<sup>77</sup>

If the answer is "No" to both <sup>or</sup>/either of the two questions, then the purported exercise of the power is ultra vires hence of no legal validity.

The President in issuing Legal Notice 179 of 1967, had no competence nor authority to exercise powers in the Kenya (Land Control) (Transitional Provisions) Regulations of 1963, thus Legal Notice 179 of 1967 was ultra vires hence void, meaning it is of no legal validity.

Cases deciding directly on this issue are hard to come by but there are cases that enunciate the principle that once Parliament has conferred a power upon a person, the power must be exercised by him, or by a responsible official who is subject to the fullest control of the person upon whom the power is bestowed.<sup>78</sup> Such was decided in R V Skinner<sup>79</sup>. In our instant case, the power is vested on the Minister, but the President purported to exercise it. The question therefore is this; is the President "a responsible official who is subject to the fullest control of the Minister?." As to his being a responsible official there is no doubt, but as to whether he is subject to the fullest control of the Minister, the answer is an emphatic No. As was discussed earlier in Chapter 3:3, the Minister is, per the constitution, a member of the Cabinet,<sup>80</sup> and the same constitution lays out the function of the Cabinet as being that of aiding and advising the President in the government of Kenya.<sup>81</sup> Thus as argued earlier,<sup>82</sup> the cabinet is merely advisory to the President who is not obliged to accept the cabinet's decisions.<sup>83</sup> The President is therefore constitutionally not liable to the full control of the cabinet, nor to an aspect of it in form of a Minister. Thus the President, being outside the purview of ministerial control, could not purport to have had authority to exercise the powers of the Minister under the Kenya (Land Control) (Transitional Provisions) Regulations.

In the case of Lavender (H) and Son Ltd. V Minister of Housing and Local Government<sup>84</sup> a company, on being refused planning permission decided to use the right of appeal in the

Town and Country Planning Act (1962)<sup>85</sup> and appealed to the Minister for Housing and Local Government. The request was for permission to extract sand, gravel and ballast from an area which was of high agricultural quality. The Minister for Housing refused the permission on the grounds of a policy he had drawn up that no licences would be issued where the Minister for Agriculture objected. The Court held the decision of the Minister for Housing to be ultra vires for by this policy, the power was in effect to be exercised by the Minister for Agriculture and not the Minister for Housing contrary to statutory provisions. Willis, J. stated,

"... I think the Minister (for Housing and Local Government) has fettered himself in such a way that in this case it was not he who made the decision for which Parliament made him responsible. It was the decision of the Minister for Agriculture ... which was decisive in this case... (T)he decision to dismiss the appeal, while purporting to be that of the Minister (for Housing), was in fact, and improperly that of the Minister for Agriculture (emphasis mine)."

In our instant case, Parliament by renewing the Regulations through the Constitution of Kenya (Amendment No.2) of 1964<sup>86</sup> gave the power to make Regulations to the Minister, and not the President. In the Lavender Case the Minister for Housing upon whom the power lay, purported to exercise it himself upon the dictation of the Minister for Agriculture. The Presidential directive under discussion shows more of a departure from the Regulations as the Minister did not purport to act on the dictation of the President, for he did not act

at all, but the President himself sought to exercise powers which Parliament saw fit to vest on the Minister. The Presidential directive was thus legally invalid.

That the President himself attempted to exercise powers of a Minister only reveals the gravity of the issue at hand, namely Land. Land has been and still is a contentious issue in Kenya's political arena, right from the pre-independence<sup>87</sup> to the post independence era.<sup>88</sup> During the colonial era, indigenous Kenyans had been disinherited of their lands, most of which devolved to the settlers. Immediately, two distinct and antagonistic social groups evolved, namely the indigenous Kenyans and the settlers, the latter obtaining the assistance of state machinery. These two broad classes were involved in struggles in order to assert their interests, struggles which reached their zenith in the Mau Mau war.<sup>89</sup> Independence did not however lead to the free return of the land to the indigenous Kenyans,<sup>90</sup> and the former colonialists still maintained a hold over the economy of the country which was land-based.

That being so, the struggles by the disinherited indigenous Kenyans persisted even after independence and threatened to acquire momentum that may have seen to the demise of the domination of monopoly capitalists. Reacting to these pressures whilst still wanting to maintain the existing social order, the President issued the directive

couched in Legal Notice 179 of 1967 purporting to prohibit land transactions with non-citizens - the monopoly capitalists and their local agents were mainly non-citizens.

Though the law, properly so-called in positivistic jurisprudence, or even extra legal power is generally a caricature of the ruling class and is further designed to principally serve their interests, occasions beset the ruling class where they have to seemingly accomodate interests of other classes default of which may lead to a crumbling of the established social order. This directive was one of the instances where the interests of other social groups had to seemingly be taken account of, lest these groups deprived of land adopt more forthright methods of struggle as in the colonial era.

However, even the effectiveness of the directive is very much in doubt. Did it really prohibit land transactions with non-citizens? Remembering that these non-citizens were mainly British nationals, the British Government passed a legislation called the British Nationality<sup>Act</sup> 1964 guaranteeing to Kenya citizens of British descent that they would automatically re-acquire British citizenship on their renunciation of Kenya citizenship. Odinga says of this British legislation;

"This gave (The British) the opportunity to become Kenya Citizens for purposes of land and loan applications, and the privileges of Kenya citizenship; and the possibility of changing their status again when it suited them."<sup>91</sup>

3:4:B PRESIDENTIAL DIRECTIVE ON THE USE OF KISWAHILI IN  
PARLIAMENT

On July 4th 1974 at a KANU Governing Council Meeting, the then President, Mzee Jomo Kenyatta, declared that thenceforth, the national and official language for all purposes including parliamentary proceedings would be Kiswahili.<sup>92</sup> At that time, S.53 (1) of the Constitution<sup>93</sup> read as follows;

"The business of the National Assembly shall be conducted in English."

The President as a member of the Executive and a member of Parliament had the power like any other member of Parliament, to initiate legislation in Parliament. However in this instance no initiative was taken until much later on.

The day after the directive, Parliament reconvened and began its deliberations in English.<sup>94</sup> However in a communication from the chair, the speaker said;

"I have spoken to His Excellency the President on the question of the House switching from English to Swahili. I have explained to him the difficulties we have in switching over to swahili but it is his feeling that we should as an experiment start straightaway. So, as from now, I am afraid Mr. Mutiso - Muyu will have to reply his debate in swahili. (Emphasis mine)."<sup>95</sup>

Thus Parliament began its deliberations in Kiswahili on that 5th day of July, 1974. Since the Constitution had not been amended with respect to the speaking of English in Parliament, S.53 still stood as it then was. S.3 of the Constitution read as follows;

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to S.47 (which has provisions as to amendments), if any other law is inconsistent with this Constitution, this Constitution shall prevail and the law shall, to the extent of the inconsistency be void (emphasis mine)."

Evidently therefore, the Presidential directive that Parliament begin its proceedings in Kiswahili without following the legal rigmaroles for the alteration of the Constitution as per S.47, and being contrary to S.53 was unconstitutional hence a nullity, and the proceedings that followed in kiswahili were void.

What is interesting in the whole scheme is the fact that Parliament of all the institutions should have been privy to the wanton defilement of the Constitution an act that was done quite consciously vide the Speaker's comments,

"Ni kweli kabisa kwamba kuna kifungu cha katiba ambacho kinasema kwamba kiingereza ndicho kitatumika Bungeni." (translation in footnote).<sup>96</sup>

Further, in 1967, the Speaker had ruled that,

"One of the oaths which is taken by hon. members is to uphold the Constitution,"

and unless a motion for the amendments of the constitution is moved,

"you cannot speak freely contrary to your oath."<sup>97</sup>

This ruling was also totally ignored.

The doctrine of supremacy of Parliament was indeed a sham insofar as relationship between the Parliament and the Executive, represented by the President, were concerned because Parliamentarians were groping with remarkable zeal to obey the directive from the Head of the Executive, hence showing the subordinateness of Parliament. And the Speaker's words no less reveal this;

"... Lakini jinsi nilivyowaeleza, ilikuwa vigumu sana kuzuia lugha (hii) isitumike Bungeni (translation in footnote)." <sup>98</sup>

Further according to Kelsenite theory on the hierarchy of norms, the Constitution is the pinnacle body of rules from which the lower norms are not only derived but also conform to. S.3 of the Constitution in fact bears eloquent testimony to that assertion. That is however the theory; in practice, and here we refer to the issue under discussion, parliament was confronted with two conflicting norms, namely, the constitutional provision which was supposed to be the Grund norm, and the Presidential directive, a lesser norm. As it turned out, Parliament amply exhibited its regard for the president as the Grund norm.

The foregone observations reveal the inherent contradictions within the legal order. The law sets assumptions which in practice are unattainable, and are therefore froth to be abused, for example the supremacy of Parliament, the

paramountcy of the constitution, the rule of law, separation of powers, and so on. However, these contradictions are merely a reflection of the antagonisms within the wider political framework especially the material base, which have recalcitrantly seeped into the superstructural components like law and language.<sup>99</sup> For language especially, it is represented by a conflict between kiswahili, which is used amongst the lower socio-economic classes, and English, the media of communication amongst the literati who form the higher and dominant social stratum.<sup>100</sup> It is no surprise therefore that English has engulfed kiswahili as the premier language employed by Kenya's bureaucracy - it is used in the legal system, educational system and government business.<sup>101</sup> This milieu thus makes nonsense of the seriousness of Kenyatta's directive, except insofar as it clouds or blurs the asphyxiation of kiswahili in Kenya's political economy, for the directive only affected Parliament. As Mkangi says,

"Within the present environment, the Kiswahili language is opportunistically tolerated for political-mystifying purposes; otherwise it has become one of the 'tribal' languages."<sup>102</sup>

And this is strikingly exhibited by the fact that as far back as 1965, the government had been urged by a private member's motion in Parliament to introduce Constitutional changes to adopt Kiswahili as the language of the House "in view of the fact that Swahili is the indigenous common African language in Kenya."<sup>103</sup> The government in a not-so-rare show of

obstinacy thwarted the move.<sup>104</sup> After nine years had lapsed, the Head of/<sup>the</sup> Executive, without regard to the constitutional provisions, opportunistically 'commanded parliament to immediately halt the use of English and instead employ Kiswahili in their deliberations even though laws generally, were written in English.

On 9th July, 1979, the second sitting after the issue of the directive, a member of Parliament successfully moved a motion that Parliament should remain adjourned until the Attorney-General had brought a Bill in Parliament to amend S.53 of the Constitution.<sup>105</sup>

On 10th July, 1974, the Attorney General introduced in Parliament the Constitution of Kenya (Amendment) No.2 Bill, 1974,<sup>106</sup> when the requirement of fourteen days publication of the Bill in the Kenya Gazette before introduction to Parliament was waived and reduced to one day. Waived also was the requirement that no more than one stage of the Bill may be taken at the same sitting.<sup>107</sup> During the whole process, but before completion, of the amendment, the business of the House was being transacted in Kiswahili and when one MP alerted the House to the fact that until the whole amendment rigmarole was over, the House was still required to use English, the Speaker said in what amounted to a dismissal of the Constitutional provision;

"Hiyo ni kweli lakini tangu hapo-imetimia siku mbili - tumekuwa tunaoongea Kiswahili na kama ni makosa tumeishakosa. Nafikiri hakuna haja ya kuwa legalistic sasa maana tulikuwa tukiongea Kiswahili .... Tunaweza kuendelea na kazi yetu (translation in footnote)."<sup>108</sup>

The Bill was passed on the following day, 11th July, 1974<sup>109</sup> and it received Presidential assent on 12th July, 1974.<sup>110</sup>

The Act amended S.53 (1) of the Constitution by substituting the word "Kiswahili" for "English", hence it now read,

"The business of the National Assembly shall be conducted in Kiswahili."

By S.1(2) of the Act, its operation was to be retroactive going back to 5th July, 1974. Between 5th and 12th July, all parliamentary proceedings as earlier stated were in Kiswahili hence contrary to the Constitution. The Act other than make provisions for the future, also gave a stamp of legality to bygone illegality.

The hastiness to amend the Constitution following this Presidential directive in 1974 thereafter caused problems in rationally reconciling some provisions of the Constitution. Whilst by the amended S.53 the House was to employ Kiswahili, one of the qualifications for election to Parliament still remained proficiency in English (not Kiswahili) as per S.34. That accounts for the embarrassingly low standard of Kiswahili manifested by many MP's in their debates.

In 1979 however, it was implicitly conceded that the English language was dominant over Kiswahili, therefore the use of English was reintroduced in Parliament such that MP's could now address the chair in either English or Kiswahili.<sup>111</sup> Further S.34 of the Constitution was also amended thus requiring prospective MP's to attain proficiency in both English and Kiswahili.<sup>112</sup>

In this section we showed the "bulldozing" capabilities, of extra legal nature, of the President by use of Presidential directives. Further it was noted that the directives were implemented with much fervour, thus manifesting the immense power, legal and extra-legal, vesting in the President at the expense of other organs of government.

#### C PRESIDENTIAL DIRECTIVE BANNING STRIKES IN THE COUNTRY

In any capitalist or quasi-capitalist society like Kenya, there is generally an amorphous division of classes between the propertied and the propertyless, the former being the economically dominant social group, by virtue of having within their gripping embracal, the means of production. The propertyless being a lower social caste, normally have nothing but their labour which they sell as a commodity to the propertied at a price usually determined by the latter. The

economic copulation between the propertied and the propertyless produces surplus value which is pilfered by the propertied. Thus in a capitalist or quasi-capitalist society, fissures may erupt between the two broad classes when the propertyless begin to question the "takes" of the propertied class from productive processes, whilst simultaneously arguing for an increment in their (the labourer's) perquisites. The most potent weapon in the arsenal of the worker in pursuance of his demands, within the strictures of the system, is strike action which has the effect of dislocating production hence depriving the owner of the means of production, of his insatiable desire, surplus-value. Limited strike action is provided for by the Law,<sup>113</sup> an aspect that has been grudgingly conceded by the propertied in centuries - long struggle by the workers for their rights. However where strike action intensely threatens the capitalistic system of production, the prime beneficiaries of that mode of production resort to state power and its coercive apparatus, which are in their employ, to quell such uprisings.

Such was the case when on 16th August, 1974, the then President, Jomo Kenyatta, banned all strikes of any type in the country, saying in a press release;

"... the Government had noted with grave concern the wave of strikes which had taken place recently in the country, both in

the training and educational establishments and in the Commercial and Industrial Sector... severe disciplinary action will be taken against anybody who incites or organises or takes part in any such strikes."<sup>114</sup>

Quite akin to most Presidential directives, such notices make no allusion as to whence legal authority for such orders was derived. And even, giving the benefit of the doubt as to its legal validity, the procedures followed are totally alien to those prescribed in the legal order, namely, a press release in the local dailies rather than a gazette notice. Because the orders came with no reference to any legal authority, we have to indulge in the thankless job of combing the whole legal milieu to ascertain whether we can peg this directive against any power conferred to the President which entitles him to issue a directive such as he had.

The Trade Disputes Act bestows no powers to generally ban strikes, and as such cannot be pleaded as coming to the aid of the President to validate his action. Other arguments have been proffered to assert the legal tenacity of the ban,<sup>115</sup> inter alia, that the decree was an implied invocation of the Presidential powers under the Preservation of Public Security Act.<sup>116</sup>

Was the ban an implied invocation of the Presidential powers under the Preservation of Public Security Act? According to S.85 of the 1969 constitution, "the President may at any time, by an order published in the Gazette, bring into operation,

generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any of the provisions of that Part of the Act (Emphasis mine)." Part III of the Act contains the provisions under the title "Special Public Security Measures" under which the President may make Special Public Security Regulations for certain matters of which an act such as banning strikes would, subject to the appropriate procedures being followed, be encompassed by S.4 (2).

The Presidential directive was not published in the Kenya Gazette but in local dailies without any mention of the Preservation of Public Security Act, so constitutionally, it was procedurally defective which renders the order void as per S.85 read together with S.3.

directive

Further the presidential/could not be seen to override the Constitution for S.3 asserts the Supremacy of the Constitution and provides that any law in consistent with it is null and void to the extent of the inconsistency. Neither could the directive have been a constitutional amendment for the legislative authority vests in Parliament<sup>117</sup> which is to exercise it in the manner provided for by S.47, a procedure that was not resorted to, for the decree came from the President and not the National Assembly acting in its legislative capacity.

Even assuming that the ban was in its very words published in the Gazette, which it was not, the obvious question is, can the Act be invoked by implication? Views on two ends of the spectrum exist in Commonwealth cases, which are <sup>of</sup> persuasive authority in Kenya.<sup>118</sup> In the Ceylon (now Sri Lanka) case of Kariapper v Wijesinha<sup>119</sup> a legislative act imposing civil liabilities upon persons named in the schedule to the Act resulted in the appellant's being dethroned from his parliamentary seat. The appellant's claim that the Act in question was void by firstly being inconsistent with the constitution, and secondly, by reason of not having been passed as a Constitutional amendment was rejected by the Supreme Court saying,

"....there is no reason for not construing the words 'amend or repeal' in S.29(4) as extending to amendment by inconsistent law..."<sup>120</sup>

The Ceylon Court continued that,

"It is the operation that the Bill will have upon becoming law which gives it its Constitutional Character, not any particular label which may be given to it."<sup>121</sup>

Thus if this decision were to be adhered to in Kenya, the President could invoke by mere implication, the Preservation of Public Security Act. However, a contrary view that an Act cannot be brought into operation implicitly and without mention, was expressed in the Sierra Leone Case of Akar V Attorney General of Sierra Leone<sup>122</sup> where an Act changing the citizenship status on the basis of racial considerations, in opposition

The Presidential directive banning strikes was according to the Press release, of "...immediate effect until further notice." Thus even assuming that the order was valid, which we have argued it was not, it would by virtue of S.85(2) of the Constitution have lapsed after twenty eight days unless renewed by Parliament. Since the issuance of that directive over eight years ago, Parliament has never ratified nor renewed it.

The Presidential directive further stated that,

"Severe disciplinary action will be taken against anybody who incites or organizes or takes part in any such strikes."

However having argued that the ban was itself unconstitutional hence void, we supplement that contention by reference to S.77(8) of the Constitution which says;

"No person shall be convicted of a Criminal Offence unless that offence is defined, and the penalty thereof is prescribed, in a written Law."<sup>125</sup>

The press release is not a "written law" for as earlier argued, the ban was not published by a notice in the Kenya Gazette as required by S.85(1). Further the penalty for the "offence" of non-observance of the directive was not even prescribed in a written law as required by S.77(8). Therefore the government is legally incapable of taking criminal action against a person who contravenes the directive, unless they lump other charges on him/her.

From the foregoing, we can no better than assert the legal impropriety of the Presidential directive to ban strikes for it did not have the blessings of the Constitution. Strikes as mentioned in the first paragraph of this section, are avenues used by oppressed persons to express themselves against those whom they regard as their oppressors, so that they (the oppressed) can be accorded better remuneration from the proceeds of their production. Hence we notice antagonism between these two social groups, of which by the ban of the strikes by the state, the benefit tilts towards the class that appropriates surplus-value, but does not itself produce it. The major role of the state - to serve this dominant class - is thus bailed out.

Despite its legal invalidity, the ban was being treated as if it were enforceable thus showing the extra-legal extent of presidential power.<sup>126</sup>

## 5 EFFECTIVENESS OF CONTROL MECHANISMS

### 5:A SEPARATION OF POWERS DOCTRINE

In Chapter one, we discussed Montesquieu's doctrine of separation of powers<sup>127</sup> and noted that it is supposed to act as a control device upon the power of the government. Recapitulating, the principle posits that nucleating governmental power in one organ would give rise to despotic and arbitrary regimes. Hence in order to obviate such a likelihood, Montesquieu argued that governmental power should be dissipated to be exercised by three different organs

which would act as controlling devices inter se.

These organs were to be namely, the Executive, the Legislature and the Judiciary. In elaborating Montesquieu's doctrine some legal pundits<sup>128</sup> contend that the principle does not mean that the Executive ought not to have influence or control over acts of each other, but only that neither should exercise the whole consignment of powers of the other. We argued more exhaustively in chapter one that once the executive is capable of "influencing or controlling" parliament, the latter ceases to provide a check on the powers of the Executive, and this contradiction within the doctrine of separation of powers makes the principle lapse. Reverberating the submission in chapter one, we contend that the capability of one organ to "control or influence" another is not surprising for the three organs are creatures of the state and are so modelled to act not in mutual restraint inter se but in mutual interest, because the prime purpose of the state is to serve the interests of the ruling class, of which/class controls these three organs.<sup>129</sup> The separation of powers doctrine is supposed to find observance in Kenya<sup>130</sup> and we shall proceed to examine whether in relation to Presidential power, the legislature and the judiciary have provided any effective check.

) THE LEGISLATURE AS A CONTROL DEVICE OF PRESIDENTIAL POWER:

In Chapter 3:3 we discussed at length the 1964 Kenya Constitution and the subsequent amendments to it. The

underlying result of the alterations of the Constitution, as we recurrently noted, was to inflate executive, hence presidential, power at the dire expense of Parliament, such that Parliament was denied opportunity to effectively act as a check upon executive power.

As we noted, the third amendment<sup>131</sup> decreased Parliamentary control over the President's emergency powers such that the period within which Parliament was required to approve a declaration of emergency by the President was extended from one to three weeks and the period the emergency, once approved, could last was extended from two to three months.

The fourth amendment<sup>132</sup> enabled the President to exercise more control over the Members of Parliament for he now had the powers to pardon any Member of Parliament who would otherwise lose his seat if he defaulted in attending Parliamentary sessions on eight consecutive sittings without the Speaker's permission.

The sixth amendment<sup>133</sup> relaxed the President's emergency powers even further and in fact amounted to Parliament ceding some of its emergency powers to the President. Further, the emergency provisions were not in an ordinary Act of Parliament and not in the Constitution thus it could be altered with the ease of a simple majority unlike if it was a constitutional provision. With the Clout the President had acquired, the executive could easily muster sufficient votes to constitute a simple majority whenever they wanted to alter the Act.

The tenth amendment<sup>134</sup> abolished the twelve positions of specially elected members of Parliament who were now to be nominated by the President,<sup>135</sup> thereby subjecting more members of Parliament to Presidential Control, for their appointment rested on their patronizing the President.<sup>136</sup> The tenth amendment also altered the manner of Presidential election by introducing the "pairing system" (see chapter 3:3) such that he was no longer dependant upon Parliament. As Gertzel puts it,

"To the extent that the President became dependant upon a national electorate he increased his independence of the legislature. While he remained constitutionally responsible to Parliament he became more independent of it, since he was no longer necessarily dependant upon the members for his election."<sup>137</sup>

The tenth amendment further resulted in Parliament losing more powers of control over the President under the Preservation of Public Security Act which embraces detention and emergency powers. Previously, once parliament sanctioned the invocation of the Act by the President, the operation of the Act was valid for eight months. This time period was now removed<sup>138</sup> such that the Act operated indefinitely as long as the President wished, subject to the revocation powers of Parliament.

The progressive attrition of parliamentary powers which were proportionately gained by the President, institutionalized the supremacy of the President and led one Member of Parliament to bitterly lament;

"...this House... has been losing power slowly, and slowly, since we came to this Parliament.... According to the changes .. no candidate can stand for elections unless he is supported by a president..., the member has to state on his ticket that he supports so-and-so as President. This reduces very much the position of a Member of Parliament as somebody who is representative and who should have a voice, because he is subjugated below somebody under whose cover he is coming to Parliament ..... It is the executive who is controlling the Member even in the House (emphasis mine)."<sup>139</sup>

The amendments have relegated Parliament to a position where it cannot in any considerable degree, check nor control Presidential power.

Why was there this aggrandizement of power by the Executive (especially the President) with a proportionate reduction of parliamentary power? This is the question we shall venture to answer. We intimated earlier that the Kenya Independence Parliament consisted of an elitist class (see Chapter 2:5:C). This has not changed even today,<sup>140</sup> This elitist class was carefully groomed by the colonial power prior to their granting Kenya Independence (see Chapter 2:5:C) so as to ensure that a proper agent class sympathetic to the monopoly capitalist interest ascended to power. As mentioned earlier also (Chapter 3:2) the departing colonialists feared that a strong central

government would threaten their interests which they had not yet surrendered. Thus at independence they created an Executive that was not as strong as it had been during the colonial era. Governmental power was extremely decentralized and the National Assembly and Regional Assembly got a lot of power. The monopoly capitalists saw this as the best way to preserve their interests (See Chapter 3:1 and 3:3).

However, due to the material contradictions in Kenya's quasi-capitalist society in form of antagonistic social groups emerging, some of the elitist Members of Parliament begin to re-align forces with the more populated lower social classes, especially the workers and peasants. Thus we find that a few Members of Parliament begin to raise contentious issues as the distribution of land in Kenya.<sup>141</sup> When it appeared that the power of the monopoly capitalist was beginning to wane in Parliament, a plan was mooted in order to preserve their pre-eminence in law making. The monopoly capitalists and their ardent local agents began to feverishly off-load from Parliament its extensive law making powers and shifting the same to the comfortable confines of the Executive where this bourgeoisie class still retained pervading influence, and where, under their meticulous scrutiny, they could direct law along a path that would yield best results for this class. This was the prime reason for the transfer of power from Parliament to the Executive through the amendments previously examined.

Rulings of the Speaker over Parliament-Executive relations have also tended to show the general mutual roles of these organs of state power. Parliamentarians are supposed to control the Executive and they can do this through posing questions to the Executive, the answers of which may be the subject of debate and criticism of the Executive where it has erred. However, the Speaker has ruled that the Government has no obligation to answer questions from the members.<sup>142</sup> Parliamentary control through criticism of the government is thus very diminished because MP's may not be able to elicit information relevant to a debate, from the government.

The constitution also needs to be indicted for it grants the President "blank cheque" authority such that he is capable, even on improper motives, of emasculating parliamentary power as against the Executive. For example, when Kenya's third Parliament first met to elect a Deputy Speaker, the House was unanimous on the choice of Hon. J.M. Seroney for that post.<sup>143</sup> Hitherto, Hon. Seroney had been a strong critic of the government and his probable election was viewed with much chagrin by the executive. In order therefore to bring a critical house to an end and possibly obviate the likelihood of Seroney's election, the President invoked his virtually unlimited powers of prorogation of Parliament in S.58(1) and S.59(1) of the Constitution and thus sent Parliament for a recess.<sup>144</sup>

The Constitution S.85 gives the President the power to invoke at any time, Part III of the Preservation of Public Security Act. Part III of that Act contains the powers of detention of persons which have been used by the Executive to detain Members of Parliament who are critical of the government. For example in 1975, two Members of Parliament, one being the Deputy Speaker, were detained following biting comments they made in Parliament on the government.<sup>145</sup> Such use of Presidential power for improper purposes has inculcated fear in MP's such that Parliament is not capable of acting as a control device of Executive action.

Parliament cannot provide control mechanism where it consciously and overtly acts as an accomplice with the President, in wantonly contravening the Constitution even when MP's have themselves taken an oath to uphold the constitution. The mutuality between the Parliament and the Executive is evident when Parliament, with extravagant alacrity, went ahead to implement the Presidential directive on the use of Kiswahili (see Chapter 3:4:B) without regard to, and in contravention of the Constitution. It is even worse when the Speaker himself rules that "there is no need to be legalistic"<sup>146</sup> thus "justifying" the disregard of the Constitution.

The hierarchical inferiority of Parliament to the President is implicitly admitted when the Speaker said after the Presidential directive on the use of Kiswahili in Parliament;

"...Lakini jinsi nilivyowaeleza, ilikuwa vigumu sana kuzuia lugha (hii) isitumike Bungeni (translation in footnote)." <sup>147</sup>

Having established that Parliament is essentially a class institution under bourgeois control, it is not surprising that it acts in reciprocity and mutuality with the Executive, for the prime purpose of maintaining the dominance of the bourgeoisie. The major function of these state Creatures, and by analogy the State, is then clear.

ii) THE JUDICIARY AS A CONTROL DEVICE OF PRESIDENTIAL POWER:

The Judiciary is the other organ of state which per Montesquieu's doctrine is supposed to act as a check upon the power of the Executive hence the President. We examined the colonial judiciary in Chapter 2:5:B and noted that its purpose was to supplement the other organs of government, namely the Executive and the Legislature, and was not and did not pretend to act as a control device. The independence government having inherited the Colonial structures, inter-alia the judiciary, meant that the role of the judiciary was unlikely to change in independent Kenya.

Like the Colonial Governor, the President is immune from either criminal or civil processes during his tenure of office. <sup>14</sup> This necessarily makes him very powerful indeed for it removes him from the purview of the courts.

*Review*

Moreover, the President has a strong hand in the appointment of judges of the High Court.<sup>149</sup> He is solely responsible for the appointment of the Chief Justice<sup>150</sup>, and he appoints puisne judges in accordance with the advice of the Judicial Service Commission. This indeed presents him with an opportunity to select persons who seek his patronage and are therefore likely once appointed, to make decisions that favour the incumbent of Presidency.

The judges are supposed to be provided with security of tenure such that he can be "removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be removed except in accordance with this section (S.62)."<sup>151</sup> And the constitution goes on to provide elaborate procedures for such removal. S.62(4) and S.62(5) state that a judge shall be removed from office by the President if the question of his removal has been referred to a tribunal which after inquiring into the matter, recommends to the President that the judge be removed. The tribunal shall be appointed by the President,<sup>152</sup> though the selection as to who will constitute it will be done, in the case of the suggested removal of the Chief justice, by the Public Service Commission, and in the case of a puisne judge, by the President.<sup>153</sup> Either way the power of the President as to who constitutes the tribunal is immense bearing in mind that the members of the Public Service Commission are themselves Presidential appointees.<sup>154</sup>

However these constitutional provisions for security of tenure, though minimal, can easily be circumvented, namely by appointing judges on contractual terms or alternatively by the use of extra-legal processes to obtain the judges' resignation.<sup>155</sup>

The courts have been incapable of controlling the Executive, for that is not their role. In Ooko V R<sup>156</sup>, Ooko had been detained under the Preservation of Public Security Act. He filed a complaint in the High court alleging that his detention was unlawful for inter alia the following reasons; he was not given reasons for his detention within the prescribed period; the reasons were not sufficiently detailed as required by the Constitution; he was detained under a wrong name. On the first ground, the Court held that the reasons were given within the prescribed period but agreed with the plaintiff that they were not sufficiently detailed out. It did not, however, think this was sufficient cause for his release.<sup>157</sup> The court also agreed that he was detained under a wrong name but held that even in spite of that, the detention was not unlawful.

It is therefore evident that Montesquieu's theory of checks and balances as applied in Kenya cannot limit governmental, or for that matter presidential, power. More so if the society is a class society, as Kenya is, the concentration of power is still in the dominant class who, by their control of the State create three different organs which though acting mutually inter se mainly for the benefit of this dominant class, they

are made to appear as if they are to act in mutual restraint.

As Frederick Engels said of the separation of powers doctrine;

"The so-called division of power... is infact nothing but the prosaic, practical division of labour applied to the state machinery with the aim of simplification and control .... like all other eternal, sacred and inviolable principles, this principle, too is applied to the extent to which it corresponds to existing relations." <sup>158</sup>

3:6 RULE OF LAW AND PRESIDENTIAL POWER:

Dicey's<sup>159</sup> formulation of rule of law, despite its deficiencies<sup>160</sup>, contained three kindred principles.

Firstly, no man shall suffer any punishment except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is, distinguished from systems of government where officials exercise wide arbitrary or discretionary powers, which necessarily means insecurity for legal freedom on the part of the subject. We have discussed in this whole chapter (especially 3:3, 3:4 and 3:5:A) the wide, arbitrary and discretionary powers, both legal and extra-legal, of the President which are evidently inconsistent with the existence of the rule of law.

Secondly, the rule law in Dicey's understanding meant that no man was above the law and further that every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. As we saw earlier, the President is immune from the court's authority.<sup>161</sup> This second element of the rule of law is therefore departed from in Kenya. Further, the second limb embraces the idea of equality, of all persons of which equality cannot exist in a society, like Kenya's, where there are classes, each with differential access to the benefits of production.

From the foregoing, the Rule of law during Kenyatta's era was considerably departed from that it was difficult to pinpoint its existence, for the exercise of power was not commensurate with that principle.

:7 CONCLUSION:

We did in chapter two trace the Governors powers in Colonial Kenya. In Chapter three, we attempted to show that the President was bequethed these powers in their proliferated nature. Further we showed that the exercise of Presidential power strayed well beyond the frontiers prescribed by the Constitution or Statutes, and was intimately linked to the political economy with the desired aim of preserving the existing relations of production and the economic system general

We noted also that the Presidential directives were implemented with much gusto and alacrity without initially establishing their legal tenacity. This therefore brings us to the issue we are to take in Chapter 4, namely "What in Kenya is considered to be the law?" Is it that which is contained in the statute books (this being the working definition we used for Presidential directives (see Chapter 1:1))? Or is it that which is actually done? We shall attempt the answers to the above in the concluding chapter.

CHAPTER FOUR

CONCLUSION

In the preceding chapters, we showed that the President's powers in Kenya during the Kenyatta era were immense and carte blanche. We also showed that the reason for this proliferation of presidential power was not a whimsical and spontaneous process but had historical roots traceable to the colonial era, when the Governor exercised similar authority. And these reasons were that Kenya should be inculcated into the International capitalist whirlpool so as to facilitate the rapid exploitation of which would mainly be pilfered by the monopoly capitalist resident in the metropolis. In order to do this the powers of the Head of the Executive had to be inflated so as to transform the pre-capitalist economy and set it on a path towards fully-fledged capitalism.

Whereas the powers of the Governor were prescribed by law, occasion was always sought to override these limitations especially when the law was deemed a constraint upon that prime purpose of the Imperial power mentioned in the preceding paragraph. Thus the law as appearing in the statute books was a mere sham.

We also noted that towards the 1920's, the structural configuration of government organisation was progressively being modified in an attempt to introduce, in a nascent form, the doctrine of separation of powers. However, this restructuring of governmental machinery in purported conformity with this doctrine was a mere façade to mask where real power actually repositied, in the Governor who acted on the instigation on the monopoly capitalists.

Come independence, and the monopoly capitalists, despite having meticulously groomed the future African leaders into an agent class with a stake in the economy, still nurtured apprehensions about this African agent class whom, the monopoly capitalist thought, would attempt to wrest control of the means of production from them (i.e the monopoly capitalist). In order therefore to ensure continuity of the economic system, governmental powers at independence were greatly dissipated to ensure a weak central government. But countries freshly emerging from colonialism, like Kenya then, had to proceed on foundations built by the colonial power which meant a strong central government. Coevally, the monopoly capitalists were bouyant enough when they did not oppose the establishment of a strong central government - the Republic - after they realised that the African agent class was indeed committed to initiating Kenya into capitalism. This fact was noted between 1963 and 1964 when this agent class comprising virtually the whole government, including the President, served their probationary period which per monopoly capitalist interest,

was a promising indicia for expansion of their exploitative excursions. Thus the constitutional arrangements began which ended in the President attaining preponderant powers like his colonial counterpart, the Governor.

The doctrine of separation of powers was also purportedly introduced but, just like in the colonial era, it served the purpose of clouding where the muscle was; in the Presidency exercising it to benefit mainly the bourgeoisie.

As was seen, the progress towards inflating presidential power was done through inter alia, the constitution which today grants virtual "blank cheque" authority to the President. In fact our constitutional structure connives to permit presidential aggrandisement of powers. Further to this, attempts were made to create in the Presidency, an institution sui generis. For example in 1973, the Statute Law (Miscellaneous Amendments) Act No.3 of that year was passed and it prohibited the use of the title "President" in Kenya, and reserved it for the exclusive use of the Head of the Executive. This was done in order to create the Presidency as a unique institution, aside from and superior to other positions. The then Attorney-General said that the aim of the Act was to,

"...avoid confusion in the minds of the Public when reference is made to both associations' presidents' and the Head of State."<sup>1</sup>

The intent to create the presidency as a paramount institution "in the minds of the public" was couched in many extra-legal forms, leading to the emergence of fanatical president-worship groups. The politicians, civil servants and others alike, strove to belong to this cult of president-worshippers, so as to reap the probable benefits of patronage. The President was showered with a confetti of praises and was flattered that he was the paragon of wisdom. All successes of the government were, deservedly or undeservedly, attributed to him, whilst the failures were burdened on others. The president was given premier treatment in all news dispatches. Even the title which Kenyatta acquired of "Mzee" was designed to uplift his status "in the minds of the public". As Sellassie says;

"Nor should the titles adopted by some of the African leaders such as 'Mwalimu' 'Mzee' 'El Rais' or 'Osagyefo' be understood as the whimsical creation of powerhungry men.. such devices were designed to strengthen the image of the new leaders and with them the nation which represented a wider loyalty than the tribes to which the Africans had hitherto been accustomed."<sup>2</sup>

The cumulative effect of all these legal and extra legal processes was to influence the emergence of the institution of the Presidency as an overawed, greatly revered position in the minds of the general citizenry. He thereby exercised enormous clout.

This explains why the President's directives, even where they contravene the constitution or other laws superior to the directives, they still attain obedience and with remarkable zeal than law proper. In Chapter one, we presented the working definition of these presidential directives in a widely positivistic sense, to be

"...rule-like promulgations issued by the President pursuant to authority which he thinks he has, derived wholly or partly or simultaneously from the constitution and the Acts of Parliament."<sub>3</sub>

Talking of the juridical positivist school of jurisprudence Kibwana states, and we quote with approval, that,

"(It) views law as an aggregate of legal norms willed by a political sovereign.... The morality or immorality of this 'law' is irrelevant in defining and thus determining its existence so long as the formal criteria - mainly constitutional - have been adhered to in its promulgation."<sub>4</sub>

The approach we used was quite intentional in order to show that it is not, jurisprudentially, the positivist school which gains currency in Kenya, for the legal norms established by the same state are themselves departed from wantonly by the same state, and we have sufficiently exhibited this by reference to Presidential directives. Thus we quite

disagree with Kibwana when he concludes, in his otherwise thought - provoking article, that juridical positivism is the school of law relied on by the ruling class in Kenya to explain the essence of law.<sup>5</sup>

We saw that presidential directives do not, quite often, accord to the formal rules of promulgation and are therefore in strict positivistic sense, not 'Law.' However, as noted, these directives are implemented with zealous fervour and adhered to as law.

In examining Presidential directives we did not utilise positivist methodology but a historical materialist one. We concur with Kibwana when he asserts that,

"Because juridical positivism defines law in (a) narrow sense, legal scholars who are its disciples are, in studying what law is, satisfied with merely analysing legal rules in a descriptive, mechanical fashion without relating them to historical and socio-economic factors which cannot possibly be ignored in fully understanding the essence of this phenomenon."<sup>6</sup>

That is in effect why when discussing presidential directives we posited it in a historical and socio-econo-political context, so as to elicit the raison d'etre for its emergence.

In analysing presidential directives qua presidential power in the mentioned historical and socio-econo-political context,

we noticed that they are (and here is where we attempt their definition which overrules the working definition submitted in chapter 1:1);

Rule-like promulgations issued by the President, the authority for such promulgations being himself and not necessarily statute law; and the function of such directives being to ensure, in the very least, the subsistence of the current political economy of quasi-capitalism, and at most, the steady progression of that economy to the fully fledged maturity of capitalism. Needless to say, these directives are indeed legally binding because they are treated as such.

Footnotes

CHAPTER ONE

1. The Kenya Constitution, Act No. 5 of 1969, S.60(1) gives the High Court "unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law". The unlimited original jurisdiction necessarily means that the High Court can examine the legality of any purported law.

We shall in Chapter III examine the extent of Judicial Review of Presidential action.

2. See Kivutha Kibwana, Juridical Positivism in Kenya; A preliminary enquiry (mimeo) at pp. 3
3. Daily Nation 5th July, 1974
4. The then Minister for Labour, Dr. J.G. Kiano referred to them as "presidential decrees", see Daily Nation, 10th May, 1966 pp.9
5. See L.I.J. Gilmore organised labour and Government Controls 1975 EALJ 1, footnote 125 - line one on page 30.
6. The Kenya Constitution (see footnote 1 above, S - 127
7. Mr. G.K. Kariithi former Head of the Civil Service is on record as having said that there are no presidential decrees in Kenya as that term connotes the existence of a dictatorial regime, of which, as he submitted, Kenya is not. What exists in Kenya were, in his partance, presidential directives, Daily Nation.

Chapter One Footnotes Cont....

This was a non legal distinction between these two terms.

8. Esprit de Lois Book XI Chapter 6  
English translation by Thomas Nugent - The Spirit of the Laws Book XI  
(Hafner Publishing House, New York) Reprinted 1962.
9. Ibid at pp. 150
10. Ibid. at pp. 150
11. Ibid. at pp. 151
12. Ibid. at pp. 151-2
13. E.C.S. Wade and G.G. Phillips, Constitutional Law 6th Ed.  
(Longmans, Green and Co., 1960) at pp. 23. See also Sir Ivor  
Jennings, The Law and the Constitution 5th ed., Sir Carleton Allen,  
Law and Orders ,, Chapter 1, J. Finkelman Separation of powers,  
Toronto Law Journal pp. 313.
14. Ibid at pp. 23
15. Wade and Phillips, Ibid at pp. 21
16. F. Engels, The origin of the Family, Private Property and the State  
in Karl Marx and Engels, Selected Works, Progress Publishers, Moscow at  
pp. 576.
17. Ibid at pp. 577-8
18. R. Milliband: The State in capitalist Society: An Analysis of the  
Western System of power (New York, Basic Books, 1969)
19. P.M. Sweezy, Corporations, the state and Imperialism Monthly Review Vol  
30, No. 6 November 1978 pp. 1-10.
20. V. Lenin, Selected Works, Vol 3 pp. 248
21. per Mwendwa, C.J. in Okunda V R (1970) EA 453 who implicitly recogni

the three pronged governmental division of power when he says at pp. 41

Chapter One footnotes continued

" The Kenya Constitution is the instrument which brought into being the entire state and government machinery that exists today. The Legislative, the executive, and the judiciary owe their existence to the constitution."

Also, the general scheme of arrangement of the 1969 Constitution admits of an attempt to introduce the doctrine of separation of powers to Kenya. See, Liyanage v R (1963) N.L.B. 313 (Ceylon) 785; (1965) AC 172

22. See generally, the Kenya Constitution Act 5 of 1969.
23. Ibid S.30
24. Ibid S. 23(1)
25. Ibid Chapter Four generally, especially S. 60(1)
26. Ibid S. 30 he is a member of Parliament
27. Ibid S. 23(1)
28. Supra footnote 24

FOOTNOTES

CHAPTER TWO

1. Africa Order in Council, 1895
2. See East Africa Order in Council, 1897, Article 3(iv)
3. East Africa Order in Council, 1906
4. Kenya Independence Act, 1963 (UK Legislation)
5. Ibid
6. Kenya Constitution Amendment Act 26 of 1964
7. Kenya Constitution, Act No. 5 of 1969, S. 23(i), S.4
8. Supra (footnote 6), S.8
9. Halsbury's Laws of England vol. 10 pp.501 et.seq.
10. Ibid
11. Gubernatorial means Governor's
12. East Africa order in Council, 1897, Article 45
13. Ibid, Art. 7
14. Ibid., Art. 7(6)
15. Ghai and McAuslan, Public Law and Political Change in Kenya (OUP, Nairobi, 1970) pp. 37-38
16. Quoted from Ghai and McAuslan Ibid at pp. 38
17. E.A. Order in Council, 1899, No. 757, S.9
18. E.A. Order in Council, 1902 Art. 28
19. E.A. Order in Council, 1897, Art. 43(i)
20. Ibid., Art. 12(1)
21. Ibid., Art. 12(2)
22. Ibid., Art. 12(5)
23. See generally, Lenin, V.I. Imperialism, the Highest Stage of Capitalism (Progress Publishers, Moscow, 1970)

Chapter two footnotes Continued

24. Ibid.
25. Hartmut Schilling, Colonial Downfall and neo-colonialism  
Special Issue No - 3, Akademia - Verlag, Berlin, 1979 pp. 1-5
26. Derived from argument submitted by K. Marx in Capital Vol. 1  
(Progress Publishers, Moscow) at pp. 716.
27. V.I. Lenin, op .cit., (footnote 23) at pp. 87-88
28. Ibid at pp. 88
29. K. Marx, op.cit., (footnote 26) at pp. 580
30. See Engels F. Letter to J. Bloch and C. Schmidt reproduced in  
pp. 487 and 489 respectively of Marx and Engels, Selected works,  
Vol. 2 (Progress Publishers, Moscow, 1970).
31. (1914) 5 EALR 70
32. Namely Robert Chamberlain and A.S. Flemmer.  
had
33. This land/actually been competed for by not only these two  
South Africans but also by a band of Jews called the "East African  
Syndicate" who had to yield to the influence of the former  
couple.
34. See F.O. 2/832 Lansdowne (Foreign Secretary) to Eliot 8/3/1904  
and F.O. 2/835 Eliot to Lansdowne 7/4/1904, Quoted in George  
Bennett: Kenya, a political History in the colonial period,  
(London, OUP, 1963) pp. 14.
35. Supra (footnote 31) at pp. 92
36. Ibid. as per Hamilton, C.J. at pp. 71
37. Lord Kingsdown in the Privy Council case of Secretary of State  
for India v Sahaba XIII Moore 22
38. per Hamilton C.J. (Supra footnote 31) at pp. 80
39. For a more detailed cogent argument on this issue, see Ghai  
and Mc Auslan (Supra footnote 15) at pp. 21-24
40. The narration is derived from Ojwando Abour, White Highlands no more,

Chapter Two footnotes continued

(Pan African Researchers, Nairobi) Vol. 1 at pp. 69 et seq

41. Me Katilili, a woman, and Wanju Madora.
42. Dilley, M.R., British Policy in Kenya Colony (Thomas Nelson, New York, 1937) at pp. 4-5
43. Lord Lugard The dual Mandate in British Tropical Africa (Frank Cass, London, 1965).
44. Walter Rodney How Europe Underdeveloped Africa, (Tanzania Publishing House, Dar-es-Salaam, 1974) pp. 31,36,37
45. Ernest Mandel, An Introduction to Marxist Political Economy (Mimeo) at pp. 19.
46. Crown Lands Ordinance, No. 12 of 1915, S.5, 54 and 56
47. (1923) 9(2) KLR 102
48. See Kenya (Annexation) order in Council, 1920, S.R. & O. 1920 No. 2342
49. Karl Marx Capital Vol. 1, (Progress Publishers, Moscow) pp. 668
50. E. Mandel (Supra footnote 45) at pp. 20-21
51. No. 21 of 1902
52. Dilley, M.R. (op.cit. footnote 42) at pp. 35
53. These were mainly the ex-soldiers who however were extravagantly assisted to settle down and special legislations to cater for them were enacted, see, East African Protectorate Land Settlement Scheme for Ex-Servicemen (Press Notice of 1919) and the Crown Lands (Discharged Soldiers Settlement) ordinance of 5th February, 1921
54. See the Agricultural Advances Ordinance, 1930 (No. 12); Land and Agricultural Bank Ordinance No. 3 of 1931; The Agricultural Mortgagor's Relief Ordinance of 1934 (No. 35) (read together with the Indian Transfer of Property Act No. 9 of 1882 received in Kenya by the 1897 Order in Council) etc.
55. See Lenin, V.I., (Supra footnote 23) Chapter 4.

Chapter Two footnotes continued

56. E. Mandel (op. cit. footnote 45) at pp. 21
57. No 8 of 1906
58. No. 3 of 1918
59. See the East African Standard, 10th January, 1920 pp. 9
60. No. 1 of 23rd October, 1919
61. Quoted in Dilley, M.R. (Supra footnote 42) at pp. 225
62. East African Standard, 27th December, 1919 pp. 18; 10th January, 1920 pp. 10; 10th April, 1920 pp. 8.
63. House of Commons, Debates, 26 ii) 20, v. 125, c 1891
64. See K. Roberts - Wray who argues in Commonwealth and Colonial Law (London, Stevens and Sons, 1966) at pp. 406 that the Colonial Laws Validity Act 1865 applies to colonies as well as protectorates so any analogous provision in the Foreign Jurisdiction Act, 1890, of which Act governs only protectorates, is redundant. Thus S.12 of the Foreign Jurisdictions Act. is thereby inconsequential by virtue of S. 2 of the Colonial Laws Validity Act, 1865
65. Ibid.
66. E.A. Order in Council, Act 12(2)
67. Dilley M.R. (Supra footnote 42) at pp. 138, see also J.B. Ojwang, The Executive in independent Kenya's Constitutional context (Unpublished LL. M . Thesis, University of Nairobi, 1976) at pp. 15
68. Dilley M.R. Ibid at pp. 138
69. George Bennett, (Supra footnote 34) see it generally
70. Ghai and McAuslan ( Supra footnote 15)
71. Ghai and McAuslan Ibid at pp. 23-24
72. Ol le Njogo v AG (1914) 5 EALR. 70 at pp. 71

Chapter Two footnotes continued

73. See Despatch.... relating to native labour Cmnd 873 of 1920 at pp. 3 - quoted in E.A. Brett, Colonialism and Underdevelopment in East Africa: the politics of economic change 1919 -39, (Heinemann, 1973, Nairobi) at pp. 187
74. E.A. Order in Council, 1897, Act 43(1)
75. (1914) 5 EALR 70
76. (1879) 5 App. Cas. 102
77. (1953) 2 QB 482
78. See Wade and Phillips, Constitutional Law 6th ed. (Longmans, Green and Co., 1960) Chapter 33.
79. (1956) K.B. 1 at pp. 15
80. See Chapter 3:3; and also Act No. 5 of 1969 S. 17(1), (2) and (3)
81. Dilley, M.R. (Supra footnote 42) at pp. 47
82. Dilley, M.R. Ibid
83. Brett, E.A. (Supra footnote 73) Ch. 6 pp. 189-191
84. No. 22 of 1919
85. E.A. Order in Council 1919
86. Dilley, M.R. (Supra footnote 42) at pp. 34
87. Kenya (Annexation) Order in Council S.R. & O. 1920 No. 2342
88. The protectorate was the remainder of the East Africa Protectorate consisting of the coastal strip leased from the Sultan of Zanzibar - see The Kenya Protectorate Order in Council, 1920 S.R. & O. 1920 No. 2343; For boundaries see the E.A. Order in Council 1902 S.R. & O No. 661; the Kenya Colony and Protectorate (Boundaries) Order in

Chapter two footnotes continued

Council, 1921 S.R.&O. 1921 No. 1134 (as amended by S.R. & O. 1926 No. 1733; statutory Instrument 1948 No. 2062).

89. dated 11th September, 1920

90. S. XV of the Royal Instructions 1920; This provision was not implemented until 1924 when the Legislative Council (Amendment) Ordinance was passed, No. 1 of 1924.

91. Additional Royal Instructions, 1925.

92. Additional Royal instructions 13th April, 1954, Government Notice 582/1954; see also Despatch to Governor (Government Notice 583/1954)

93. Maina-wa-Kinyatti, Mau Mau: The peak of African Political organization in Colonial Kenya (mimeo).

94. Oginga Odinga, Not yet Uhuru, Heinemann, 1967 at pp. 249-250

95. For an African to get a vote he had to be 21 years old or over, and satisfy one of a number of conditions, getting an incremental vote for each such qualification upto ceiling of three;

(a) to have completed intermediate school,

(b) have property yielding an income of over £120 or being worth over £500,

(c) to have been long in government service or the armed forces,

(d) to have achieved a higher education,

(e) legislative experience or meritorious service,

(f) seniority by virtue of being an elder or of age of over 45

(women were ineligible under this last section).

96. S. 49

97. S. 68

98. A.V. Dicey, An Introduction to the study of the law of the

Chapter two footnotes continued

Constitution (London, Macmillan, 1959 a 1973 reprint)

99. See S.B.O. Gutto, Taking the law into their own hands:  
the Ruling class, the rule of Law and the Public in Kenya  
(mimeo, 1981), Topic 3.
100. Dicey, (Supra footnote 98) at pp.187-8
101. Dicey, Ibid., at pp. 193

CHAPTER THREE

Footnotes

1. See generally, Colin Leys, Underdevelopment in Kenya (Heinemann, London, 1975); Oginga Odinga, Not Yet Uhuru., (Heinemann, 1967) pp. 256 et seq.
2. See Chapter 2 Subtopic 3
3. Maina-wa-Kinyatti, Mau Mau: The Peak of African Political organisation in colonial Kenya (Mimeo)
4. Oginga Odinga, Not Yet Uhuru, Heinemann, 1967. I recommend the whole of Chapter 14. I will however quote important passages from pp 255.

" But freedom for Kenya came not at victory point; as in Algeria, at the climax of the military rising (i.e. Mau Mau), but only five years later, in staggered stages after the administrators of the colonial system had made preparations for the timing and the manner of the Independence take over...(W)hen settler groups could no longer protect their interests in the names of white parties, from the benches of the legislature, they switched to lobby, caucus and backroom activity, and then used African political movements, especially KADU and Majimbo, to project settler policies. By the time it became clear that KANU could not be stopped from heading the first independence government, the ground had been laid by settler activity and by careful colonial office planning, for the slowing down of the full achievement of our independence aims".

Of independence, he says,

"Only the political and economic content of that independence can reveal whether it will have real meaning for the mass of the people. President Nasser has been foremost among those who have warned against the leaders of popular movement who give themselves upto deceptive constitutional facades while imagining that they have truly attained complete freedom".

5. Oginga Odinga, Ibid. at pp. 256 et seq.
6. See J.B. Ojwang, Executive power in Independent Kenya's Constitutional Context. Unpublished LL.M Thesis, University of Nairobi, 1976 at pp.20.

- 110 -
7. Statutory Instruments 1968/1963
  8. Kenya Independence Constitution S. 19(4)
  9. "Majimbo" is the plural Kiswahili word for a region or state as opposed to, but still a subset of the larger Federal State. It is used by writers such as Oginga Odinga, op.cit. footnote 4 at Ch.12; Ghai and McAuslan, Public Law and Political Change in Kenya, OUP, 1970 at pp.178, etc.
  10. s. 75
  11. s.75(3)
  12. The Prime Minister could be removed if within 3 days, he did not resign after a vote of no confidence in the House of Representatives, see s.75(4)(a); or, if following a general election, the Governor General considers that the Prime Minister did not enjoy popular support as indicated by the election results, see s.75(4)(b).
  13. S.75(3),(6)(a)
  14. The cabinet was established by s.76(1)
  - 15.s.76(2)
  - 16.s.76(2)
  - 17.s.76(2)
  - 18.s.72(2)
  - 19.s.65(1)
  - 20.s.65(2)
  - 21.s.65(3)
  - 22.s.69
  - 23.Oginga Odinga, op.cit. (ff4) at pp.249-250
  - 24.See footnote 6 above.
  - 25.Oginga Odinga, op.cit. (ff4) at pp.256
  26. See Chapter 2
  27. Kenya Constitution (Amendment) Act No.28 of 1964.
  28. s.33

29. S. 33A
30. S.33A(8)
31. S.33A(11)
32. See First Schedule to the Act and s. 76(4) of the Amended Constitution.
33. See S.186(2),(7),(8),(10),(11) &(13)
34. S. 34 c(a)
- 35.S. 33(b)
36. S.33(c)
37. See E.A. Order in Council, 1897. Article 43(1) and S.33G of the Amended constitution.
38. Kenya Constitution (Amendment)(No.2) Act No.38 of 1964.
- 39.Kenya Constitution (Amendment) Act No.14 of 1965
40. Kenya Constitution (Amendment) Act No.16 of 1966
41. S. 87
42. S. 87(a)(1)
43. Kenya constitution (Amendment)(No.3) Act No.18 of 1966
44. S. 29(1) of the above Act no. 18 of 1966 is presently couched in S.85(1) of the 1969 Constitution.
45. S.4(2)(a)
46. S.4(2)(b)
47. S.4(2)(b)
48. S.4(2) continues that the President may make special public security regulations for control of aliens, control of communication and information, control or prohibition of processions, meetings etc.
49. Kenya Constitution(Amendment) (No.2) Act No.45of 1968.
50. J.B. Ojwang, op.cit.,(footnote 6) at pp.85
51. S.33 A(3)(a)
52. Cherry Gertzel, The Politics of Independent Kenya 1963-8 (E.A.P.H., Nairobi, 1970) at pp.154

53. S.4
54. S.4(2)
55. Act No.5 of 1969
56. S.15(1)Ibid.
57. Ibid. S.15(6)(a)
58. Ibid. S.16(3)(a)
59. Ibid. S.17(1)
60. Ibid. S.17(2)
61. Ibid. S.17(2)
62. Ghai and McAuslan, op. cit. (footnote9) at pp.235.
63. Kenya Constitution Act No.5 of 1969, S.58, 59.
64. Ibid., S.59
65. S.27
66. Act 14 of 1975, S.2
67. See Chapter 1.1
68. Kenya Order in Council 1963 S.I. 1963/791.
69. Ibid. S.11(1) which read,  

"The Governor may, by regulations which shall be published in the Kenya Gazette and, if made on or after the appointed day, in the Regional Gazette of each Region concerned, make any provision which he considers necessary or expedient for giving effect or enabling effect to be given to the provisions of the constitution or in consequence of the coming into operation of the constitution and may in a like manner, provide that any of the provisions of the constitution shall have effect subject to such temporary adaptations, modifications, qualifications, or exceptions as in his opinion are necessary or expedient for the purpose of avoiding any administrative or other difficulties that may be incidental to the transition from the constitutional arrangements provided for by the existing orders to those provided for by the Constitution".
70. See Legal Notice 457 of 1963.
71. S.I. 1963/No. 1968
72. S.I. 1963/No.791 - see S.2 of S.I. 1963/No.1968.

73. See S.4(7) and Schedule 1 of S.I. 1963/No.1968 -  
Column 3 noted the date of expiry of Kenya (Land Control)  
(Transitional Provisions) Regulations 1963 (LN 457/1968)  
but see footnote 74 below.
74. S.14(1), S.15(2)
75. Bailey S.H.; Cross C.A.; Garner J.F.; Cases and Materials  
in Administrative Law (London, Sweet and Maxwell, 1977)
76. Ibid., at pp.154.
77. Ibid., at pp.154-155
78. See for example Lewisham Borough Council v. Roberts (1949)  
2 KB 608; R v. Skinner (1968) 2 QB 700
79. Ibid.
80. See footnote 60 above.
- S.17(2); See also Chapter 3.3 and footnote 61 above.
82. Chapter 3.3
83. Ghai and McAuslan op.cit. (footnote 9 above) at pp.235.
84. (1970) 1WLR 1231; (1970) 3 All E.R. 871.
85. English Statute
86. S.14(1), s. 15(2)
87. See Chapter 2:4, 2:5
88. Oginga Odinga, op.cit. (footnote 4 above) at pp.261  
et. seq. especially the debate aroused by B. Kaggia that  
drew even Kenyatta into the fray, leading to Kaggia's  
resignation as Assistant Minister.  
See also C. Gertzel, op.cit. (footnote 52 above) pp.44 et. seq
89. Maina-wa-Kinyatti, op.cit. (footnote 3 above)
90. Oginga Odinga, op.cit. (footnote 4 above) at pp.257 et seq.
91. Ibid. at pp.262
92. Daily Nation 5th July, 1974 pp.1

93. Act No.5 of 1969

94. Baraza la Taifa, Taarifa Rasmi, vol.xxxv safu 19-22

95. Ibid.

96. Ibid. (footnote 94) safu 57 translation as per the instant author,

"It is very true that there is a section in the constitution saying that the official language of the National Assembly is English which is to be used in conducting the business of the National Assembly".

97. National Assembly, Debates, Volume xii, part 1, 24th May, 1967 Column 155.

98. Taarifa Rasmi op.cit. (footnote 94 above), safu 57, translation as per instant author is as follows,

"As I told you, it was very difficult to prevent the use of this language (i.e. Kiswahili) in Parliament".

99. See Karl Marx, Preface, A Contribution to the Critique of Political Economy, 1859 where he says,

"In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life ....(I)t is always necessary to distinguish between the material transformation of the economic conditions of production... and the legal, political; religious, artistic or philosophic - in short, ideological forms in which men become conscious of this conflict and fight in out... (T)his consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production (emphasis mine)".

Appears in Marx and Engels, Selected Works, (Progress Publishers, Moscow, 1975) at pp.181.

100. See Gakuru, O.N. Pre - School Education and <sup>c</sup>Access to Educational Opportunities in Nairobi (Unpublished M.A. dissertation, University of Nairobi, 1979) at pp.124-6; see also K.G.C. Mkangi, The Political Economy of Kiswahili: A Kenya: Tanzania comparison (Mimeo,1982) at pp.20
101. K.G.C. Mkangi, Ibid. at pp.15  
Moreover, the use of English was reintroduced by an amendment in Parliament in 1979 - Act 1 of 1979 - see later in Chapter.
102. Ibid. at pp.21
103. House of Representatives, Debates, Vol.IV 23rd April, 1965 Co.1460
104. Ibid., Col.1485 where the government representative said that the Government should be able to introduce the constitutional amendment "when the time comes, to adopt swahili as one of the languages of this House and to hasten the date upon which the use of swahili would commence in the National Assembly."
105. Baraza la Taifa, Taarifa Rasmi, Vol.XXXV, 9 Julai,1974 safu 57. The MP was John-Marie Seroney.
106. See Kenya Gazette supplement No.49 (Bills No.13)
107. National Assembly, Standing Orders, Order 98, 99  
See Taarifa Rasmi (footnote 94) 10th July 1974 safu 70

108. Baraza la Taifa, Taarifa Rasmi, Vol.xxxv, 10 Julai, 1974 safu 70. The translation by the instant author is;  
"It is true that for about two days, we have employed kiswahili and if we have erred, we have erred (sic.) I think there is no reason for being legalistic now, because we have been using kiwahili ... we should now proceed with our business."
109. Taarifa Rasmi, Ibid., 11th July, 1974, safu 97
110. See Daily Nation, 13th July, 1974
111. Act 1 of 1979 S.3
112. Act 1 of 1979 S.2 - see amended S.34 (c)
113. Trade Disputes Act (cap.234 of the laws of kenya)
114. East African Standard, 17th August, 1974 pp.1
115. L.I.J Gilmore, Organised Labour and Government Controls (1975) EALJ 1 at oo.28 footnote 125.I owe part of the arguments developed subsequently to the above writer.  
  
Other justifications given to validate the Presidential directive are, according to Gilmore, that the order may be justified by the "doctrine of necessity" or that the decree effected an overthrow of the Constitution and the creation of a new legal order.
116. Cap.57 of the Laws of Kenya
117. S.30, Kenya Constitution Act. No.5 of 1969
118. as per Newbould, P in Dodhia V. National and Grindlays Bank (1970) EA 195
119. (1968) AC 717
120. Ibid., at pp.742-3 citing with approval the case of M<sup>C</sup> Caurley V the King (1920) AC 691

121. Ibid. at pp.743
122. (1970) AC 853
123. Another method is by invocation of the preservation of Public Security Act Part III - see Constituion S. 83 (1)
124. (1970) EA 453
125. However, the Proviso to this subsection exludes the criminal offence of Contempt of Court.
126. See for example, East African Standard, 29th Septemer, 1974 where "Bank workers in Kenya yesterday asked the government to warn employers not to misuse the Presidential decree banning strikes in the country. The Committee alleged that despite the strike at the end of July which paralysed banking services .... some employees were being victimised."
127. Chapter 1:2
128. Ibid. See Chapter 1:2 footnote 10
129. Ibid. Chapter 1:2
130. Okunda VR (1970) EA 453 Mwenda C.J. implicitly recognises the three pronged governmental division of power.
- Also, the general scheme of arrangement of the 1969 constitution smacks of an intent to introduce the doctrine to Kenya. It was held in Liyanage V R (1963) N.L.B. 313 (Ceylon)785;(1965)AC 172 that such a scheme of arrangement of the constitu<sup>t</sup>ion does infact imply the acceptance of the doctrine of separation of powers.

131. See footnote 33 above
132. See footnote 34 above
133. See footnote 40 above
134. See footnote 44 above
135. See footnote 49 above
136. See footnote 45 above
137. C. Gertzel, op.cit. (footnote 52 above), at pp.154-155
138. See footnote 50 above
139. Hon. Tom Okelo-Odongo, National Assembly, Official Reports Vol. 16 pt. 3 February, 12th 1969 Col. 4919
140. Kenya has had only one political party, KANU, between November 1964 and April 1966; and also from October, 1969 to the present day. In June, 1982, KANU was legalized as the only political party thus making Kenya a de jure one party state - see Weekly Review, 11th June, 1982.

All this time that KANU has been the only party, all MP's had to belong to it because as per the Constitution S.34 (d) and the National Assembly and Presidential, Elections Act, (cap.7) all contestants for parliamentary seats had to be nominated by a political party. And S.20(b) of the KANU Constitution (1974 Revised edition) requires that all intending contestants for parliamentary seats must deposit Shs.1,000/= with the party in addition to having paid Shs.1,000/= as life-membership fee of the party. This is an extremely high figure for the ordinary citizen considering that Kenya's per capita income is \$ 220 (Shs.1,650/=) per annum as of 1978 - see New African Development (a monthly), march 1978 No.127 pp.39.

Therefore only with adequate financial resources can one make it to Parliament. This necessarily excludes the ordinary citizen.

Further the National Assembly and Presidential Elections Act (Cap.7) states that the ceiling for election expenditure for parliamentary seats for each candidate is Shs.40,000/=. This figure was supposed to be a realistic indicia of how much one is required to spend in order to stand a chance of winning the elections. Thus to make it to Parliament, one has to belong to a high social group.

Evidently therefore Kenya's Parliament remains a class institution for the elite.

141. Oginga Odinga, op-cit (footnote 4) from pp.255-268; see also C.Gertzel, op-cit (footnote 52 above) pp.44 et.seq.
142. National Assembly, Debates, Vo. xl February 1967 col.1974
143. See R.Martin, Legislatures and Social Economic Change in Africa, Nairobi, 1975 (Mimeo)
144. Ibid. at pp.29
145. These MP's were Hon. J.M. Seroney, Deputy Speaker and MP for Tinderet, and Hon. J.M. Shikuku, M.P. for Butere - see Weekly Review, 20th October, 1975.
146. See footnote 108 above.
147. See footnote 98 above
148. The Kenya Constitution, Act. No. 5 of 1969, S.14

149. Ibid S.61
150. Ibid. S.61 (1)
151. Ibid. S.62 (3)
152. Ibid.S.62 (5)
153. Ibid. S.62 (6)
154. Ibid. S. 106 (1) and (2)
155. For example, one judge Justice E.G. Harris was retired by President Moi after intense public pressure following a detestable judgement he made in the case of R V Sundstrom (1980) Unreported High Court at Mombasa - see Weekly Review, 9th January, 1981 at pp.10; and also Weekly Review, 17th October, 1980.
156. (1966) Unreported.
157. The plaintiff had referred the Court to the Indian Case of Ram Krishan V Delhi (1953) A.I.R. 318, where the Supreme Court ordered the release of the detainee because of the insufficiency of details.
158. F. Engels - In an article appearing in Neve Rheinische Zeitung - a daily paper then published in Cologne, of which Karl Marx was the Editor - in - Chief.
159. A.V. Dicey, An Introduction to the Study of the Law of the Constitution (London, Machillan, 1959 a 1973 reprint)
160. See S.B.O. Gutto, Taking the Law into their own hands: The Ruling Class, the rule of Law and the Public in Kenya. (Mimeo, 1981) especially topic 3
161. See footnote 148 above.

Chapter Four

Footnotes

1. Daily Nation, 18th April, 1973 per Njonjo C.
2. Bereket Sellasie, The Executive in African Governments (London, Heinemann, 1974) at pp.304
3. Chapter 1.1
4. Kibutha Kibwana, Juridical Positivism in Kenya: A preliminary enquiry (1979), Mimeo) at ppl3
5. Ibid., at pp.11
6. Ibid., at pp.3