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AN ARCHAEOLOGY OF THE DOCTRINE OF AUTOCHTHONY AND ITS
APPLICABILITY TO THE SOCIO - ECONOMIC AND POLITICAL
SITUATION IN KENYA

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BY

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A C K N O W L E D G E M E N T S

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INTRODUCTION:

This dissertation deals with one aspect of a broader subject of law, namely, Constitutional law. It may be said here therefore that, though at times I will have to reflect on issues outside the boundaries of constitutional law especially in areas where an idea or concept which is expressed radiates or is inherited from another branch of the law, generally speaking, I will confine myself within the ambit of constitutional law

"The constitution embodies ideas that are not part of the native cultural heritage of the people, ideas originating in Roman law and Greek philosophy, but which by a process of assimilation have become a common heritage of the whole of Europe but certainly not Africa" 1

Here Nwabueze is talking about constitutionalism in Africa and is particularising on the legitimacy of the constitution. This area of constitutional law came by and large to be known by a word first used by Wheare K.C.,2 "Autochthony" which generally is;

designed to demonstrate that the authority of the constitution is rooted in the native soil, and not derived from an imperial predecessor" 3

Through its popularity especially in African states, this term, has come to be regarded as an important doctrine in Constitutional development. It is a doctrine which ventures to say that a constitution, in order to be legitimate, must spring from the roots of the country, from the common customs of the people, it must reflect the social aspiration of the indigenous populace and must embody the will of the masses and attribute its validity to the demands of the majority.

The Kenyan society is one that is riddled with strains. Some of these strains are social, for example, classes in society, development of some areas more than others. Others are economic.

for example, unemployment, landlessness, the increasing gap between the rich and the poor, while still others are political, for example, political development in accordance with western ideas, repealing of customary laws and their replacement by foreign laws, defeat of popular motions in parliament, etc.

This is an area I seek to explore with an aim to providing a remedy to those socio-economic and political strains. I seek to assert that unless a revision of the constitution by the powers that be is undertaking to having it reflect the common aspirations of the general populace then the enacted laws will continue to be oppressive and deliberately designed to suit a certain socially and economically ruling class dominant?

This work is also constitutionally archaeological and it has been said

"It is commonplace of archaeology that successive strata will frequently reveal the former existence of several successive cities on the same site" 4

and constitutional law in reference to Autochthony has developed in a not dissimilar manner, changes in philosophy and social reform have been superimposed upon, and periodically consolidated with, the previous social, economic and political belief;

"... with the result that the patient excavator is able to unearth relics of an earlier culture which are quite different from the later development by which they were thought to have been superseded" 5

On this level come into play the historical and sociological schools of thought which I contend are descendants of Autochthony. The historical school of thought preceded the sociological school of thought. Though these will be explained later, it is on their reflection that I wish to concede to the argument that a country's laws and especially the Constitution must of necessity, be autochthonous, reflecting the way of life of the common people and the people own-made jurisprudence. Stone has said while reflecting on those schools of thought;

"Historical Jurisprudence ... not only led the jurists towards the promised land; it also reduced the main forts of its existing occupants. It played the role of Moses, and in part at least, of Joshua as well. But it was not to be under its banner (the volkgeist) but under that of sociological jurisprudence that the promised land was to be conquered and occupied" 6

These are the foundations of autochthony and I will assert that it is only by understanding the harm caused by the foreign laws in this light that we can provide a remedy.

Savigny, himself a staunch supporter of the historical school of thought has this to say;

"In the general consciousness of a people lives positive law and hence we have to call it people's law (Volksrecht) It is by no means to be thought that it was the particular members of the people by whose arbitrary will law was brought forth; in that case the will of individuals might have perhaps selected the same law... Rather it is the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to be the consciousness of each individual not accidentally but necessarily and the ~~same~~ same "7

By the same argument it will be shown that the Kenya people possessed an established system of dealing with their social, economic and political problems different in content and practice from the English system but not less effective.

Such a system as the one that existed in Kenya based on such autonomy of the peoples' common consciousness will reflect best what goes on in society and a constitution based on it will find popularity amongst the people since everybody sees in it an expression of his value system. Since as Nwabueze says

"It cannot be disputed that a major cause of the collapse of Constitutional government in many of the new states was the general lack of respect for the constitution amongst the populace and even among the politicians themselves" 8

This lack of respect for the constitution undoubtedly lies in the general inability of the people to attribute the constitution to themselves.

"The state itself is alien, if also a beneficial creation; its existence is characterised by a certain

4

artificiality in the eyes of the people and it is remote from their lives and thought" 9

Most countries with federal constitutions are some what autochthonous. For the very basis of federal constitutions is an acceptance that the common practices of the people are not uniform throughout the state, they differ in certain aspects and hence their Constitutions must reflect these differences.

These may appear in a country with a people of different ethnic groups and thus different cultural, social, economic and political beliefs. Customary law in such a state will differ in accordance with tribes and hence the mention of each in a federal constitution reflects the seriousness with which the Jurisprudence of the people is held by the state.

An example of this is the Nigerian Constitution which states,

"We the people of Nigeria, by our representatives here in parliament assembled, do hereby declare, enact, and give to ourselves the following constitution" 10

Although this does not reflect exactly what happened but at least it has a nationalistic outlook. But the American constitution is the best example here;

"We the people of United States ordain and establish a constitution" 11

This American Constitution has survived for more than 200 years with only minor alterations. Only five of these changes affected procedures directly. This suggests a high degree of procedural regularity despite tremendous changes in the countries area and population and in economic, social, political international and technological conditions. This ~~excitation~~ ^{excitation} will bring to the surface the real origin of autochthony and the great need for the people to identify with that law that governs them.

In my first chapter I will deal with the history of autochthony and the countries of its origin e.g Greece and Rome We shall also see the social, economic and political climate that necessitated its steady growth and the reasons for its quick appeal to the oppressed and masses of those countries.

Here I will deal mainly with Savigny, Maine and the proponents of the sociological school of thought. This will serve as a basis for the discussion in the other chapters.

The succeeding chapter will deal with Kenyas' history and struggle against foreign ideological dominance. I will contend that this was not just a violent search for political freedom but a reaction towards the imminent loss of autochthony in the various societies in Kenya and how independence was regarded (at least before it was attained) as a re-assertation of autochthony in those societies.

The third chapter will deal with the period of post independence at which time, I will contend, the people's aspirations to restore the lost autochthony and overthrow the bourgeoisie ideology was defeated. This was brought to the limelight by the compromising Lancaster House Conference and the subsequent enactment of the constitution. The rise of an opposition party which challenged the validity of the governing party and the writers of post - independence who voiced an outcry against loss of land and freedom embody the extend to which the need for autochthony was not realised even after independence. I will contend here that there needed to be a socio-economic and political change to reflect the will of the masses.

The result of such continuity of the pre-independence socio-economic and political status quo has manifested itself nowadays in landlessness, unemployment, social-stratification and lack of long-term policy in government plans. My conclusion will contend that to combat these evils there need to be a change in the constitution to reflect an autochthonous sytem whose superstructure and institution of infrastructure reflect the common consciousness of the people. This is the only peaceful remedy to the current socio-economic and political strains in Kenya.

FOOTNOTES

- 1 = Nwebueze B.O. "Constitutionalism in the Emergent states"
London Hurst, 1973. pg 36
- 2 = Wheare K.C. Modern Constitutions Oxford, 1966, pg 11
- 3 = De Smith "Constitutional and Administrative law
Longman London, 1973. pg 17
- 4 = Ralph Instone "The archaeology of Companies Act" M.L.R.
Vol. 25 1962, Stevens, London pg 406
- 5 = Ibid pg 406, pg 86
- 6 = Stone Julius "Social dimensions of law and Justice"
London, Stevens 1966
- 7 = Savigny C.Y. "System of Modern Roman law" (quoted by
Lord Lloyd of Hampstead in Introduction to Jurisprudence"
pg 563)
- 8 = Supra note 1 pg 8
- 9 = Supra note 1 pg 10
- 10 = Nigeran Constituion preamble
- 11 = U. S. Comstitution preamble

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CHAPTER ONE :

THE BASIS OF AUTOCHTHONY

1) INTRODUCTION:

Ideas and philosophies do not exist in a vacuum but find their relevance and the standards and norms by which they are judged, and maybe discarded, in social set up in a defined historical era and at a defined geographical place. These ideas may be adopted by another people because of their suitability to that other people's society and because of the likelihood that ^{that} philosophy will solve the contradictions and problems of that society. And so it is with autochthony.

Autochthony, I venture to contend, has its roots in Germany and was represented by the figure of F. C. Von Savigny who lived from 1779 - 1869 when German was under the high grip of the Roman Jurisprudence. So Savigny and the Germans in general in evolving the doctrine of autochthony were reacting to this dominance of their societal arrangement by the Romans, indeed the Germans have been described as,

"the people of the romantic counter-revolution against the rationalism of the Enlightenment of ... the mystical uprising against intellectual clarity" 1

But it wasn't for the mere love of a revolution that the ideological savigny-led Germany rose to meet the challenge of Roman dominance but a realization that Germany needed to be freed from the shackles of Roman law which was becoming increasingly devoid of remedies in German society. This idea so influenced German that one writer said of it

"No doubt, this strange Volk, which has haunted the souls of its sons with the uncontrollable persistence of a ghost, has denied itself the "present" not only for the sake of its "becoming" and messianic future, but also in its archaic faithfulness to the mythological past" 2

The reasons that made this philosophy of "Volkgeist" so strong cannot be immediately grasped except when one resorts to the historical, social, economic and political influences of Germany at that time so as to understand the then Germany. Autochthony as experienced in Germany had its origins in the Natural law theories rampant at that time. Thus here, I am going to flashback in a brief form at the development of Natural law up to the time of the Historical school of thought which was in the middle of the 19th century

Stone has said;

"The call for a more accurate history is, in a real sense, always a call for a return from myth to reality; from acceptance of certain facts as the relevant ones, to a reopened inquiry as to what facts actually were relevant. What is true of history generally is true of the history of law... it should not be surprising. Therefore to find that the historical school of Juniors ... pioneered in the first part of the 19th century, some of the basic ground of the modern inquiry concerning law in society"3

This need for a more accurate application of the law and the modern inquiry concerning law in society was the attribute of the historical school of thought. But the call is made here to the realization that there must have been instigation to this vision, a motive to this reform. This is to be found in the social, economic and political set up of the society before this period, this is going to be examined in detail here.

The historical school of thought gave vent to the sociological school of thought which, as stone says in "Social Dimensions of law and Justice" conquered the promised land. It rounded up the discovery of a peoples consciousness. This school of thought sprung up as a consequence of apparent conflicts in the ruling class in German parliament and thus its inability to perform its functions properly. This school will be also inspected here.

But the main aim of looking in detail at these schools of thought will centre on their contribution to autochthony as the

central theme of a people's will put into enactment and enforced through the courts. The main ^{aim} here is to show that the contradictions which existed then, were, as the ones existing in the Kenyan society now, a result of the fact that the people's common consciousness is disregarded in most enactments and that to resolve these conflicts this factor of the common consciousness must be paramount.

ii) Development of Natural law upto the historical school of thought;

"The history of all hitherto existing philosophies is the history of class struggles" ⁴ This idea pervades and straddles the natural law in all its history. The only moment of tranquility and serenity is the instance of the communal ideas of Natural law amongst the Greeks in their early stages where philosophers then viewed the cosmos to be in unity. The society was characterised by people living in scattered areas but living in harmony for there was no competition in trade for the mode of production was one of use - values only and nothing for exchange-value.

Thales, one of the thinkers of that time who was concerned about the origin of matter said that things get their being from water, and because water is universal therefore the communal living was intergrated in it -

"Thales' idea led him to getting a notion perhaps from seeing that the nutrient of all things is moisture and that heat itself is generated from moisture and kept alive by it (and that from which they come to be is a principle of all things)

He got his notion from this fact that the seeds of things have a moist nature and water is the origin of the nature of moist things" 5

He also lived at a time when there was not one god. This was the early 11th century B.C and there were gods for every kind of activity and natural activity that took place in the Greek community. There was the god of rain, the god of drought, the god of day etc. But the king of them was Zeus. "an indeterminate infinite out of which all things come" 6. he was the source of justice, of natural law.

Heraclitus about 504-501 B.C popularised the idea of one god. At this time city-states had begun. Slavery had set in. Heraclitus belonged to a new generation of aspiring slave owners who wanted to turn slavery from a domestic affair to a public institution. This idea was not very popular and made him such. So no wonder his main aim was the unity of opposites which he believed existed on the tension of opposites. He was looking at the tension between slave owners themselves, and between them and the slaves" 7

This is yet another milestone in the submission that natural law developed because of class struggles. It would change either in support of a new development in society or as a reaction to an unpopular development. In Soowhenyhere Heraclitus argues that;

"God is the universal reason, the universal law-immanent in all things and the reign of unalterable law, being content with the necessary process of the universe and not reboiling against it, in as much as it is an expression of the all-comprehensive, all-ordering reason or law" 8 he is saying that there is need amongst the slaves to be obedient, and subservient and to accept the existing system that enslaves them. He is supporting the status quo.

So natural law developed from communalism, where there was co-existence and mutual accentance. Slavery sets in and with it a change in the general notion of natural law. Plato who lived at this time advocated the demand for the rule of the best. He said that men were created for different function. His celebrated statement on this ran thus

"You in this city are all my brothers, but god as he was fashioning you, put gold in those of you who are capable of ruling; hence, they are deserving most reverence. He put silver in the auxiliaries and iron and cooper in the farmers and other craftsmen. For the most part your children are of the same nature as yourselves" 9

He was advocating rule by the mighty slave-owness. At his time Athens had been conquered by Sparta and its allies. The rule of the best of the slave-owners was according to plato the mighest of law

"Until philosophers are kings or kings and princies of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never rest from these evils-no, nor the human race, as I believe and then only will this our state have a possibility of life and behold the light of the day"

What was taking place in Greece was also happening in Rome concerning the development of Natural law. Cicero (106-43 B.C.) was a Roman lawyer who contended that

"True law is right reason in agrement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from, wrongdoing by its prohibition ... It is sin to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely ... And there will not be different laws in Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge..." 12

To justify themselves against the slave-system they divided law into two classification i.e. Jus gentium, which was natural law which was that part of the law that they applied both to themselves and to the foreigners, and Jus civile, which was positive law, man-made law. This was the law governing the relationship between the Romans themselves. This prohibilites slavery but not Jus gentium which was the law under which they enslaved people.*

There is a period of silence as far as natural law is concerned when religion dominates. These are the so called "dark ages" and they fall between 400 A.D. -1000 A.D. They are influenced by what was happening in the previous three centuries when the

whole Jurisprudence in both Greece and Rome was influenced by religion especially Christianity.

Jesus who was born about 4 B.C. contributes much to the Jurisprudence of that period. He advocated the idea of one god who was the ultimate lawgiver. The slave system then was established and the Roman rulers did not like his anti-establishment teachings. But this found favour with the exploited slaves and the general proletariat. The church under his influence became very strong and the clergymen took power to decide over matters in the state.

Natural law, through Augustine (354-430 A.D.) and the other "church fathers" i.e. Ambrose and Gregory, advocated that man committed the original sin and thus it was hard to realise any goodness in man so to help man attain that goodness the church had to interfere with law and property since the church was the guardian of the law of God. The pope had the final authority in the interpretation of the law.

The evangelical interpretation of natural law is that human law is something ordained to an end. But clergymen believe that in order to be useful, human law must comply with a certain standard, higher than the ^{standards} standards within its limits. This measure or the barometer thereof is said by St. Thomas Aquinas to be

"two fold, that is, the divine law and the natural law" 13

According to the clergy, natural law emerges in man with the perceptions that natures are at work of a supreme intelligence, that they are ordered to a common good transcending the expediences and mere utilities of life

"the common good in which all things share is communicated through, creation by God's compliance as it were the eternal law. 14

This state of affairs continued until the middle of the medieval period when St. Thomas Aquinas (1226-1274) comes up with his four divisional of the law, namely Lex aeterna (eternal law), lex naturalis (natural law), lex divina (Divine law) and lastly lex humana (human law) In his "Summa Theologica" he explains that in order for law to have validity it must comply with reason. So arbitrary oppression or blasphemous law lack the quality of law. **

By this time the state has begun to question the infallibility of the church and actually rebel against the idea of the church interpreting the law. The feudal system is in the process of waning away and to strike a balance between these two contending camps it is said that Pope had Jurisdiction to interpret spiritual matters while the monarchs could interpret secular matters.

His idea about property is that it is a natural right. whereas property had been held by the church fathers to be sinful, Thomas doesn't think so and he distinguishes between its acquisition, which he says is the province of human law and is not a sin, and its use, which is the affair of the church and is not sinful if used for the benefit of others. Ownership of private property is springing up at this time and while earlier property was in form of slaves now property is assuming substantive character.

Next came what is commonly called the classical era of Natural law. Rampant at this time are the social contract theories. The state after acquiring supremacy over the church becomes monarchical and it is this monarchical nature of the state that conceptions of social contract is reacting to. these can be periodised:

a) Period immediately after reformation which is characterised by mercantilism in economics, absolutism in politics and protestantism in religion. Here Hobbes, Spinoza, Hugo Grotius, Samuel Pufendorf claim that the best guarantee for Natural law in society is the wisdom and lack of restraint of the monarch. They are clamouring for absolutism. ?

b) After these come Locke and Montesquieu who take a more radical view of the theory of social contract. They advocate that the surest guarantee of natural law is some form of democratic representation for it is the only way of protecting subjects from the absolutism of the monarch.

The theory of social contract upheld that man in his state of nature is either essentially evil or essentially good but men get together and form a contract. This pact between individuals they call Pactum Unionis to live together in peace. Historically these individuals either simultaneously or consquently transfer their contract to the sovereign - this pact they call Pactum subjectionis.

The sovereign in exchange promise to act in a accordance with the will of his subject and for their good. Consquently if the sovereign doesn't live up to his promise then he has breached a contract - a social contract - and the subject can disobey him.

At this time capitalism has got hold of the society and there are wealth rulers and poor subjects. The mode of exchange is, as said above, capital. Politically there is a search for political dominace by monarchs and socially relations are strained. Some lawyers are arguing vehemently in support of the bourgeoisie and to the subjection of the proletariats. Natural law failed to bring a remedy to the strains. Time is ripe and long overdue for answers to the social strains. It is an ideal time for Savigny to assert his Historical school of thought.

iii) Basis of Historical school of thought;

"It was the Roman law... which was received into Germany in the course of the fifteenth and Sixteenth centuries. It could hadly have been otherwise, for the reception itself was the work of lawyers rather than rulers, and those lawyers had been trained in Italian schools or at least in Italian methods..." 15

The Germany Jurisprudence had been permeated thoroughly by Roman law and practices especially in the fifteenth and sixteenth centuries. This was the law that was also practised by most of Europe since the Roman conquests and the subsequent influence of Roman customs and philosophy over the conquered people.

It should be noted here that the law applied to the Germans was a law that had been founded in the beginnings of the Roman dominance of Europe between the fifth century and sixth century B.C. and it fitted the mode of production which was prevalent in those centuries and it remained to be seen whether it could still be adequate for Germany in the sixteenth century. Politically the Roman emperor was then claiming, as a political weapon, continuity of authority in ancient Roman precepts. In this context Rome managed to dominate European Jurisprudence for long.

Rome was able to dominate the European countries because, firstly, it had a natural advantage of a developed system over the comparatively primitive, feudalised law of the European tribes, for Roman law came to Europe in its maturest form.

" After a thousand years of juristic adaptation, development

development and refinement to meet the needs of a great imperial and commercial civilization" 16

Secondly, there was the intellectual movement which, as part of the renaissance made a training in the Roman law a part of the stable culture of the literate European, and elevated it to the status of "written reason" the framework of all thought on law and politics. Thus as Stone puts it:

"This combination of forces, then, not without some bitter popular resistance, led to the thorough consolidation of the position of the Roman law. By the Nineteenth century it was in force in most Germany states as their common law alongside the varied local law" 17.

~~These~~

These were the circumstances surrounding Germany at the time of Savigny and his followers. Roman law was expressed and treated in isolation from the Roman society from which it had sprung. This found favour in the philosophy rampant then, that of Natural law. Natural law was viewed to be universal and unchanging and not made for a particular people and as such applicable to all peoples regardless of their social beginnings. In the words of Cicero

" True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting... it is sin to alter it, nor is it allowable to attempt to repeal any part of it...and there will not be different law in Rome and in Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations at all times..." 18

As long as this philosophy was ringing in the ears of the lawyers and rulers then Roman law, applied outside the conditions of its origin, found fertile land in Germany society but the more divorced this Roman law became from its original found, it became correspondingly adapted by contemporaneous discussion, interpretation and application to the social conditions of post... medieval Europe and the more obscure the origin Roman social context became.

"The beginnings of the school of historical law in Germany are rooted in their immediate origins, in a reaction against its rationalism, against its universalism, and against its individualism. instead of pure ration covering the world and time with its system of rational rules, and proceeding from and returning upon the individual, there was to be substituted the Volkgeist, immersed in the historical flood of its own particular development. and immersing the individual in the movement of its own collective life " 19

Rousseau was one of the people who contributed much to this new way of thinking and tried to reorganise peoples thoughts for the structure of natural law and redirect them towards the

the structure of natural law and redirect them towards the idea of the popular will of the people as the basis of the law that was to govern them

"Rousseau... prepared the way for the new style of German thought which was to divinise the folk-persons and to historicize law as the expression in time of the general will or consciousness of right which proceeds from that person." 20

Looked at from this level law acquires a new identity. it is not divorced and extricated from the historical and social basis on which it developed and acquired its character. Legal rules lose their mystical look and are vested with a new meaning. The populace can identify themselves with it for in it they find an embodiment of their values of life

"The Volkgeist is a literary movement; but it is a literary movement with an immanent philosophy of its own. That philosophy is a philosophy of the Folk, as a being which creates a language for its utterance; which utters itself through its language in folk-songs and folk-tales; and which sets the folk-tunes it has composed" 21

Savigny basically protested against the Natural law ideas as being unrealistic and asserted that

"All law was originally formed by custom and popular feeling. next by jurisprudence-that is by silently operating forces. in any scheme of thought which proceeds on the premiss that the social life of man is the life of super-individual entities, the introduction of the Volkgeist into the theory of law will always continue to be regarded as the starting point of a deeper and profounder theory of society" 22

For Savigny, however, the true nature of law is best seen in customary law

"All law is originally formed in the manner in which in ordinary but not quite correct language, customary law is said to have been formed; that is, it first formed by custom and popular faith and only then by Juristic activity. Everywhere, therefore, by internal, silently operating powers and not by the arbitrary will of the lawgivers" 23

It is seen here the close ties between law the customs and culture of the people. It is our contention here that it is this theory of law (the historical school of thought) that gives the most significant basis of law in society. All else would be wanting in quality and would not meet face to face the direct demands of a particular society. It would be regarded as foreign since the people do not identify with it. it is essentially the

ideas inherent in the...

ideas inherent in the historical school of thought that are resurrected in the notion of autochthony. Before we engage in a look at this notion we must analyse in brief the sociological school of thought which succeeded the historical school of thought.

iv) The sociological school of thought;

As a result of the successful campaign of the advocates of the historical school of thought there was a split in parliament with one camp upholding the notion of Volkgeist in all legislations and the other advocating the continuing of the old system of Roman law. This had the unhappy result that the ruling class began to be outwitted since it could no longer rely on parliament to deliver the political goods. The bourgeoisie had to find an alternative.

They turned to the judiciary to rescue them and began to campaign for a judge-made law. Whereas earlier the judges were only interpreters of the law they now began to look deeper than just the interpretation, they began to look at the social implications of a case. They began to look at the social operations of the law.

This sociological school of thought sprung under such conditions. One of its promulgators Roscoe Pound says, "Law is the skeleton of social order, a delicate mechanism of social control for adjusting relations and ordering conduct"²⁴

But Pound's most celebrated phrase is "Social Engineering" by which he meant that law is the oil by which parts of an engine's friction is reduced. Without it the engine (society) would have so much friction that it would grind to a stop.

"Social engineering was a misleading phrase; for Pound it was descriptive of a neutral process rather than prescriptive of pragmatic reform. It meant only that law was shaped in accordance with social ends..."²⁵

to brief here below

v) A critical look at the school of thought in relation to autochthony;

The critics of this doctrine of autochthony have had to concede, even unwillingly, that the writers of this paragraph... it is in... with a corporate...

Though the bourgeoisie was using this concept to achieve evil ends, it had in it more logic and substance. Law should be seen to reflect the popular practices in society and to control the relations of individuals in society and aimed at achieving the maximum ease by which these relations can be operative.

So it is contended here that law should not be static but should be developed by judges and even parliament in order to meet changing social needs. Law is not a closed system of definitions, rules of operation and substantive major premises but should be a reflection of the social relations. But such changes it is contended should not be haphazard or emotional but reasoned and contemplated upon in view of the customs of the people.

The sociological school of thought and its predecessor the historical school of thought created a renewed interest in law and its function in society and achieved a new standard in the reawakening of scholars and legal writers to the fact that these schools of thought may have led to the conquering of the legal promised land. Stone puts it dramatically:

"Historical Jurisprudence... not only led the jurist towards the promised land; it also reduced the main forts of its existing occupants. ^{It} played the role of Moses, and in part at least, of Joshua as well. But it was not to be under that of sociological Jurisprudence that the promised land was to be conquered and occupied" 26

This meant that these schools of thought led to more equality in class struggles under the recognition of law and thus it meant a threat to the supremacy of the bourgeoisie. No wonder, therefore, that many criticisms have been levelled against these ideologies. These are critically examined in brief here below

v) A critical look at these schools of thought in relation to Autochthony:

The critics of this doctrine of autochthony in a bid to render the same meaningless assert that the writers of of this persuasion seem to assume that every "people" is in some way an identifiable entity, with a corporate convic-

tion or will of its own

"But,...., it is implied that the notion of a people' is a perfectly definite one that can be applied to specific groups which possess this mysterious collective consciousness" 27

But such a criticism is a half-hearted attempt to mystify the fact that when a people have developed together under the same environmental thrusts and social struggles they endeavour in a like manner to manouvre through these threats and in the process acquire a consciousness and will that is only akin to them only.

Another criticism levelled upon this doctrine is that owing to the complexity of developed law the precise details of decisions are a specifically juristic task beyond the scope of the popular consciousness. They are saying, in other words, that modern disputes are so complex that it is beyond the scope of the independent will of the people. But they turn a deaf ear to the fact that Malinowski, 28 and Hoebel 29, in a renewed study of Customary law amongst the Barotse and Swazi tribes respectively have shown that customary law developed in the lines of the popular consciousness of the people is able to combat even the most recent and modern complex cases.

They should also take note that such law which is reflective of the popular will of the people and autochthonous in nature is not static but that

"Customary law embodies principles of Justice that can be applied to new forms of property. These principles like any other may be modified by the courts to suit new situations, if the courts are manned by those who have studied customary law and not abhor its value system" 30

Yet another apparent defect in the doctrine of autochthony in the minds of its critics is, they say, that it underrates and underplays the importance of legislation. While they concede that a progressive society has to keep adapting the law to fresh social and economic conditions, they assert that legislation has proved the essential means of attaining this end, and that

"Those who exercise the legislative autochthony

~~have~~ frequently

have frequently while paying heed if not lip service to public opinion, to provide a lead in many directions where the public is confused or undecided, and even in some cases where these may be widespread hostility to a proposed reform." 31

This is the very idea that this work is against for every legislation must be clearly aligned to the popular feelings and customs of the people and these are not as the above quotation says "confused^{o2}, undecided" but is clear and unmythified as I have earlier shown. To enforce a legislation "where there may be widespread hostility" would be dictatorial and aimed at suiting a particular people and would serve to enhance class differences in society.

It has been shown that these criticisms do not ~~touch~~ ^{touch} the core of the doctrine of autochthony and that they arise out of a misconception of what the doctrine aims at. They can then be disregarded as unfounded and misleading. They also arise from the proponents of imperialism who for their own selfish ends would want to pay little attention to the popular consciousness of the people.

vi) Conclusion;

The preceding pages have tried to show the frequent change from Natural law where there was a belief in the metaphysical propounder of law which could not be abrogated and how this fitted in each succeeding period with the social and economic mode of production and upheld the status quo upto the time of the historical school of law. This school turned the tables and appealed to a scrutiny of a basis of law in the customs of the people and then the sociological school of ~~thought~~ ^{thought} that said law should reflect the social order.

We have also seen how critics of the doctrine of autochthony have tried to render the doctrine ineffective and unsound. But this has not achieved its desired end. It is contended here that this doctrine is the only rational basis of law and without it then the popular basis of law is lost and hence law becomes dictatorial and oppressive. Since it is not based on the popular will of the people then the people regard it as foreign and do not identify with.

This popular consciousness of the people cannot be suppressed by any forces be they internal or external. Thus when law stops being rooted in the land where it is being applied we find that there appears, inevitably, social, political and economic strains and drifts. There cannot be a long standing bridge to these strains and the result may be destructive to the powers that be and also the system. A remedy lies in the realisation that law has to be rooted in the customs of the people, in other words, law must be autochthonous

philosophy (Published by Maya Literature Bureau) pg 1

Aristotle's "Nicomachean Ethics" pg 5

Frederick Schlegel, "A History of Philosophy" chapter 1 pg 2

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10 - 1011

11 - 1012 "The Republic" Vol 1, Plato pg 12

12 - 1013 "The Republic" Vol 2, Plato pg 13

13 - 1014

14 - 1015 "The Republic" Vol 3, Plato pg 14

15 - 1016 "The Republic" Vol 4, Plato pg 15

16 - 1017

17 - 1018 "The Republic" Vol 5, Plato pg 16

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FOOTNOTES

- 1 = Lord Lloyd of Hampstead "Introduction to Jurisprudence"
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- 2 = E. Helter. "The Ironic German" (1958) page 156-157
- 3 = J. Stone "Social dimensions of Law and Justice" pg 86
- 4 = Karl Marx "Manifesto of the Communist Party" quoted
by paschal B Mityo in "The development of Legal
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- 5 = Aristotle "Metaphysics" Supra pg 5
- 6 = Frederick compleston S.J. "A history of philosophy"
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- 7 = Paschal B. Mityo "The development of Legal philosophy"
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- 8 = Ibid
- 9 = Plato "The Republic Vol V - Mityo-Spra pg 18
- 10 = Supra note 9 pg 19
- 11 = Ibid
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- 13 = Thomas Aquinas "Summa theological quoted by Paschal
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- 14 = Ibid
- 15 = J. W. Jones "Historical introduction to the theory of
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- 19 = Gierke, O.F. "Natural law and the theory of society 1500-1800 (Cambridge press) Introduction pg XLVII
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- 31 = Supra no 27 pg 563

THE STRUGGLE FOR AUTOCHTHONY

INTRODUCTION:

In my first chapter I discussed in some detail some Eighteenth century Germanic philosophies, namely. The Historical school of law and the Sociological school of law, as the basis for the present doctrine of autochthony. The circumstance which led to such philosophies were also touched. In this chapter I am calling for a deflection of focus from Europe to Africa and particularly Kenya which is the arena where autochthony is to be put to the test and scrutinised.

In the introduction I contended that Constitution based on the peoples common consciousness will reflect best what goes on in society and will find identification with the people since everybody sees his interest which, in the African context, is the interest of society represented in it. Since,

"It cannot be disputed that a major cause of the collapse of Constitutional government in many of the new states was the general lack of respect for the Constitution among the populace and even among the politicians themselves" 1

and since in the consciousness of the people

"The state is itself alien, if also a beneficial creation; its existence is characterised by a certain artificiality in the eyes of the people and it is remote from their lives and thought" 2

and because this is caused by the lack of autochthony in the state and the constitution; The first things we are going to examine are the customs and traditions of the Kenyan people the absence of which makes the constitution alien and artificial. These customs are going to be looked at in their ^{social} ~~social~~, political and economic aspects

It was earlier said that the history of Kenya and especially the third to the sixth decades of this century is one that has a common denominator of violence and struggles

"... The minds of the Kenyan people were turned toward violence and revolt by the preachings and political

situation of

agitation of men such as Kenyatta, Koinange and other K. A. U. leaders..."3

There are many reasons for such conflicts at that time; politically, Kenya was under foreign dominance and the political voice was suppressed by diplomatic and forceful means, socially, the indigenous people were deprived of social togetherness. Economically, the white man had taken all the good pasture land and alienated the white highlands to himself in complete disregard of the African. Those were issues that called for immediate attention by the Kenyans.

But I am going to contend here that these social, political and Economic factors had a confluence in the desire for recognition of African rights. In other word the people were seeking for recognition of their customs and practices as the basis for the government that was seeking to rule them. They were seeking recognition of their values as the determining factor of the legislative and administrative activities going on in the country.

The conclusion will focus on the expectancy of the people for independence as the turning point of the trend in the colonial times, the expectancy for independence as the restoration fo the peoples value system and the attainment of the consciousness of the people. I will analyse how the people saw independence as the fulfilment and the supremacy of the peoples common consciousness or, in one word, autochthony.

- 11) Kenyas autochthonous background;
 - a) Social organisation

Before the disruption of the traditional way of life by the colonialists in Kenya the indigenous people had a complete social, political and economic system.

The first social entity in Kenya was the family which was knit together by virtue of belonging to the same parents or grandparents. But the word "Family" in the African context is broader than it is in the english sense,

"The family extend to the village so that all one's fellow villagers may be regarded as cousins or even, quite commonly, brothers and sisters: "4

This makes probable a family in the African sense to consist of quite a sizeable number of people. These people share the same feelings and have the same social outlook. They have a common economic and political view since they fight the same common enemy in life. Marwick says

"...One eats and drinks and talks and works and plays and hunts and perhaps fights, alongsidethe same set of pe ople. This constant succession of face-to-face relationship covering all the activities of living gives to tribal life a ~~special~~ ^{special} quality and makes the rules governing the formal relationship between people particularly important. " 5

The clan is the second social entitiy in the Afican society and this consists of a number of families of the same lineage. Perhaps this is what Simon and Phoebe Ottenberg mean by a "Corporate group"

"The term is used in much the same way as "Corporation" in the dictionary sense, that is, a group of persons having an identiy, rights, and obligations distinct from those of the individuals who make up tje group" 6

This description would fit a clan very well but in the African sense it would also fit the other bigger social entity, the tribe. But perhaps when one takes account of the social groupings in the African society it will be better understood as the group between the family and tribe which has administrative powers over the families that make it.

"An important charactersitic of African of lineages and cla ns is that their membership includes not only the living but the dead also. For death signifies not the end of existence, but rather a change from the corporeal to the non-corporeal " 7

This inclusion of the dead members of the soeity is more pronounced at the clan level for the clan are members of one descendant.

The division of clan makes administration easy and surveillance of each individual member of the clan simple. Social order is of utmost importance and since a person finds his identity (even as an individual) in the society dissidents are very few and far between. The clan is more tied together by the fact that they engage in social and communal work together. This communal world involve cultivation,

hunting expeditions, clearing shamabas etc. Tribe, This is made up of several clans which are also related by blood. The tribe has the ultimate administrative powers and undertakes at an advanced level social organisations and even when the need arises defence measures

"... Its adult members come together from time to time to carry out some corporate action; it has a chief or council with the authority to represent the group as a whole; it owns or controls property as a group" 8

Each tribe has a chief who is the representative of that particular tribe but he has little discretion since everything is ordered by custom and the values of society. The powers and authority of each chief is also delegated to each council of elders which represents the clan. This is going to be looked at in more detail later.

" An important characteristic of the corporate nature of lineages and a value in Kenya is that to an outsider one member represents the entire group"9

This is the extent of the way in which the African individual identifies himself as a unit in the society and also the society sees its member as itself personified that it is hard to draw the distinction line.

Of value also in the African society is the system of age-group

"Underlying regional and areal differences are broader unities. Such elements of culture as unilateral descent systems the religious importance of the ancestor ... and the consequent respect for age as evidenced in the rule of senior members of any given grouping, or found everywhere. The stress on age differences underlies the institution of age grades..."10

This is not without a purpose since it helps strengthen relationships. Age is equated to wisdom and knowledge and experience and since these virtues are embodied in the person who is supposed to emanate them then that person has got to be respected. Africans seek for perpetuity and as such marriage is granted utmost respect.

"Filiation and descent may be thought of as giving a society continuity through the birth of new members and affinity as the way of arranging for this. Marriage assures an ordered means of providing parents for potential members of the descent groups" 11

So it is by the observance of ^a member being a strict adherent that the societies characteristics are perpetuated

"Members of the African society feel their unity and perceive their common interests in symbols, and it is their common interest in symbols which more than anything else gives their society cohesion and persistence" 12

and by symbols he means

"...Myths, fictions, dogmas, ritual sacred places and persons" 13

These symbols represent the unity and exclusiveness of their respective groups. These symbols are regarded, however, as final values in themselves. And by these values and symbols the social life of the African is complete and not lacking in many things.

Need any more be said then to make the social life of the African more monumental? Need it be stressed any further that though the law may not show it the Kenyan society was developed? The contention is complete that if there was no autochthony of the Constitution it is not because Kenyans lacked a developed society. The political awareness is looked at the succeeding pages.

b) Political; organization;

"An African ruler is not to his people merely a person who can enforce his will on them. He is the axis of their political relations, the symbol of their unity and exclusiveness, and the embodiment of their essential values" 14

It can be seen here that there is a close relationship between the political element in African society and the Social and economic aspects of the society. But these are not forced on ~~them~~ ^{them} by their leaders but find their values and expression in ~~the~~ the customs and practices of the people.

The African society was headed politically by a chief;

"The chief must... protect the rights of his subject, provide justice for the injustice and oppressed and punish wrongdoers" 15

The chief in most of the places is an old man and has a lot of respect accorded to him since it has already been seen that age is associated, correctly, with wisdom and experience and knowledge. But the chief is not left with everything at his disposal and discretion since

"Both he and the heads of all local segments (clans) should see that such local segments are satisfactorily governed by their rulers and they govern against gross abuse and incoptence" 16

The chief also, as the head of the tribe, is their representative in external matters where he represents the intersts of the whole tribe

"As representative and spokesman of the tribe, he deals with external relations. He communicates with other chiefs on matters of mutual concern, and receives and entertains them or their messengers should they come to see him" 17

The political heads are also the Judicial heads

"...they (chief and heads of clans) have their own courts, with power to enforce decisions and to compel the attendance of litigants and witnesses" 18

But the chief is the highest court to which appeal lies from the verdicts of all other and

"...Normally it (chief's court) alone can punish such offences as ~~society~~ ^{sozcery} and homicide" 19

And he himself is usually the Judge, but in Larger tribes, senior princes or clan heads may act on his behalf.

Perhaps because of the concept of the separation of powers in modern systems of government, somebody could be inclined to think that the concentration of all powers in the person of the chief in Africa soceties would be a sure way to dictatioship or at best totalitatianism, but nothing could be further from the truth since the process of administration and the Judicial system consist of

" Rules handed down from one generation to another" 20

In cases of first instance, where there are no establishment rules

"...The chief, with the approval of his people, may also make laws..after consulting his private advisers he usually submits his proposals to the full council, *council*, and then to the popular assembly as well." 21
(emphasis mine)

And to reinforce the above the social system will have safeguards against arbitrary use of power even against the chief

"An administrative organisation backed by coercive sanctions, clanship, lineage and age-set ties, the fine spun web of kinship all these unite people who have different or even opposed sectional and private interest .. also there are common material interest...or complementary economic pursuits binding different sections to one another. Always there are common ritual values, the ideological superstructure of of political organisation" 22

This in fact serves as the

"...Means of reinforcing it, (society) against the abuses and infringements of rulers actuated by their private interests" 23

There was thus in African traditional life a developed political system with sanctions for those who, and they were the minority, dared deflect from the social and political norms

c) Economic Organization

It has earlier been said that the mode of production in traditional African society was a communal one. Land which was the basic means of production was communally owned by the largest social unit which was the tribe, The overall controlling power was however, vested in the chief

"The chief also controls the distribution and use of land. This he does mainly through his clan heads and headmen all of whom manage the land within the areas they govern" 24

And all the land not specifically allotted to local rulers remains under the immediate control of the chief and he uses it both to satisfy new internal demands and to accommodate groups of immigrants.

"Most of the economy in traditional Africa was subsistence and the exchange that was done was only for the small needs of the

farmers or hunters with implements. Ornaments for traditional dances would be bastered with crops from the blacksmiths.

Kenyattasays about marketting that;

"There are fixed prices for certain goods dictated by the seasonal law of supply and demand. For instance if a man wants a cultivating-knife, he goes to a smith who has fixed a general price for each article according to their sized eg. a small knife is exchanged for a small basket of beans. Again, if a woman wants an ornament she goes to a man or woman who has them and their exchanges two heaps of sweet potatoes or one heap of yams for a bracelet or an earring" 25

Here Kenyatta is really talking about an agricultural economy and this was the predominant one but not to say that it was the only one. In pastrol economies the medium for exchange would not be crops but would be animals and the goat was considered the standard. A fixed number of she-goats would be equalled to a cow and as such a person who didn't have goats could use the cow as a medium for exchange.

There used to be communal work to help one another. The women would go to cultivate one farm on a certain day and the next day they go to another until all farms had been visited. The men likewise would do the same in those jobs normally considered to be for men e.g. clearing new patches of land etc. But of more economic value is the fact that a man who did not have cattle or goats would be helped to get some by his kins or even clansmen. This was a kind of customary law of contract. 27. This reflects an extremely humane nature of the african society.

On wanting to marry - a young man would get the cattle and goats for the dowry not just from his father's household but from the broader unit of the society, that is, the clan members. This was because a wife was considered to be economically v valuable not just to the particular household she went to that is in patrilineal societies - but to the whole society. Thus the economic life of the traditional african was not hampered by the modern capital system and the monetary media of exchange.

These aspects of the social, political and economic organization of the traditional life have been considered at length here because it is the contention in this paper that if

the Kenyan Constitution is to be of any real help to the Kenyan and if it is to command any respect from the society then it must be rooted in the country and should reflect customs and aspirations of the people. The common populace has got to see in it an image of the real values of the african.

After looking at the african value system in its social political and economic contexts it remains to be examined whether the present constitution is autochthony as we now understand autochthony in the Kenyan context. But this will be dealt with the third chapter which will focus on autochthony in post-independence times. The rest of this chapter is going to be a look at how the advent of colonialism destroyed autochthony and how the african resisted this loss of his value system and looked at the coming of independence as the return to autochthony.

The struggle over the years was, as I contended earlier, a struggle for the recognition of the african value system and a forceful search to ~~reassert~~^{reassert} the lost autochthony of the country. This is looked at hereinbelow

iii) Struggle for recognition;

Much has been written about colonialism in Kenya and the factors that quickened its coming and the inhumanity of the legislation since 1886 when Kenya was born. Through the loss of title to land of the african and his been reduced to a tenant at will in the decisive and landmark case of Ole Njogo 28 and the birth of "anya colony in 1920 etc. There is no need to repeat that in this paper. This is because any task must have its limits otherwise it becomes unmanageable and also repetition is avoided.

More than that this work is going to look at the African reactions only to certain aspects of the whiteman's act of disregarding the african rights and interest. The emphasis will be on the role they served to kill autochthony and thus motivate the battle from the african to have it resurrected.

"The British imperialism affected all the Kenyan communities but in different ways. These communities have a "common humanity" which

is associated with present day's idea of "Human rights". It could be argued that in the Kenya independence struggle or in the colonial Kenya, the main actors were the people (call Africans and the English who represented the other Europeans - the race factor in colonial Kenya was great but the chief struggle was for the human and natural resources" 28

Here Kuria is alluding to one of the chief killers of autochthony which was the social relations brought about by the white man that undermined the indigenous social relations. Whereas in traditional Africa the people interacted freely and even strangers were welcome, now the African was reduced to literary, a slave. Odinga says

"...Nyanza was milked dry for carriers, many thousands of whom never returned to their homes but died of disease in service, though they wore no soldiers uniforms..." 30

And Tom Mboya adds

"...Most missionaries in Kenya clearly shared the colonial and white settlers mentality. They were amongst those who constantly told the African he was not ready for various advances, that he must be patient and believe in God and wait for the day when he might advance sufficiently. They were amongst those who spread fear and inferiority complex among Africans ..." 31

Social relations were not just strained at the working place and at the church but worst of all they were strained also in the rural areas (as in the towns) where the Africans had enjoyed unlimited freedom. Odinga writes

"The law for the compulsory carrying of Kipandes (every African over the age of 16 to carry a fingerprinted card 32) had been passed in 1915 and was rigorously enforced in 1921. Complaints of harsh treatment by chief and headmen and district officers began to seep through to government authorities" 33

This social factor was a crucial one and it made the Africans unite to have it eliminated from their society. In doing this ie. Uniting, they formed associations eg. Kikuyu Central association, (K.C.A) Young Kikuyu Central association (Y.K.A.) and later Kenya African Union (K.A.U.) In western Kenya there was the "Piny Owacho" (The country says) movement. Odinga summarises the early social demand of the movement as ^{want} ~~what~~ better education, against forced labour, against being caned, against being asked to feed the District commissioner when he came on tour etc. 34 These were issues that lowered the African social dignity ^{and} ~~and~~ consequently made him better

Odinga again feels bitter that

"It was all to teach the African that his ways were alien to civilized living... White and African religions were not only different, but christianity had to be recognized as unquestionably superior... in turning his back, to old ways to embrace the new, the African was made ashamed of the traditions of his own society" 35

Here we find the african pushed against the wall and pinned there and the only way to react had to be violent and thus came the period of the emergency. This was a war for socio-economic and political recognition. Socially the african had been undermined and his social virtues disregarded and discarded. A social system he did not understand had been imposed on him forcibly. No wonder then that the african had to fight.

But this was not just social , it was also political, whereas the African had ruled himself since time immemorial he now found himself overwhelmed by harsh rulers who were not willing to listen to the African view of administration and demanded that his system be accepted unquestionably. Odinga learned this while he was still in school.

"But Carey Francis also knew well the attitude of the White settlers and especially of the Government towards African people. He knew the Europeans did not in truth believe that the Africans could shoulder responsibility. His training at Maseno was to prepare us to lead a life acceptable that the Europeans had settled in Africa and we had to take direction from them" 36
nor was this just confined to the students because

"Maseno school was organized so that no African teacher was free to discharge responsibility. Every African teacher was put in charge of a dormitory and made responsible for the welfare of a group of children; but at the head of every three or four groups was placed a White master who had to supervise the African staff member. The same thing was repeated in the classroom the African teachers were in charge of their classes but over each group of classes was a white supervisor" 37

It is realized here that the African had been deprived of authority over himself and he could not be listened to. There was also the element in political ideals of the traditional rulers being diverted to seek

their own economic glory because of their political advantages.

"The Governement "says Lucy Main" also made those Chiefs whom they supported almost immune from any effect of popular dissatisfaction" 38

And Odinga adds on the issue of chiefs

"..... In many cases the people were given as chiefs individuals whom they would not have chosen themselves..... chiefs were no longer the custodians of their peoples' tribal law and custom; they were now civil servants, pensionable, but also subject to instant dismissal by the governement. They were the expression of the power of the new governement in the village. They could use their position to amass and exercise personal power, something which was previously unheard of....." 39

and Lucy mair voices the dilemma of the chiefs. UNIVERSITY OF NAIROBI LIBRARY

"The dual position of the chiefs, between the European governement with its specific expectations, and their subjects with quite other expectation is quite an anomaly" 40

Whatever little authority the Africans might have been given was fettered by the colonial bureaucracy and sieved by their White supervisors to favour their interests. Odinga tells us;

"The governement and their appointed chiefs were the final arbiter. On the council we could talk and pass resolutions but we had no power to enforce our decisions" 41

The result of this was the uprising of the late 1940s and the 1950s which had been preceded by the detention of Africans political leaders and was characterised by mass killings and detention of so many of the Africans. Maina-wa-Kinyatti writes,

"This clearly demonstrated that Kenya was plagued by a merciless foreign regime whose ideological creed was to maintain repression and exploitation by force of arms. second, it also demonstrated to many that non-violence as a form of struggle was inapplicable to the social reality of the country then....." 42

The political reasons that led to the rising of the Emergency cannot be exhausted here. Suffice it to say that the African had been politically disinherited and deliberately suppressed. The Africans wanted the return of the old familiar and fair system and fought for the revocation of the English type of political system. They (africans) wanted the popular

consciousness of the people to be taken into account in making decisions that would affect them. They wanted the rule of a popularly elected parliament that would represent their interests.

The economic factor cannot be ~~left~~ overlooked here since it played a significant role in the fight for independence and the search for the recognition of the customs of the people as the media for the distribution of economic gain. It has earlier been said that land was and still is the basic means of production and the dominant economic base and as such any issue touching land would be very sensitive.

This incidentally is the very first thing that the white man parched on in Kenya. One of the first legislations in Kenya was for the control and use of the land. Gradually the African was dispossessed of his land until, as earlier stated, the case of Ole Njogo 43, rendered the African a tenant at will in his own country of birth. Moreover Africans began to be pushed from all the fertile land to leave it for the use of the European settlers.

Nowhere was this issue of land more acute than central Kenya where there was most fertile land but also dense population so that any social disturbance created by the Europeans in their bid to grab land caused much bitterness amongst the people. No wonder then that the revolt stated in central Kenya. As Philip Bolsover put it

"If Mau Mau and other secret societies exist, they are the direct result of land robbery by white settlers, suppression of trade unions and democratic rights, and the use of violence by the British Government against the African people" 44

again the same writer said;

"What is going on in Kenya today is a great liberation movement of the African people, and the struggle is being waged by the only methods left open to them as a result of the violence and suppression exercised by the British imperialists" 45

He was writing in 1953 at the height of the Mau Mau uprising and was commenting correctly on the hot issue of land. The Africans who had fought for the British in the second world war had come back to find that the same British had taken their land and that they had been

they had been rendered landless.

Other burning economic issues were those ones of ^{Hut} that tax and poll tax. These were increased to the degree where the African could not get it and thus he was forced to work on the white mans farm so as to get money for the tax. Thus Kinyatti in giving some of the reasons that led to suppression of K. C. A. in 1940 said it was because it militantly agitated against the distribution of land; the kipande system; the "hut and poll tax; exploitation of African working class; and the ban of many respected traditions considered "Savage" by colonialist 46

The Africans were not given the same commercial and economic consideration with the European. Odinga tells us,

"We had hindrance on all sides, and little assistance. Invariably when we applied for loans we were turned ^{down}. A condition generally attached to a loan was that we should accept a European general manager; ...There was a network of trade regulations and restrictions designed to "protect" Africans but which merely served to militate against their economic initiative and to leave the monopoly of trade in the hands of the Asians and the Whites" 47

He adds;

"We could raise no loans from Banks because in the African areas communal land ownership prevented individual land title which could be offered as as security" 48

These are just some of the social, political and economic reasons that led to the revolt but as earlier submitted they have a confluence in the fact that they all search for a recognition of the customs of the people and their use as the criteria for all administrative, Judicial, constitutional and social reforms and enactment that were made. When this did not happen then the people revolted. They were calling for a state of affairs that was not alien. They were not against changes but wanted changes that would reflect their culture. They wanted the changes to be autochthonous

FOOTNOTES TO CHAPTER 2

- 1 = Nwabueza B.O. "Constitutionalism in the Emergent States"
Sweet and Maxwell, *Pg 28*
- 2 = Ibid
- 3 = Mohammed Mathu "The urban guerilla" Richmond, Canada pg 17
- 4 = M.G. Marwick "African Studies", Thomas Crowell pg 45
- 5 = Ibid
- 6 = Simon and Phoebe Ottenberg "Cultures and Societies of
Africa" pg 56
- 7 = Supra "note 4"
- 8 = Supra Note 6
- 9 = Supra Note 6
- 10 = McEwan "Modern Africa" Crowell pg 24
- 11 = Supra note 9
- 12 = Supra note 4 pg 48
- 13 = Ibid
- 14 = Meyer Fortes and Evans Pritchard "African political
system" Crowell pg 28
- 15 = Isaac Schapera "Government and politics in tribal
Africa" pg 98
- 16 = Ibid
- 17 = Ibid
- 18 = Ibid
- 19 = Ibid

- 20 = Supra note 15 pg 100
- 21 = Ibid
- 22 = Supra note 15 pg 101
- 23 = Supra note 14 pg 55
- 24 = Ibid
- 25 = Jomp Kenyatta "Facing mount Kenya" pg 139
- 26 = For a fuller discussion of this see Atiyah "An introduction to the law of Contract"
- 27 = Ole Njogo (1914) 5 E. A. L. R. 70
- 28 = G. K. Kuria "Religion, the Consitution and Family law and succession in Kenya" A handout pg 3
- 29 = Oginga Odinga "Not Yet Uhuru" A. W. S. pg 23
- 30 = Tom Mboya "Freedom and After" pg 15
- 31 = For a fuller discussion of this see the Staff seminar paper of 12 June 1980 by Sultan Hassanali Somjee "Kipande, the symbol of imperialism (1915-1948): A study in colonial Material culture".
- 32 = Supra note 30
- 33 = Supra note 27
- 34 = Ibid pg 63
- 35 = Ibid
- 36 = Ibid
- 37 = Lucy Mair "Africa" pg 112
- 38 Supra note 30 pg 21
- 39 = Supra note 38
- 40 = Supra note 30 pg 93
- 41 = Moina wa Zi

- 41 = Maina wa Kinyatti "Mau Mau; The peak of African political organization in colonial Kenya - Kenya Historical Review U. O. N. 1977
- 42 = Supra Note 28
- 43 = Philip Bolsover, " Kenya: What are the facts?" Pg. 4
- 44 = Ibid
- 45 = Supra Note 42 Pg. 7
- 46 = Supra Note 30 Pg. 88
- 47.= Ibid.

THE FUTURE OF AUTOCHTHONY IN KENYA

1) Introduction

The previous chapter have been devoted to the period before independence in Kenya for it is felt very strongly by the writer that the history of a country (and a philosophy) plays a very major role in determining its present existence and also effect its future development. The present and future stages of a country are either an acceptance or a rejection of the practical or ideological past. And Kenya is no exception to this assertion for cherry Gertzel tells us

"The manner in which Kenya has tackled the problems of independence and set out to create a new political order has, to a considerable degree, been dictated by circumstances and institutions inherited from the past" 1
and he adds

"Every state that has moved from colonialism to independence has sought to shape its inherited institutions to the changing circumstances and ideas of that independence. Seeking to move away from the colonial past they are concerned with adapting their political system to the needs of the independent society. But new states often like to seem newer than in fact they can be, for they all have to work within an inherited framework which is more difficult to change than it might appear" 2

So it is not unusual that Kenya at independence found itself in such a position where there was only at its disposal the old institutions to either change or uphold. Kenya's future would be determined by what attitude the ~~past~~^{past}-independence politicians adopted vis-a-vis the British colonialist.

It has also been submitted earlier that the common place waited for independence with expectation for they saw in it the return of all their lost values and a manifestation of the common consciousness of the people and the substance of an administration with its roots in the country, a home-grown legal system. They saw in it the form of the peoples aspirations to restore the lost autochthony and overthrow the bourgeoisie ideology.

In this chapter I will consider some of the events of post-independence and pitch them against the common consciousness of the people at their time and see whether they measure up to the standard of expectation of the masses. In other words the question to be answered is whether independence brought back the lost autochthony in its raw and untarnished sense applied considering the social political and economic situation of post-independence.

The next stage of this chapter will develop from the first stage. It will look at some of the remedies that need to be adopted by the Kenyan legislators to make the Constitution of Kenya reflect the will of the people. It will be contended that as of now the Constitution only serves the interest of the ruling class and thus to avert conflict it needs to be amended to suit the majority. Andrews tells us

" The will of the majority is accepted because to do otherwise would sap the authority of the state, thereby producing a greater evil, one opposed to consensus" 3

And on the states institution He says;

" Consensus on the form of its institutions and procedures is especially important to constitutional government. If large numbers of citizens feel that design of the machinery of government operates unjustly to their disadvantage, they may not accept its facilities for the resolution of social conflict, thereby undermining its authority" 4

These institutions and facilities, I will submit, are designed to favour a small minority and as such if there is not change of policy and laws in favour² the workers and peasants who are the majority a conflict may be inevitable. This remedy should not be one-sided or directional but should be all encompassing.

At the time of writing this work there are in Kenya now detainees, political detainees in a country which only two months ago was acclaimed the world over for having no detainees. The writer sees these detainees as the harbingers of a great social and political turmoil to come. It is wondered whether the recommended change may not have been left for too long. Adrews cautions us;

"Every government uses force against those within it who oppose its will. The size and intensity of the opposition usually determine the amount of that force" 5

ii) Autochthony at Independence?

Independence is normally associated with a constitution which is the supreme authority of a state. A constitution is the embodiment of freedom from the shackles of former colonial masters and the advent of a new era in which subjects under the constitution are free and able to determine their own social, political and economic goals.

"A newly independent nation may have its birth registered through admission to the United Nations, but a constitution is normally required as a baptismal certificate. A nation may exist without one, but there will be doubt concerning the likelihood of its passing through the pearly gates into the Heavenly city of political stability" 6

Of this constitution, De Smith says that it should be

"Designed to demonstrate that the authority of the constitution is rooted in the native soil, not derived from an imperial predecessor" 7

and Nwabueze adds

"There can be no doubt that the core and the substantive element of Constitutionalism is the limitation of government by a constitutional guarantee of individual civil liberties enforceable by an independent tribunal. Deriving from the fundamental values of society, which values, articulated in public opinion, express a society's way of life and uphold its members personality individual civil liberties are indeed the very essence of constitutional government" 8

And Kenya also did indeed have a constitution at independence. But what kind of constitution was it? Did it conform to the above requirements? Was it autochthonous?

Odinga says

"The settlers liked the Lennox-Boyd constitution. This they said, would prevent Kenya turning into a Ghana. What they were offering us was a central African or South African regime" 9

So it is clear from the start that the kind of constitution that the settler wanted Kenya to have was one that was limited in giving liberty to the Kenyans. ~~Although~~ ^{Although} this was not the final draft of the constitution but it gives us an idea what kind of constitution the settlers wanted.

At a later date when the African elected members had gone to London for the Lancaster House Conference we find the situation has not changed,

"Macleod vetoed Koinange's entry (as advisor) because of his special responsibility for the unhappy events which led to the emergency" 10

Although they (African elected members) were able to get Koinange in but this was after talks had been delayed for five days and the worst part of it is that the talks were to the disadvantage of the Africans. Odinga reports

"Macleod was a skillful psychologist: His direct approach infuriated the settlers, and their fury impressed us that we were winning. In retrospect we were naive and did not notice how the settler reaction was being played against us. Macleod was patience itself. He called us in one by one, sounded us out, talked to us as man to man. We should assist him in dealing with the settlers who were not prepared to give an inch of the way. He conscripted us into looking at the problems from his point of view, caught between the demands of the African and the intransigence of the settlers of the settlers. His threat, by implication, was 'the talks will break down'. When he put down his final plan it was a matter of take it or leave it. We had talked ourselves at a prolonged conference during which the African representatives had been made conscious of their minority position" 11

These talks held in London to discuss the type of Constitution that is best for Kenya (this in itself is an appalling irony) were not useful. These had been the preliminary steps towards arriving at the ideal constitution. When the last talks were held for the final draft of the constitution in the presence of Kenyas elected members and under the guidance of Kenyatta. Odinga says

"As the deadlock persisted, Kenyatta called KANU representatives together. Arguing, he said, was all very well, but we had to reach a settlement. If we failed government would be snatched from our hands... we might be forced to accept a constitution we did not want, but once we had the government we could change the constitution" 12

It is clear here then that the kind of constitution that was adapted was a compromise between settler (representatives of Europeans interests) and the African interest.

Such a constitution was, perse, not autochthonous and did not represent the interest of the common populace. It cannot be said to have its roots in the country. So here for those Africans who had associated the coming of independence with the return ^{of autochthony}, this was a disappointment. The question that everybody would want to ask at this juncture is best put by Mohammed Mathu

"...The mind of the Kenyan people were turned towards violence and revolt by the preachings and political agitation of men such as Kenyatta, Koinange and others...leaders. The question we now ask is: Why did these men abandon us in our hour of greatest need?" 13

Another social unit that had displayed a glimmer of hope in perpetuating social unity amongs the people was the party KANU. People saw it as the guardian of "Uhuru" aims. Such a party organization that made members subject to discipline and whose organisers were restrained in the spirit of sacrifice was the only guarantee against politicians Jockeying for position to further their won ambitions. Even an institution - Lumumba institute - was built and opened in 1964 by Kenyatta.

"It was to act at the party school of KANU to define, teach and popularize African socialism in the context of Universally accepted principles and practices of socialism to instil the spirit of harambee, nationalism and patriotism" 14

But this institution which had been built immediately after independence never came off the ground and was left to die a natural death which signified the death of nationalism and patriotism. KANU was no longer interested in explaining party policy to the people;

"As an arm of the government for popularizing development programmes, for keeping the people alive to the aim of Uhuru, or the government alive to the needs of the people, the party was paralysed" 15

Another social item that people had hoped independence would restore was social equality of the type that had existed before discription by colonialists. The Europeans had demanded a higher social status above the Africans and had in the process destroyed the old African system where all people

were equal. The fight for independence anticipated that that would mark the return of social equality. But there is a bitter realization when after independence none of it is seen.

"I should like to remind those African leaders who now condemn Mau Mau and tell us to forget our past struggle and suffering, that their present position of power in the Legislative Council and elsewhere would not have been realized except for our sacrifices. I would also warn them that we did not make these sacrifices just to have Africans step into the shoes of our former European masters" 16

and yet another writer adds

"When we hang out the national flag for uhuru meetings and rallies we don't want the cries of wapi Uhuru (where is Uhuru?) to drown the cheers. Our independence struggle was not meant to enrich a minority. It was to cast off the yoke of colonialism and of poverty. It is not a question of individuals enriching themselves best of achieving national effort to fight poverty in the country as a whole. Kenyatta's cry to Kaggia before a vast crowd at a public meeting. 'What have you done for yourself?' is a sign of the depth to which our spirit of national sacrifice for Uhuru has sunk...Has Uhuru given the people what they need?" 17

The constitution, provided for the formation of a black mans parliament. But as earlier ~~sated~~^{stated} such constitution and even parliament had to hinge on the popular consciousness of the people and reflect the social aspirations of the masses. Did the independent parliament do this?

"...The Cabinet did not seem to be its own master. When we came to cabinet meetings we were faced with decisions that had been taken outside by a group of the Ministers acting as a caucus, with or without outside advisers-we were never told" 18

It is a pity that a parliament that had been popularly elected by the people to represent their interests and help enact into laws the will of the people was now not its own master and it is not hard to guess where the masters came from since even some of its advisers were white men.

"A group in the Cabinet, growing alarmed at the strength of the back bench and popular pressure, was resorting to caucus forms of procedure and was excluding some of us in the Cabinet from decision-making procedures. The party as the expression of the will of the ordinary people, was not being allowed to function..... It seemed to me that our leaders in government and party were retreating from the people, that every excuse was being made to avoid consulting them, and that government by a small circle of leaders could too easily be influenced by force against the national interest"19

The fact that parliament had already turned its back against the people and that personal gains were being put before national interest is a fact that, perse, makes one ask where national sacrifice had disappeared to.

An economic factor that had stirred most Africans and that had been central in the consciousness of the people was land. This factor more than anything else made the people sacrifice themselves and give up all that they had in order to realise the return of their land from the settlers. They expected that they would have free access to their land that had been taken and where they were squatters they expected that the White man to be removed and them given the land. But what happened? Kaggia who hails from kandara where land issue wer hot tells us,

"In my daily work in my constituency, I have encountered a very difficult problem- the confiscated land- which was formerly owned by the freedom fighters who were then called "terrorists"..... The problem is a bit difficult because the land so confiscated was absorbed into the public purpose land and cannot be found now. But the whole question is very serious because our freedom fighters in the whole province expect a complete change of policy on the question. In my opinion, land must be found for these people somehow and somewhere"20

This letter was written to the Minster of lands and settlement at that time, J. H. Angaine,. The reply was astounding;

"I do not know to what extent the allegation of confiscation of land can be substantiated, but no doubt the facts of the case could be established by a searching inquiry through the old administration. I believe that any attempt to disrupt the present consolidated areas in the Central Province would lead to agricultural Chaos, a grave set-back to the economy and

in direct contravention of the spirit of Harambee
whereby past differences are to be forgotten.
(emphasis mine) "21

It need not be said here that the reply to Kaggia's letter bordered on the utterly unreasonable and that a motto "Harambee" was being wrongfully used to dismiss a social and economic reality, a reality that the people had sacrificed themselves for. But even of more importance are the consequences of a memorandum that Kaggia wrote to the Members of Parliament... It is partly quoted here;

"Everyday we hear of hundreds of poor helpless African families evicted from farms on various excuses. Many of these victims have lived in the farms for years with the knowledge and permission of the farm-owners..... But now, wherever a settler wakes up from his daydream and reports to the police, these poor Africans are termed illegal squatters and physically thrown out on the roads. These inhuman settlers are not only evicting the TRUE SONS OF THE SOIL FROM THEIR OWN SOIL, but also destroying their crops, making our brothers beggars in their own Country"22

He was voicing very real and disturbing facts which needed immediate attention. He got the reply from the Prime Minister Jomo Kenyatta a month later,.

"Your document..... is a general criticism against the government's policy of discouraging illegal squatting on private property..... I am seriously concerned at your repeated attacks on the policies of the Ministry of Lands and Settlement, and with your interference with land consolidation at Fort Hall..... If a parliamentary Secretary is unwilling to support and accent collective responsibility for any of the Governemnt's acts or policies, the only course opens to him is to resign "23.

Kaggia took up the challenge and resigned and in his resignation he said

"As arepresentative of the people I found it very diffilcult to forget the people who ele cted me on the basis of definite pledges or to forget the freedom fighters who gave all they had, including their land, for the independence we are enjoying" 24

This may be seen not as a battle between Kaggia on one side and Kenyatta and Angaine on the other but as portraying autochthony one side and imperialism on the other and it need not be repeated that the fair party-autochthony-has lost. This is an indication of how much the government and parliament had, in their question for power, lost sight of the economic aspects of the struggle.

It may also be mentioned here that Kenya accepted a loan from Britain to compensate those settler who wanted to leave their lands - in essence they were being paid, proportionally, for the exploitation of labour the economic gain they had got from the land, and helping create in Kenya a bourgeoisie and proletariat classes - amounted to a betrayal of African interest which in essence should have been compensated by Britain for the economic, social and political loss and hardships undergone during the struggle for independence.

Having shown how independence failed to restore the lost autochthony this chapter will be lacking if recommendations are not made as to what remedy can be resorted to rectify the worsening situation.

iii) Recommendations;

It has been said that as long as there is Democracy whose underlying idea is the popular basis of government and the idea that the government rests on the consent of the governed given by means of elections, in which the franchise is universal for both men and women then this government is legitimate. But this is far from the truth for

"Universal suffrage can create and support a tyranny of the majority or a minority or of one man... The absolutisms of the 20th century have usually been based upon universal suffrage..." 25

So my contention here is that elections are not a determinant of the will of the people but rather the people undertake them as a kind of formality that may appear after every five years or so. One contributing factor to this apathy is because the people are quite ignorant on matters of politics since, as beforesaid, they associate it with the ^{State} ~~state~~ which is alien.

There should therefore be a forum where the elected meet the elect~~ors~~ on an equal basis and where the leader (elected) gets to learn the common will of the people. The presented KANU meetings and political rallies are anything but what is suggested. Without this forum, arranged at the level of the common man in the rural areas the common consciousness of the people remains obscure, and in the minds of many of the people, metaphysical.

Apart from this the people themselves should have a forum where they meet to air their views and develop more sharply the common consciousness before it is brought to the ears of the leaders and legislators. This would be going back to the autochthonous background. These meetings should not be bound by the stringent rules that surround meetings in modern times e.g getting a written authority to meet etc.

Such a move will serve a dual purpose since it will develop more sharply the common consciousness of the people while at the same time encouraging and providing social get-togethers of people ^{from} ~~form~~ a common background.

Something in the nature of modern co-operatives should be encouraged at the common-mans level where communal work should be done for the benefit of all. But these co-operatives should have an African outlook. Institures (something in the line of the aforementioned Lumumba Institute) should be ~~be~~ build to teach the Young people the African value system and encourage development in the line of African ideology.

Perhaps in making the last recommendation the marxist analysis of society should be borne in mind. The superstructure has a direct link with the economic base. If the superstructure is changed the economic base will inevitably change and the reverse is equally true. The superstructure here will be things like educational system, government policy, Religion, laws, parliament etc.

So, with this in mind, it is recommended that there be a change in the superstructure to reflect the views and aspirations of the majority and to uphold ideologically the African social-political and economic structure. The superstructure should advocate for most African interests and portray an

African image. This will influence the economic base and bring back to us the much needed Autochthony

iv) Conclusion;

~~Reversion~~ ^{Reversion} to the African way of thinking and emphasizing the popular will of the people cannot be underscored since it is only, as discussed earlier, through such that chaos can be averted. The present system above all else is designed to favour the economically, Propertied class. These bourgeois magnates find their way to political positions because of their economic advantage over the poor. Once in power they serve to exploit the less advantaged. This creates a stratified society where the rich are becoming richer and the poor poorer.

The only solution to this type of society is the initiation of that type of ideology that sees all men as equal socially, politically and economically and where the less advantaged are pulled up by the advantaged until all stand on the same plane.

11 - Supra note 10 pg 175

12 - Supra note 11 pg 179

13 - Mohamed Matha "The Urban guerrilla" Richmond, Canada, pg 17

14 - Supra note 21 pg 270

15 - Supra note 10 pg 175

16 - Mohamed Matha "The guerrilla" Richmond, Canada pg 17

17 - Ogiara Odinga Supra pg 310

18 - Ibid pg 275

19 - Ibid pg 275

20 - H. Gargis "The roots of freedom" pg 90 letter to
Min. of Agriculture dated 5th Sept. 1953 - C.O. No. 1110.

21 - Ibid pg 275

FOOTNOTES

- 1 = Cherry Gertzel "The politics of Independent Kenya 1963-68
C.A.P.H. pg 1
- 2 = Ibid
- 3 = Andrews W.G. "Constitutions and Constitutionalism, Canada pg 12
- 4 = Ibid
- 5 = Ibid
- 6 = Sup ra Note 3 pg 24
- 7 = De Smith S.A. "Constitutional and Administrative law" ..
- 8 = Nwabueze B.O. "Constitutionalism in the Emergent States"
- 9 = Oginga Odinga "Not yet Uhuru" A. W. S. pg 153
- 10 = Supra note 9 pg 177
- 11 = Supra note 10 pg 179
- 12 = Supra note 11 pg 229
- 13 = Mohamed Maths "The Urban querrilla" Richmond, Canada,
pg 17
- 14 = Supra note 9 pg 270
- 15 = Supra note 10 pg 272
- 16 = Mohamed Mathu "The querrilla" Richmond, Canada pg 75
- 17 = Oginga Odinga Supra pg 310
- 18 = Ibid pg 276
- 19 = Ibid pg 284
- 20 = B. Kaggia "The roots of freedom" pg 86 letter to
Min. of Agriculture dated 5th Sept. 1963-c.c. to Min.
of Lands & settlement

21 = Ibid

22 = Ibid letter dated 20th April 1964

23 = Ibid Letter of June 1964

24 = Ibid Mimeographed statement deated 6 1964

25 = Wheare K. C. "Modern Constitutions London Oxford pg 3

C O N C L U S I O N

In this work I have tried to tackle in some length the doctrine of Autochthony and its place in the general constitutional law. I have not dealt with the doctrine in isolation for to do so is to tell half the story. I have looked at the basis of the doctrine of autochthony as far back as the nineteenth century in Germany. Here I have dealt with the development of Natural law from the communal mode of production upto the start of the Historical school of thought.

The historical school of thought, spearheaded by Savigny, I have submitted is the proper basis of the doctrine of autochthony. This school of thought advocated that law should have its base in the common customs of the people which customs are developed and continued according to the popular consciousness of the people. At this level law is an expression of the common will of the people.

The sociological school of thought has also been tackled. Here it has been considered as the successor of the historical school of thought. If fulfilled and accomplished the half-done work of the historical school of thought. In the words of Stone

"Historical Jurisprudence... not only led the jurists towards the promised land; it also reduced the main forts of its existing occupants. It played the role of Moses, and in part at least, of Joshua as well. But it was not to be under its banner (the Volkgeist) but under that of sociological Jurisprudence that the promised land was to be conquered and occupied" 1

So the two schools of thought here are seen as together embodying, in totality, the whole doctrine of Autochthony and demystifying the Natural law thinking of the law being metaphysical.

After laying the basis of autochthony inconsidered the degree of autochthony practised in traditional cultures and in tribal Africa. it was contended that tribal Africa constitute a truly autochthonous value system in its social, political and economical aspects. This found validity in the common consciousness of the people and the fact that everybody found his identity in the totality of the African value system.

With the advent of colonialism, it was submitted, began a steady dying process of the African values and their customs were being by the white man as primitive. So laws were made in favour of the white man and at the expense of the black man. This caused a deep resentment in the hearts of the Africans.

As a result of this the Mau Mau emergency was launched. But this struggle was also considered here as a struggle to reinstate the lost African value system and the African social, economic and political life. People also looked at independence with expectation as the one event which would be the embodiment of all that the Africans had lost at the hands of the white man ranging from land to social recognition.

But contrary to the people's expectations, it has been submitted, independence did not act as a restoration of the African value system and the aspirations of the people were not recognised at the advent of independence. Here Odinga and Kaggia and other post-independence writers were considered at length as voicing the resentment and deep anguish that enveloped the masses.

At this stage it was considered that since autochthony is seen as the only peaceful solution to the great social, economical and political problems that beset our society. A few general recommendations were made on which changes in the constitution could be made to make reflect a truly African character. These changes are being in their socio-economic and political applicability. In this Savigny's statement is of untold importance;

"In the general consciousness of a people lives positive law and hence we have to call it people's law (Volksrecht). It is to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth; in that case the will of individuals might have perhaps selected the same law ... Rather it is the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore it to be the consciousness of each individual not accidentally but necessarily and the same" 2

It is on this peoples common consciousness developed by people at a certain historical time and at a particular geographical area - and it is not static but develops with time and in accordance to cha nging pressures - that law should reflect. Thus law and particularly the constirution should be autochthonous and should be applicable to the African value system given the socio-economic and political situation in Kenya

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