AUTOCHTHONY IN BRITISH COMMONWEALTH AFRICA WITH SPECIAL REFERENCE TO KENYA

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By

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For

Mother, father for their Patience; the late Nabwire for her sacrifice; and, the disinherited.

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I N T R O D U C T I O N

A PRELIMINARY

The aim of this study is to critically examine and evaluate the principle of constitutional autochthony as it applies to member states of the British Commonwealth Africa. Special reference will be made to Kenya. The purpose of this introduction is to analyse the definitional and terminological problems attending the subject of autochothony. A formal definition of the term autochthony will be given. In addition, an attempt will be made to define the term in the context of the needs and aspirations of aparticular people. It may therefore transpire that the working definition to be adopted in this work will differ somewhat from the formal one. It will also be necessary to set out here the problem, the hypothesis and a theoretical framework within which the problem will be examined. The method will also be explained in brief.

B. In ahistorical perspective, the art of constitution making in Black Africa is a relatively new phenomenon. It was only after the Second, so-called, World War that nationalists in imperial controlled African territories started agitating for independence, or, if not that, then for participation in the administration and legislative process of colonial territories. It was not, however, until two decades later that the first of these territories, Ghana (in 1957) acquired her political independence.

The principle of constitutional autochthony specifically refers to the historical and/or legal origins of a constitution in respect of a territory on the verge of gaining its independence. Loewenstein[1], says that in some countries, such constitutions symbolized statehood and the independence attained. In others, a previously serviceable document did not survive.

"... the authoritarian hurricane and had to be completely recast in the light of past experience. In others again, the changes in the location of political power caused by revolution required a redefinition of the political organization."[2]

The world 'autochthon' is defined in the shorter Oxford English Dictionary as "One sprung from the soil he inhabits" and 'autochthonous' as "... native to the soil ... aboriginal ..."[4] The term may therefore, be best interpreted to mean 'homegrown'.

Thus to be autochthonous in this formal sense, a constitution should appear to have a strong link with values that prevail in the country it is to govern.[5] Wheare argues that a constitution, to be autochthonous, must have the "force of law, and if necessary, of supreme law within its territory through its own native authority and not because it was enacted or authorised by the parliament of United Kingdom. That it is, so to speak, a 'home grown', sprung from its own soil, and not imported from the United Kingdom".[6]

It will be our contention in this study that the above formal definition fails to provide an exhaustive criteria for defining the term autochthony. We shall argue that just because a constitution is 'home grown' does not make it

autochthonous. In our own view, the most important aspect of a constitution is its content or substance rather than its origin. Our definition shall therefore raise the following fundamental questions: is the independence constitution suitable to satisfy, and does it in fact satisfy the needs and aspirations of the people living under it? We therefore shall posit that alien elements in a constitution, do not, per se make it unautochthonous. While we agree that a "home grown" constitution may be, de jure autochthonous, it is not beyond reason to expect that such a constitution may be de facto unautochthonous. It is our argument in this respect that certain values are common to all humanity, that they are of universal application because notwithstanding the subject of their application, they are beneficial to mankind positively. We further argue that the various contemporary ideologies obtaining in the present world are not peculiar to particular peoples or nations. These ideologies, e.g. capitalism and communism, are by their very nature, capable of application to other peoples and nations thought they may not have had their origin therein. It is therefore because of the universality of certain values that we argue that the more formal definition of the term autochthony does not meet the minimum standard of wants, needs and aspirations which an application of universal values would satisfy. Therefore in our study, emphasis will be placed on the degree to which the substance or content of the constitution meets these minimum standards. It is our contention that principles of socialism, because of their inherent humanity are a requisite of any society that is striving towards positive human development.

We further suggest that the principle of Fundamental Rights is of universal application, per se, and for that reason, any constitution claiming autochthonous status must take cognisance of them. These rights have been reproduced or declared in various instruments of international organisations such as the United Nations Organisations and its specialised organs. It may be pointed out in passing that the concept of Fundamental Rights, found in constitutional law, owes its origin to the doctrine of Natural Law. Though a classically western concept of law, though it was propounded by a class trying to escape from serfdom at the hands of feudal lords, and though its effect was to create a new exploiting class, viz, the capitalist class and an exploited class, the workers, natural law still reflects man's desire to recognise that some rights are natural to man, notwithstanding his ideological orientation. We may thus justify our arguement that an autochthonous constittution may incorporate apparently borrowed principles on the grounds that some values are universal in nature.

It is abundantly clear that our redefinition of the term autochthonony for purposes of this study drastically departs from the formal textbook definition. As will be noted in the first chapter, various classifications of constitutions have been advanced, based on a number of criteria. To mention them only in passing, we have the so called adventitious constitutions. These are those said to be neither legally nor content-wise autochthonous. Then we have those said to be procedurally autochthonous. These are those constitutions, though foreign in content, whose origin may be traced wholly to a local legislature. Yet another criteria of classification

is that based on legitimacy. Here, if a constitution has after independence been accepted by the people, then it is said to be autochthonous! We finally have that classification where the criteria is the substance of the constitution. This is where the new constitution provides adequately for the political, economical, cultural and other aspects of a peoples rights.

Our basic problem in this study is whether or not Kenya's independence constitution is autochthonous. In particular, attention will be paid to the independence constitution of 1963 or its supercedent, the 1964 Republican constitution, and the fact of their relevance to an independent Kenya will be discussed.

In this regard, the process of the genesis of Kenya's independence constitution shall be reviewed. We suggest that such a review is necessary for the following reason. And this is that colonial policies prior to independence had a tramendous impact on the nature of and the actual process of the making of independence constitutions. For Kenya, we shall first identify the various interest groups involved during the colonial period. We shall further seek to evaluate the goals and tactics used by the said groups in trying to achieve their similar or divergent interests as the case may be. Second, we shall try to establish whether or not these interests were realised in whole or in part, and the consequences of such realisation or failure thereof to realise the goals on the independence constitution of 1963.

In so doing we shall attempt to see the role played by the colonial government, the local administration, the immigrant community and the indigenous peoples. The total effect of this review will be to establish whether or not the values created were suitable for post-independence Kenya.

The main hypothesis of this work is that Kenya's independence constitution was not (and is not) the genuine product of indigenous nationalism but rather was a compromise between colonial vested interests and the emerging class of local economic bourgeoisie and their political proteges. To support this hypothesis, it is intended to examine, in perspective, British colonial policies in Kenya up to independence. It will also be necessary to trace the various constitutional developments in order to ascertain whether or not the evolution of Kenya's independence constitution was a vertical or horizontal process. By vertical, it is meant the exclusion from the constitution making process of any effective local participation resulting in alien values. Conversely, by horizontal, it is meant the effective representation of the territorial peoples in the making of the constitution resulting in one incorporating values consonant with the needs and aspirations of the emergent nation.

It shall be argued that colonial heritage was one of the single most important factors influential in the making of, and the nature of Kenya's independence constitution. We shall identify the various groups (and goals) involved in the actual process of constitution making. It is hoped to be shown that the real needs of an independent Kenya were not predominant in the final document. Relevant areas of the independence constitution which will merit assessment will include:

(a) Provisions relating to economic, social and cultural rights.

(b) Those provisions confering political and civil rights.

We posit that the picture that emerges on this evaluation will indicate that Kenya's independence constitution was not only a compromise of the rights of the majority of Kenyans but also that it was a conspiracy of continuity of the old order.

The genesis of the independence constitutions can best be understood within a specific theoretical framework. Before defining this framework, it is necessary to restate the basic problem of this work. That is, that are the independence constitutions "... suitable to satisfy, and do they satisfy, the needs and aspirations of the people living under them?"[7] A primary concern will therefore be: what has been accepted as the essence and role of law in society?

We suggest that the most ideal theoretical framework is that which defines the essence and role of law as involving the development of objective laws of social and especially economic development. The constitution in liberal democracies is generally regarded as the supreme law of the land. Kenya, as we shall show later on in this work, may be regarded as a liberal democracy. It is therefore important that the essence of the genesis of the constitution be placed within a specific reference framework. For this reason, we shall here examine the general theories as to the essence of law with a view to understanding the development of law in colonial Kenya and the ultimate evolution of the independence constitution.

Bourgeois jurisprudence is replete with a multiplicity of theories and explanations as to the genesis of law. A leading jurist in this field, Allen C.K.[2] admits this multiplicity. He, however, choses to divide the bourgeois definitions of law into two broad categories. Allen cites the analytical positivist school and its leading proponent J. Austin who argues that law is the will or command of the sovreign enforced through penal sanctions. This definition therefore depicts the picture of an omnipotent authority standing high above society and issuing downwards its behests. Thus here, the authority must be the creator of that law and it enforces the law, as it were, because it has the right to do what it likes with its own. In essence then, this positivist definition of the essence of the law would justify the view that a local legislative assembly, empowered to legislate by an Act of Parliament of the colonial power would therefore make an autochthonous independence constitution. This view would be doubly justifiable if it be borne in mind that the positivist school rejects all other metajuridical factors in the theory of law. As we stated earlier in our hypothesis, it shall be the main contention of this work that the only genuine form of autochthony is one where the substance of independence constitution trully reflects the needs and aspirations of the people under it. We therefore reject the positivist school as a format through which the genesis of independence constitutions may be viewed and evaluated.

Allen's second broad category as to the essence of law as expounded by bourgeois scholars is that law is spontaneous and grows upwards independent of any dominant will.

This view does not exclude the notion of saction or enforcement by a supreme established authority. This definition has two glaring disadvantages. First, the notion of independent growth of the law tends to exclude other major components of societal growth, viz social, economic and political factors. Secondly, the element of a supreme authority as an agency for enforcement of law, when applied to colonial territory situations simply means that an alien and illegitimate authority, having imposed its will upon a previously independent people now enforces laws without other considerations of that Law's relevance to the latter's needs and aspirations. It is therefore submitted that neither of the two broad categories, that is, the positivist and the sociological schools, are adequate frameworks within which law development in colonial territories may be evaluated and judged.

For purposes of this work, then, we shall adopt the Marxist school of thought as to the essence of law as a referential framework for understanding the development of law and the ultimate creation of independence constitutions. The essence of the Marxist school of thought is that the Marxists adopt a materialist approach as opposed to bourgeois idealist approaches. It is intended here to give only a very brief summary of the marxist concept of law and thus explain why it is adequate as a proper theoretical framework for our work. The basic tenets of marxist concepts of law are as follows:

First, law is a historically determined social phenomena, that is, law is a product of human society at a temporary stage of development.

Secondly, law is inseparably inter-linked with the state. Hence, an understanding of the relationship between state and law is a prerequisite to the understanding of the phenomena of law.

Third, every social-economic formation brought fourth its own congruous type of state and law. Therefore in accordance with each socio-economic formation each will have four types of state and law as follws: state and law in slave owner society; state and law in a feudal society; state and law of capitalism and lastly, state and law of socialism.

The above principles may be summarised thus: As Marx and Englels[3] postulated, law is "merely part of the superstructure of society, the content, purpose and very existence of which was determined by the economic basis. Law was thus an instrument by means of which the ruling class kept itself in power; though its content might change in accordance with the economic relations peculiar to any given capitalist society, it drew its raison d' etre from the existence of divided antagonistic classes". Marx and Engel thus expected "that with the triumph of Communism, a classless society would be achieved and that this must involve the withering away of the state and the disappearance of its handmaiden - law. The choice was, therefore not between bourgeois law and socialist law but between law as such and a new social order based on administration."

It is beyond the scope of this work to undertake a critical evaluation of the controversial marxist concept of the withering away of the state and law although this is emminently desirable in the post-Marx experience of so-called socialist states,

notably the Union of Soviet Socialist Republic and The People's Republic of China. However, it is our submission that this school of thought provides the best theoretical framework within which law development in colonial territories may be viewed for reasons as hereunder.

Firstly, the concept of law as a product of human society at a temporary stage of development means that with further development of that society, the previously existing law may prove incompatible with the new reality. Hence it may justifiably be replaced wholesome. This leads to the suggestion that probably most laws, being the product of colonial heritage are thereby irrelevant to the socio-economic and political realities of independent countries.

Secondly, the concept of the inseparability of law and state is of great relevance to the colonial situation. This is on account of the fact that then, the state was, and, represented an alien group consisting of the immigrant class and also the local colonially created elite whose main objective was to perpetuate the status quo.

Thirdly the concept of a social-economic formation bring fourth its own congruous type of state and law is ideally suited to understanding the type of laws during the colonial era and the resultant constitution at the time of political independence. These, among other reasons, makes the marxist concept of law a more viable medium for understanding the genesis of independence constitutions, than the positivist or sociological schools.

A word about the approach to be adopted in this work. This work, apart from the introduction, is divided into four basic parts. The first will deal with the definitional

aspects of autochthony, and the possible classifications or categorisation of autochthonous constitutions; the second will examine the phenomenon of colonial rule and the genesis of law during that period and the impact upon the independence constitution of Kenya of this colonial legacy; the third part will attempt a suggestion of an ideal constitution through various examples, the main one being Tanzania. The last part will form the conclusion.

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C H A P T E R I

TYPES OF AUTOCHTHONOUS CONSTITUTIONS: CLASSIFICATION.

(i) Introduction:

A major problem facing an attempt at classifying constitutions into various autochthonous types takes on three phases.

The first is that the term auto-chthony is a relatively new concept or word in the study of constitutional law[1] and is infact a by-product of the end of the colonial era or process, and the concomitant emergence of new, politically independent states. This is not, however, to suggest that the essence of the term autochthony is not applicable to the constitutions of some of the older former British colonies the United States of America for instance, which achieved its political independence from Britain in 1776. While therefore, the term was coined specifically to cater to newly independent commonwealth countries, it will transpire later on in this work that it is in its essence applicable to any constitution of a country that has in its history suffered foreign domination.

The second aspect of the problem and perhaps resulting from the first is that the majority of bourgeois jurists, who in the main have formed the bulk of contributors to the subject have not bothered to critically evaluate it[2]. (the subject autochthony). Perhaps this is due to the positiuist and legalistie stance of western concepts of law.

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The final phase of the problem is that few authors[3] who have in their treatises contributed to the subject of autochthony have studiously avoided any serious attempt at a technical or terminalogical classification of constitutions into varius autochthonous types. However, a general feature of these attempts have been to draw a distinction between what may be called procedurally' autochthonous constitutions and 'substantively' autochthonous ones. It is the aim of this chapter than to consider the problem of autochthony in its definitional and classification aspects. Our main concern here will be to evaluate the manner in which the constitution was conceived, considered, agreed upon and finally gained its status as the supreme law of the land or as the case may be - in independent states.

(ii) AUTOCHTHONY RE-STATED

Wheare, K.C.[4], addresses himself to the topic of autochthony and says of an autochthonous constitution; "... such a constitution has force of law within its territory through its own native authority and not because it was enacted or authorised by the Parliament of United Kingdom. That it is, so to speak, a 'home grown', sprung from its own soil, and not imported from the United Kingdom". He adds that when members of the commonwealth say that they enjoy a system of government not subordinate to the government of the United Kingdom, "... they assert not the principle of autonomy only; they assert also something stronger, of self-sufficiency, of constitutional autacky ... of being rooted in their own soil".

Nwabueze[5], on the other hand, argues that the importance of the source of a constitution's authority lies, not so much in a nationalistic longing or aspiration for autochthony as in its bearing upon legitimacy. He avers that the constitution is no less law for its being on act of the colonial power or of the local legislature but its "moral authority", that is to say, "its legitimacy is another matter". According to him, for a constitution to have legitimacy in the public eye, the people should be involved in the process of its making. That its form and contents should be subjected to public discussion. He further adds that if the final act of adoption is that of the people, then that may conceivably enhance the constitution's legitimacy.

Wheare's definition of autochthony therefore, revolves around the issue of the indigenousness of the independence constitution. The essence of his understanding of autochthony is that a constitution will be deemed autochthonous if it owes its creation wholly to its own land and peoples. On the other hand, Nwabueze simply says that its sufficient if the people give the independence constitution its legitimacy through some act of "ratification", e.g. a public referendum.

However, the above two definitions cannot be deemed sufficient for purposes of this work. As we mentioned in the introduction, besides indigenousness and legitimacy, a constitution, being the supreme law of the land must also fulfil certain fundermentals. We

mentioned that various International Organisations, notably the United Nations Organisation (herafter denoted as U.N.O.) and its organs have over the years re-stated certain principles of Human rights. It is our contention that these principles of Human rights have not, by being reproduced in various instruments, been created. We argue that such instruments are merely declaratory. Ratification is not necessary to give them universal application. We posited in the introduction that independence constitutions, besides indigenousness and legitimacy must take cognisance of Human rights principles to be trully autochthonous.

Our theoretical framework rejects the various bourgeois definitions of law as the basis of our understanding the evolution of independence constitutions. We argued that the marxian concept of law is more suited to the problem. However, it is necessary to state that not all bourgeois concepts of law are ill-placed to serve as a framework for understanding the role of law in society. Among these exceptions is, for instance the Natural school of Law. Although in essence this school was basically a reaction against the feudal era when monarchism and feudal Lords reduced the rest of mankind to serfdom, and an expression of a desire by the intelligensia to be allowed the freedom to acquire capital, it still has its uses. Natural law is useful in societal development. We note for instance that in the post world-war II era, natural law was revised

and was influential in ending fascism and ultra positivistic laws. In addition, natural Law may also be used to emphasize the social relationships and socialist principles of equality. This is indeed a very positive aspect of natural law. Thus, at an ideological level, Natural law may be used to bring about principles of socialism. To the extent that it does this, we may therefore say that natural law, though basically a bourgeois concept of law may give an independence constitution an element of substantive autochthony. The concept of Fundamental Rights, found in Constitutional Law, owes its origin to Natural Law. It is therefore important for an independence constitution that it takes cognisance of Fundamental Rights as defined by Natural Law.

Any definition of autochthony is therefore incomplete if it fails to incorporate all the above mentioned requirements, viz, indigenousness, legitimacy, recognition of universally accepted Human Rights principles as propounded by natural law and most important of all, a total commitment to socialism and its principles of equality and the non-exploitation of man by man and also the doctrine of mutual responsibility. At this point, it is necessary to examine how independence constitutions may be classified in relation to autochthony.

(iii) CLASSIFICATION OF INDEPENDENCE CONSTITUTIONS INTO AUTOCHTHONOUS TYPES:

One classification of constitutions is that of

autochthonous and adventitious constitutions[6]. Below we shall discuss each of these two categories giving, where appropriate, relevant examples.

(a) ADVENTITIOUS CONSTITUTIONS:

By definition, adventitious constitutions are those not legally or politically indigenous to the recipient country. Naturally, they also lack those fundermentals refered to heretofore. They are imposed on the recipient country as in the majority former British colonies in Africa[7]. Indeed, the main problems facing the constitution as an instrument of restraint on the government (to state but one of the supposed functions of constitutional instruments) relate to the constitution's legitimacy and its source of supremacy. Owing to their origin as colonial creations, the new states have had constitutions adopted for them by the colonial power at the time of its withdrawal or by the local legislature set up by the colonial power at the time or under the authority of a law enacted by it[8]. In the ex-British colonies, the adoption of a new constitution after independence is occassioned by the need and desire to change from a Monarchy to a republic.[9] An example of an adventitious constitution is that of Nigeria of 1963[10] which changed the country from a monarchy to a republic. It was enacted by the parliament established by the independence (imperial) constitution of 1960.[11]).

The method has been more or less the same in the rest of British Commonwealth Africa. The only

possible exceptions are Ghana, Tanganyika and Uganda[12]. Here, the republican constituent assembly was the imperially created National assembly under a different name. The national assemblies here simply resolved themselves into constituent assemblies and under that name, enacted the new republican constitutions under the power confered upon them by acts of National Assemblies themselves.

The independent constitution of Nigeria is a classic example of adventurism. While its preamble[13] it declares that "...we the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following constitution ....", it was actually the prime minister and the Regional Premiers who just meeting for one day, agreed among themselves that a republican constitution for Nigeria should reproduce the 1960 imperial constitution with such amendments as would conform it to a republican status. (!) What discussion there was was confined to just a few technical issues. Thereafter, Parliament proceeded to enact the proposals as agreed among the Premiers, and as is usual in that body, there was hardly any discussion of substantive issues. The result was that Nigeria had to continue its life under what has been called "..artificial constitutional regimes which were created by the hidden impulse of a foreign (colonial) constituent power working through small groups of converts to Western constitutionalism"[14].

Certain basic reasons may be assigned as to why it is possible to impose such unfavourable constitutions on the young independent states.

First, the colonial government, due to the absence and/or ineffective liberation movements, has the upper hand in the making of independent constitutions. Thus it ensures that the new supreme law will, in the tradition of western (bourgeois) law guard the interests of the metropole, the multinationals and hence the petty-bourgeoisie.[15]

Secondly, the African political and economic elite which has gone to the metropole to negotiate for independence is by and large contented with political independence and as such does not raise real objections as to the omission of substantive matters in the new constitution. An example illustrating this contentment is conveyed in Kwame Nkurumah's words; "Seek ye the political kingdom first and all else shall be added unto you[16].

Thirdly, the african political elite seeking independence is the middle-class or petty-bourgeoisie and stands to gain the most from a constitution which is not substantively autochthonous[17].

In British Commonwealth Africa, the conclusion may be drawn that the majority of independence constitutions are adventitious, that is, foreign in origin and lacking in legitimacy. Kenya's independence constitution of 1963 and the subsequent republican

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one of 1964 falls into this category of constitutions[18]. Further reference will be made to this in the next chapter where a more detailed analysis is undertaken on the independence constitution of Kenya. The other category of constitutions falling under this classification are substantively autochthonous ones.

(b) SUBSTANTIVE (OR CONTENT) AUTOCHTHONY

Ghai and McAuslan[19], in their dealing on the subject of autochthony identify three broad definitions or classifications of autochthonous constitutions. They refer first to wheare's definition[20]. According to their second definition, autochthony may be traced through an examination of the impact the local leadership and policies have had on the independence constitution. The third and last definition is what concerns us here. They aver that there is another, less formal sence in which autochthony may be understood; that in this instance the content rather than the origin of the new constitution is more important. Content or substantive autochthony, is, as we pointed out in the introduction, the more important of the classifications.

Put in another way, a substantively autochthonous constitution, is we argue, one which will fulfil all the three conditions as outlined in the introduction.

First, it must not owe its legal or political origin to the British Parliament. Thus, the process of creating it involves the snapping of the link between the

former colonial power and the new government in that the new constitution does not derive its validity from the colonial power.

Secondly, the constitution should, by its contents reflect the political economic and social realities of the nation it is geared to serve. It is our contention therefore, that only a constitution with a socialist ideology bias will have any chance of fulfilling this role. The socialist principles of equality of man, the control of a country's resources by the people in concert will result in an equitable distribution of wealth, services and opportunity.

Thirdly, a constitution can only lay claim to substantive autochthony if it takes cognisance of and incorporates within the universally applicable doctrines of Human Rights as derived from the concept of natural law. It should be noted that these Fundermental Rights have been re-enacted in numerous instruments pertaining to International Organisations. Of note here is the U.N.O. Charter of 1948 which in its preamble says in part that the peoples of the United Nations determined ".....to reaffirm faith in fundermental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,...." This statement is elaborated in Art.55[21] of the charter which considers political, economic, social and cultural advancement as part of the fundermental rights of all human beings.

An acceptance of marxist legal philosophy means an acceptance of the fact of the existence of logical contradictions in society or as otherwise termed dialectical materialism.[24]

Examples of countries in Africa whose constitutions reflect the above principles exist as mentioned above. A case study will be made in Chapter III of such an example: Tanzania's republican constitution of 1965. The non-inclusion of this case study here is purely dictated by the structure of this work.

Another classification of constitutions is that of procedural autochthony on the one hand and substantive autochthony on the other. The latter has been dealt with above hence we shall hereunder examine the former.

(c) PROCEDURAL AUTOCHTHONY

Procedural autochthony is concerned by the way in which, or the degree to which a specific constitution has indigenous as opposed to foreign legal roots. It deals with the method of enactment, adoption and application and by who. Marshall,[25] gives the examples of the Republic of Ireland, India, Pakistan, South Africa and possibly Ghana as countries whose independence constitutions fall under this classification. He points out that in all of them, a new constitution has been promulgated and claims made in its behalf that the people (or God!) rather than the British Sovereign in some sense stand behind it. Robinson[26] also refers to Ghana and presents a strong case why the Ghananian constitution of independence is autochthonous. On this type of constitution, Nwabueze[27] says that it is understandable (and perhaps inevitable too) that a colonial

territory should be launched into independent statehood under a constitution made for it by the colonial power. He adds that it is not understandable that when the country, after some years of independent existence, adopts a new constitution, the existing legislature which was a creation of the colonial power should be the one to enact it. His position seems to be that the fact that a new constitution superceeds the colonially created one does not automatically make the former autochthonous. This is true enough. But we shall see where such a situation has resulted in a substantively autochthonous constitution when we study the case of Tanzania in Chapter III.

Another way of looking at procedural autochthony is to ask whether or not, in the setting up of independent institutions, the processes necessary for constitutional legislation under existing legislation have thoroughly been complied with.[28] Or alternatively, whether or not, in the enactment of constitutional provisions or the setting up of constituent assemblies, legal continuity has been broken.[29] Whether or not it has been broken may well be the subject of difference of opinion. The Irish in 1922 did not regard their constitution as having been made under the authority of the Irish Free State Constitution Act passed at Westminister, though it was that very Act, in the British view, which gave the said constitution its legal authority.[30]

The independence constitution of Ghana, on the other hand, resulted from a series of legal steps each carried out in terms of previous law and traceable directly back to the

British Independence Act and Constitutional Order in Council of 1957.[31] Ghana's leaders, however, emphasized the autochthnous personality of their independence constitution. Why then this diversity of opinion between the two groups? The case study below is intended to resolve this issue.

- AUTOCHTHONY IN GHANA: A CASE STUDY

Both Madden A.F., and Marshall G.[32] argue that procedurally, Ghana's independence constitution to be of the same opinion. And to repeat, the Ghananian leader of the time insist otherwise. Perhaps the legislative history of the Ghananian 1960 constitution will provide an answer.

Before the enactment of the 1960 constitution, the constitution of Ghana was contained in the Ghana (Constitution) Order in Council.

"... by virtue and in exercise of the powers confered upon her by the British Settlements Acts 1890, the Ghana Independence Act, 1957 and all other powers enabling Her in that behalf". That constitution had in certain important respects been ammended by the Ghana legislature in later years, notably by Constitution (Repeal of Restrictions) Act 1958, making it possible for simple majority ammendments. However, Section 42 of the Constitution Order in Council which provided that "No Bill shall become law until her Majesty has given Her assent thereto" remained unammended. On February 23rd, 1960, the "Constituent Assembly and Plebiscite Bill" was presented in the House of Assembly. It was meant as a first step,

"... necessary so that the people of Ghana can decide for themselves the form of constitution which they wish ..." and also to "... transfer the supreme power to make law, so far as the constitution is concerned from parlament to the National Assembly ..."[34] It was emphasized once more that in "strict law", it was or would be for "... the constituent Assembly finally to enact into law the new constitution ..."[35]

Clause 2(2) provided that notwithstanding Her Majesty's consent, a Bill for the new constitution, any Bill containing provisions consequential thereon, or supplementing the new constitution ... shall become law. Another clause (No. 4) of the Bill provided that once the new constitution came into effect, the Bill was to expire and further that this provision was to operate as a repeal for the purposes of the Interpretation Act, 1957 (which preserved validity of things done under the repealed Act).

On March 7th, 1960, the government issued proposals for a Republican constition.[36] It stated that the draft constitution recognized that ultimately, all powers of the state came from the people and not primarily from the constituent assembly to determine the form of the constitution. The Assembly was then asked to endorse the Bill. The Prime Minister (Dr. Nkrumah, K.) said in a speech to the Assembly:

"... The constitution recommends to the poeple of Ghana the government proposals for a Republican constitution ..."[37] After refering to the last victory of the Convention Peoples Party at the 1956 election, that the said victory should have hit the conscience of colonialism to the Ghananian

people alone to provide for themselves their own constitution by which they would be governed. He pointed out in the speech that imperialism dies hard and that again, another constitution (The 1957 one) had been imposed upon his people. He declared the continued government of the Ghanaian people by a constitution imposed upon them.[38] The opposition camp, however, seems to have been in total disagreement. Its leader asserted that

"... the constitution of an independent Ghana for an independent Ghana should be unique... Our history, our traditions, and our ambitions are different from those of other nations ... there is not the slightest coicidence that the proposed constitution is the product of our own genesis ...[39]" An independent member declaimed the constitution, arguing that

"... to attain our objective, we have got to master, properly allocate, and thoroughly prepare our forces for a longer march forward-stride - this we cannot achieve under the present unsuitable bourgeois constitution ... prepared for us by ... Imperialist ... Britain.[40] This same member then echoed the classic revolutionary standard grounds on the objectives of constitutional autochthony.[41]

In the final analysis, the constitution was accepted by the masses in a plebiscite held on April 26, 1960 and was finally enacted on July 1, 1960.

What then makes the Ghananian constitution of 1960 not procedurally, and not substantively autochthonous? As Marshall argues (see above) the series of legal steps leading

to this constitution are directly traceable to the British Independence Act (Constitution) Order in Council of 1957. This alone makes the 1960 constitution not proceedurally autochthonous. We may also surmise from the speech by the opposition leader and the independent member that the content of this instrument was not in keeping with the aspirations of the Ghananian peoples.

The above view is, however, at variance with Nwabuezi's[42] interpretation of autochthony. He remarks, in his evaluation of the legislative process of the Ghananian constitution that a constitution need not necessarily have been enacted by the people to have legitimacy, or in his own words "acceptance".[43] He avers that acceptance is directly linked to the necessity for people to be involved in the process of constitution making. Thus, he adds, the 1960 constitution was enacted by a constituent Assembly, but only after it had been submitted to the people at a plebiscite; that the constitution gained legitimacy because it further institutionalised the people by acknowledging them as the donors of all political power and by incorporating them as part of the legislative machinery of state. In concluding, he points out that out of the fifty-five of the Articles in the constitution, no less than seventeen were made alterable only by the people, exclusive of the legislature.

With respect, it is submitted that Nwabuezi seems to have fallen victim to terminological confussion. If we understand him right, it would appear that he is equating "legitimacy" or "acceptance" with autochthony. The fact of a largely illeterate populace voting 'Yes' to accept a document

they can hardly read, leave alone understand, could not, even with the most strenious logic translate such a document into an autochthonous one. The plebiscite exercise remains largely an anachronism of liberal democracy with its principle of the right to vote. The fact of the constitution being popularised by a scheming, conniving, gang of politicians makes the constitution even less autochthonous. Additionally, the criterion of labeling a constitution as autochthonous because the independence leader happens to be charismatic[47] must be termed mischievous and irresponsible interpretation of reality. Finally, "acceptance" may be more real in theory than fact due to the rigid institutionalization of the colonially inherited institutional superstructures, coupled to the obvious inability of the dominated to eject them.

Be it as it may, proceedural autochthony can not be seen to redeem a constitution of its shortcomings. In the absence of such a constitution meeting the people's needs and aspirations it does not serve any other purpose than that of protecting the dominant class and its interests against the justifiable interests of the dominate. In short one may say that proceedural autochthnony is adventitious autochthony in disguise.

Another possible classification is that of "acceptance" autochthony and "charismatic leadership" autochthony. Adequate reference and remarks have been made on these two categories above and any further explanation would be repetetive.

Suffice it to say here that our argument so far has been that to best evaluate the genesis of independence constitutions, it has been necessary to understand law in

the context of marxist philosophy. Marxist philosophy is based on the principle of the primacy of economics over politics, law and state. By this, it is meant that the state, the law and politics (the struggle for power) are human institutions which have arisen at a specific time in different human communities as a result of changes in economic relations, or in the relation between producers and consumers. Hence the existence of the law is not a precondition but a consequence of economic relations. The attempt, therefore, by bourgeois scholars to define autochthony in terms of legal continuity or lack thereof is a cover up of the true reality: that of economic relations. It is for this reason that we have argued herein, that only substantive autochthony is of any worth to the newly independent states in Africa.

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CHAPTER II

AUTOCHTHONY IN KENYA

PART A.

1. AUTOCHTHONY RESTATED

It has been submitted heretofore that the only meaningful criterion of establishing the autochthonous nature of an independence constitution is by way of looking at the content rather than the legal and/or historical origin thereof. It was contented that only a substantively autochthonous constitution can best ensure the social, economic, cultural and economic independence and development of the newly emancipated peoples. We mentioned, and argued that the very fact of the indigenousness of a constitution does not necessarily make it autochthonous. In our view, it is possible that the inclusion of apparently foreign elements in an independence constitution, provided that the said elements are of universal application will make the constitution an autochthonous one. It was thus our opinion that a constitution must provide for, and guarantee for the people under it, economic quality as obtains under socialist doctrines, fundamental rights as derived from principles of Natural Law and declared in various instruments of recognised international organizations.

In this chapter, we set out to first survey the colonial period in Kenya. This will give us an insight into, inter alia, the policies of the period, and more

important, the new values which evolved thereof. Second, we shall evaluate the consequences of Kenya's colonial legacy on a supposedly indpendent Kenya-constitution. In trying to establish Kenya's colonial legacy, special reference will be made to the following areas: a brief sketch will be presented of pre-colonial Kenya with a view to better evaluate the impact of the colonial process on indigenous ways of life; the establishment of a protectorate and subsequent annexation and effects thereof; the new definition of proper rights and its implications; The evolution of the legal system; the development of the legislature; Nationalism and its role and effect on independence, and finally, class formation.

2. THE COLONIAL PROCESS IN KENYA: THE LEGACY

(i) PRE-CONONIAL KENYA

Before attempting to establish and evaluate the legacy the British colonial process bequethed to Kenya, it is pertinent to refer, albeit briefly, to the nature of pre-colonial Kenya society. The scope of this paper does not allow us to do so in great detail, but a brief description can be attempted. At the end of 19th Century, just before formal colonialism, the country that is now Kenya consisted of a number of tribal societies. Kipkorir[1] says that with the exception of the Wanga state, all these tribal societies lacked any form of traditional chieftainship or administrative bureaucracy. An outstanding feature of these societies was egalitarianism. This was based "... not only on the

stratification of society according to age but also on the prescription of steps to be taken by all members of that society, and on the granting of equal opportunity to all."[2] Experience and age-"learning" - in the context of strict conformity to tribal custom, gave a man a distinguishe status in his society. Kipkorir further observes that with or without any such distinction, a man was, however, not particularly either worse off or better than any other men, "... at least from the material point of view."[3] (Emphasis - underlining - mine) Certain minimum traditional requirements existed which ensured a man's respectable place in his society. Provided that he fulfilled these requirements - initiation, marriage, paternity, etc., - he was an equal of his fellow men. Industry could mean that one man had a larger crop than another but this did not guarantee for him either a marked degree of affluance or of a hereditary position of influence. For example, with regard to livestock, though it was possible for a man to accumulate more than his neighbours, the universal African custom of distributing cattle, sheep and goats among relatives and friends, both distant and near, to ensure against human and other disasters, had the net result of ensuring a generally equitable distribution of this form of wealth. Thus, concludes Kipkorir, "... a subsistence mode of economy combined with age-old traditions, to preserve an egalitarian (and, generally, equalitarian) social and political system."[4] Dalton[5], writing on "Traditional Economic Systems" observes that traditional Africa lacked resource and product market intergration (the institutional network of capitalism).

There therefore existed a perpetual state of mutual dependence, which mean mutual obligation.[6]

In the subsequent sub-titles, we seek to evaluate the forces of Western acculturation on the above socio-political framework.

(ii) THE PROTECTORATE AND ANNEXATION: STATEHOOD

The first legacy bequethed to colonial territories by the British colonial power is their present existence as states.[7] The late 19th Century scramble for territories in Africa had led to the arbitrary partition of the continent into territories coming under the sovereighty of any one of the then imperial powers of Europe, viz, Britain, Germany, Belgium, etc. This division was not harmonious either geographically or ethnically. Whole kingdoms were split up. Tribes and complete ethnic groups were dismembered. For Kenya, a protectorate was declared on the 15th June, 1895[8], to become the Colony and Protectorate of Kenya in 1920 on formal annexation 9. It is worthy to note that the tradition Western style of justifying injustice, viz, the use of the cloack of legal mechanisms to legitimate territorial acquisition, was employed fully by Britai n in the process of colonising Kenya. The net result, however, of the colonial process, was that at indpendence, the colonial territories preserved their geographical boundaries and emerged into the world order as complete sovereign states within the context of international law.

(iii) ECONOMIC LEGACY: ALIENATION OF LAND, REDIFINITION OF PROPERTY RIGHTS AND CONSOLIDATION AND REGISTRATION OF LAND.

Brett observes that

"Whatever the importance of strategic or philanthropic concerns among those who originally took Britain to Africa at the end of the 19th Century, those who kept her in the 20th Century were obsessed with the need to create an export economy which would draw her directly and profitably into the British system of International trade. By the end of the First World War, a powerful faction in public life saw the colonies as areas of immense economic potential."[10] It is therefore appropriate to argue that despite western legal theory to the contrary, law and its development and application in the colonial territories, can not be denied a material indicia. Land alienation by the colonial power thus takes a significant meaning within the social theory of colonization British attitudes to colonial development were decisively conditioned by her needs as a major manufacturing, capital exporting country.[11] With the resulting demand for external markets and cheap sources of raw materials, policy was influenced accordingly. The First World War greatly influenced and intensified these demands. For Britain, the blessing was that at this stage, the dependent colonial empire appeared to be free from economic nationalism. The colonies had almost no indigenous capital, narrow internal markets and technically backward populations. And more significant, all these territories' governments were controlled by Britain and could

be prevailed upon to introduce economic policies tending to favour the metropole.[12]

With land alienation for the effectuation of Britain's settlement program serving as a background, British capital was invested in colonial infrastructure to make possible increases in the production of colonial primary products. The sale thereof, preferably to the metropolitan manufacturers, would in turn create the markets for manufactured exports. Thus, the economic ideology of the peirod may be summed up thus: It required both that colonial development be confined to forms of production which would not compete with British manufacturers and that colonial consumers prefer British commodities, however, uncompetitive.[13]

It is crucial to emphasize that the British were as committed to capitalism in Africa as they were at home but (and especially in East Africa where there was a recognized poverty of both human and material resources) its relationship to the state had to take into account sharp differences in circumstances. Since the introduction of Settler Politics in 1903, a scheme was embarked upon to open up the territory for White Settlement. The culmination of this opening up was the 1915 Crown Lands Ordinance[14] which redifined Crown Lands so as to include land occupied by indigenous peoples in addition to land reserved by the Governor for the use and support of members of the native tribes. The raison d'etre behind this alienation was that independent peasant production and capitalistic settle production existed as sharply antagonistic modes and any effective development of one necessarily precluded an equivalent development of the other in the same social universe.[15] Labour, besides land,

was required for the Europeans to establish complete monopoly over the new economic infrastructure created by the colonial system. To effectuate this, Africans, the main labour pool had to be denied access to land for production purposes. In 1918[16] therefore, legislation was passed laying down that payment by Africans for occupation of settlerland could in future only be made in labour and not in cash. This turned the relationship from one of tenancy into one of serfdom. Though the 1923 White Paper "Indians in Kenya" purported to declare the interests of the "African natives" as paramount over all others, by the end of the depression in Europe (1939) it was well established that the white highlands were the European's domain. However, dispite settleropposition, by about 1940, the establishment of a viable peasant agriculture in reserves was gradually, but very slowly, gaining momentum.

The purpose of this section has been to show the effect of settlement on property rights in relation to land. Several conclusions may be made. First, the concept of private property is seen, by 1940 to be acquiring strong roots amongst the immigrant community. In the Native reserves, consolidation is yet infirm and land rights ambiguous. Thirdly, communal utilisation of land of the pre-colonial period has fast eroded away. For convenience of analysis, the discussion of consolidation and registration of title to land is being defered to the section which discusses the independence bargain.

(iv) THE RULE OF LAW AND THE COMMON LAW LEGACY

Gower[17] observes that another important legacy bequeathed to independent African nations by the British colonial process was the concept of the Rule of Law, on the one hand and the common law legacy on the other. Briefly, the concept of the Rule of law in Western legal theory stems from the doctrine of fundamental Rights and Freedoms of the Individual. In the context of Marxist legal theory, the guarantee of fundamental Rights and Individual Freedoms must be understood as necessary tools within a capitalist system. As for the common law legacy, Gower rightly notes that local legislation, emanating from local legislative council was at best unimaginative. It amounted to verbatim repetition of English legislation on the same subject matter. By English Common Law, as applicable during the colonial and in post-independence era by virtue of the 1967 Judicature Act[18], Chapter eight of the Laws of Kenya, it was/is meant Statutes of General Application, the Common Law, and Doctrines of Equity. It is worthy of note that even African customary law was made and has been made applicable only if it is not repugnant to morality and justice.[19]

What, therefore does it mean for a supposedly independent Kenya to have inherited not only the western concept of the Rule of Law, but more particularly, the English Common Law? The impact of this inheritance may only be appreciated more fully if viewed within the whole colonial legacy, with particular reference being made to the economic and political inheritance. The former has already been discussed above. The latter is discussed below; there-

after certain concrete conclusions will be made.

(v) THE WESTMINISTER MODEL

The British penchant for parliamentary democracy consisting of representatives elected on the principle of one man one vote manifested itself from the very earliest stage of colonialism in Kenya: at independence, this resulted in one of the most important institutional legacies bequeathed to Kenya - the Westminister model type of government.[20] Here, a brief historical sketch will be given while a critical analysis will be attempted at a later stage.

In establishing the institutions and structures of government and administration in the Kenya colony, the usual pattern as obtained elsewhere in the British Empire was followed. This pattern was based on Wight's[21] two great principles of subordination: first, that the legislature is subordinate to the executive and second, that the colonial government is subordinate to the imperial government. In Kenya, however, while this pattern was followed in terms of constitutional forms, it's constitutional history remains unique in several ways. For one thing, her eventual destiny was in doubt: uncertainty persisted over the aims of constitutinal development - was it to be along the lines of white settelements as in Australia and New Zealand, etc. or like the tropical territories of West AFrica? As Ghai and McAuslan[22] observe, the early frequent change of constitutional forms reflected the conflict between these two goals. They argue that Kenya's constitutional history was profoundly influenced by the presence and the claims of her

immigrant communities. They further note that when eventually the conflict was resolved "in favour" of the indigenous people, the balance of power shifted very rapidly and the basis of political activities changed to reflect more accurately the realities of the country. A detailed analysis of the historical legislative process in Kenya is beyond the scope of this paper. However, a highlight of those aspects of the conflict which affected the independence constitution is given below.

The first specific legislation in respect of local administration was the East Africa Africa Order in Council, 1897.[23] It, inter alia, established the office of the Commissioner who occupied a pivotal position in the formulation of, and application of colonial policies. In 1905, an Order in Council established the legislative Council. This was vested with the competence to make laws for the peace, order and good government of the protectorate. Indeed, its establishment was consequent to direct pressure from the settle community. The same Order established an executive council to advice the Governor on matters pertaining to the indigenous people in the protectorate. It is noteworthy that these two councils eventually ripened into important independence institutions: viz the National Assembly and the Executive - bastions of parliamentary democracy. During the earlier years, settler representation was direct while indigenous participation was by proxy, if at all. The first African on the council sat in 1944 and by 1954, an African was sitting on the Cabinet.

Context-wise, the 1950's were years of resolution of settler and AFrican conflicts and should be seen as the compromise stage between the metropolise and the immigrant community on the one hand, and the emergent African ruling class on the other. The role of nationalism, such as it was will be discussed below. Suffice it to say that by independence time, the Kenya colony was ready to adopt the West Minister model, complete, as in the Metropolis.

Other legacies bequeathed by Britain to Kenya are examined under Part B of this Chapter for ease of arrangement and logical continuity.

PART B: AUTOCHOTHONY IN KENYA

(i) CLASS FORMATION: Nationalists; Education System; The Civil Service; and The Petty Bourgeoisie.

Nkurumah[24] argues that class-formation in many colonial territories was a product of the colonial process. He notes that with the onset of colonialism, communical ownership of land was abolished and private ownership imposed by law. Subsistence agriculture was gradually destroyed and Africans compelled to sell their labour to the colonialists. With the growth of commodity production, single crop economies developed, completely dependent on foreign capital. At the same time, the spread of private enterprise, together with the needs of the colonial administrative apparatus, resulted in the emergence of class bureaucrats, reactionary interllectuals, traders and others who became increasingly part and parcel of the colonial economic and social structure.[25]

From the British, thus, Kenya inherited party politics,[26] British style education,[27] the civil service system[28] and other manifestations of class.

In respect of Nationalism and its role in the supposed "struggle" for independence in Kenya, it is well to remember Mohiddin's[29] observation that independence was granted, not on the basis of the destruction of the system but on its continuance. Wasserman[30] adds to this by arguing that Nationalists contributed to the dismantling of colonial empires but that "one cannot equate the rise of nationalism with the demise of colonialism". In Kenya, and Africa generally, it was not really until during and after World War II, however, that demand for independence began to take organised form. During World War II, it became apparent to the Africans, both on mass and elite levels that the European powers were vulnerable, and also that Africans were helping the allies fight a cause for human freedom and justice which should rightly include themselves.[31]

The history of Mau Mau is still controversial. Paden and Soja[32] point out that earlier findings by European writers had presented a strongly pro-British evaluation, but that, however, latter writters on the same subject came to "... view what came to be called Mau Mau as part of an ongoing process of African political development, begun in the 1920's which received little positive response from the colonial government."[32] In the main, however, violent opposition to colonial rule in Kenya was effectively destoryed and it remained the duty of the nationalist parties to peacefully bargain for independence with the metropolis and its local

representatives and the immigrant community. In summary, we may say that one of the legacies of the colonial process was the formation of classes: the bourgeois class comprising of the rulers, the high-echolon civil servants, the interllectuals and the business community; the proletariat, comprising of the workers and the peasants and finally, the capitalists comprising of International capital with its local agents.

(ii) THE INDEPENDENCE BARGAIN

It has been argued[33] that decolonisation is not merely the transfer of formal political authority to indigenours rules. It also represents the adaptive, co-optive and pre-emptive process of intergrating a potentially disruptive nationalist party into the structures and requisites of the colonial polifico-economy. It is therefore true to say that decolonisation, in the case of Kenya was adaptive in that the colonial political and economic elites must seek new kinds of influence in altered political authority structure. The immigrant community in Kenya represent this elite class. The settlers sought to maintain their control of the agricultural export sector. The Asian's business interests had to be protected from the indigenous people. The British government as the colonial power had to ensure that its exported peoples continued to lead a fruitful life in the new lands. Additionally, the crown and to guarantee that the new state would maintain links with its colonial master.

Decolonisation is co-optive in that it aims to socialise the new elite into colonial, political and social patterns.

Finally, it is pre-emptive in that it is initiated largely to prevent the formation and mobilisation of the mass nationalistic base. In fact, Wallerstein I. contends that the response of Europeans in Africa to the rise of nationalism

"was to come to terms with the middle class leadership by arranging a rapid transfer of power to them in the expectation of ending their verbal radicalism before it became coherent, ideological and national in organization."[34] From the foregoing, the conclusion may be drawn that whatever indigenous forces took part in the struggle for political independence, they cannot be equated to an ideologically committed political party. Hence Kenya's independence struggle lacked that revolutionary ingredient which is a pre-requisite of the absolute shading of the colonial yoke with its neo-colonial manifestations of economic dependence on the old colonial power. The actual independence bargain clearly furnishes us with evidence of the nature of interests that were preserved at independence.

Wesserman[35] says that "... independence can be viewed as a deal: a bargain struck between various colonial interests and a nationalist party". By this, we understand him to mean that for Kenya, the dream of making it a "white man's country" was doomed. The co-optive method of decolonisation therefore began to feature strongly in settler politics in the mid fiftees. Land consolidation and registration was introduced to create a landed class - a small pseudo-capitalist class.[36] The overall impact of these pieces of legislation was momentous on the then mainly communal land tenure systems of the indigenous peoples. This was not just the conceeding of ownership rights to Africans.

It was the introduction of a capitalist mode of production in the agricultural sector. It also assured that an indigenous landed class with similar interests to those of the settlers would be firmly entrenched by independence time. The continuity of the colonial political economy was then assured.

The first Lancaster House Constitional conference provides an illustration of the interests that the various groups sought to preserve. The Chairman of the conference, who was then Secretary of State for colonies said in his address that

"Our objective is a united Kenya Nation capable of social and economic progress in the modern world, and a Kenya in which men and women have confidence in the sanctity of individual rights and liberties and in the proper safeguard of the interests of minorities".[37] It is therefore no surprise that all the minority groups were represented at that conference. Among them were the Conservatives or United Party who sought to preserve settler agricultural interests.

The liberals on the other hand sought to preserve the colonial economic, social and the political system - the liberal democracy type - including the preservation of the open colonial economy and the sanctity of private enterprise.[38] Indeed their main aim was to preserve their place in the system by restructing the society away from the one split on racial lines to ones divided among white settlers. How resistant were the so called nationalists to these subtle and at times blantantly open manipulations by the settlers? Wasserman's answer is precise and to the point. He says that

> "the nationalists came to accept their role as guardians of the colonial society. They see the role as developing the existing social and economic structure. The most alteration they foresee is that of intergrating part of the African populace into the structure and preventing the rest from entering it."[39]

Thus, the land transfers advocated for by some of the white settler groups and demanded by the nationalists served two roles. First, the transfer was intended to drain off rural discontent. In Kenya, land is the opium of the masses and the bargainers knew this very well.

And what, if any was the interest of the British Government in an independent Kenya? The Secretary of State for Colonies was quite clear about this at the 1960 conference. He stated that Her Majesty's aim was twofold. First to build a nation based on parliamentary institutions on the Westminister model or in other words, to entrench liberal democracy. Secondly, the aim was to achieve a general acceptance by all of the right of each community to remain in Kenya and play part in public life.

At this point, it is certainly clear what the groups, goals and tactics in the phenomenon of Kenya's constitutional development were. What then was the outcome of vigorous bargaining seen earlier? The result was the independence constitution whose most outstanding characteristics were a form of Westminister government and an extensive system of

registration. To discuss the death of regionalism is beyond this work but suffice it to say that by December 12, 1964 when Kenya was declared a sovereign state, regionalism had ceased to exist and a central Republican government regained full control of the affairs of state. Our next task is to examine critically the significance of Liberal Democracy and its relation to substantive autochthony.

(iii) THE REPUBLICAN CONSTITUTION: LIBERAL DEMOCRACY - A CRITIQUE

What is a liberal democratic society? Before an attempt is made to answer this question, we must first explain what is meant by a liberal society. It is a society based on the theoretical principle of individual choice and open competition.[40] This type of society is sometimes analogously described as a 'market society'. Here, an individual is theoretically free to order his life in accordance with the dictates of his choice.

In England, the liberal society had its beginnings during the seventeenth Century.

But this too was the beginning of the capitalist economic system. For in reality, the liberal society is the social aspect of the capitalist economic system. It should be hereby noted that, then, capitalism was a great liberalizing force. It freed man from his traditional bondage. However, the capitalist economy has in-built inequalities. It cannot work unless some people have accumulated capital and others have none.

To maintain this kind of society, a responsible form of government was needed. This follows from the logic of the system - the principle of choice - people have what suits their interests. In England, this kind of government was provided by change from feudalism to capitalism through a revolution of sotes. The cumulative effect of this revolution coupled with the agrarian and industrial revolutions was to place government itself in a market situation. Why then was it necessary to introduce liberal democracy in Kenya?

The first reason for this is that liberal democracy institutions were the only institutions with which Britain was familiar with. Secondly, it was only through the establishment of these peculiarly British institutions that Britain could hope to control the colonies. In short, what the British attempted to do in their colonies was to create Africans and Africa in the image of Britain. The late Sir Philip Mitchell, a British colonial Governor put it thus: "What we have set our hands to here is the establishment of a civilised state in which the values and standards are to be values and standards of Britain".[41] "Values and standards" of Britain were therefore created in the colony and also in independent Kenya in an effort to create a liberal society. Land Consolidation Schemes were implemented to create a class of property-owning Africans who could safeguard and maintain, and perpetuate the emerging liberal society in its economic aspects. The colonial education system and the predominantly missionary religious organisations and the

predominantly missionary religious organisations and the churches saw to it that the social, religious and cultural values of the emerging elites were in tune with the new order. And as already seen, the independence constitution had either to be modelled on the British Westminister model - or independence was not granted. Thus the society created at independence was basically one of the elites, immersed in foreign values and prejudices and one in which the colonial political economy dictates the daily lives of the people.

In respect of the Republican Constitution itself, one sees the entrenchment of the political economy of the colonial power. The form of government and the institutions thereof are colonial in origin. S.75 of the constitution ensures the sanctity of private property, however, owned. This has tended to encourage heavy foreign participation in the economy resulting in economic dependence on international finance.

(iv) THE KENYA INDEPENDENCE CONSTITUTION

Could it then be argued that Kenya's Independence Constitution is autochthonous substantively? We submit that Kenya's independence constitution is not substantively autochthonous for two basic reasons. First, the political structure is a wholesale adopation of the colonial system. The liberal democratic institutions adopted essentially promote private enterprise which has inherent inequalities which cannot be eradicated except through a structural changes. Secondly, the entrenched property provisions ensure economic dependence and exploitation of the masses by the foreign and indigenous capitalist.

Alternatively, could it be argued that Kenya's Independence Constitution is legally or historically autochthonous? In other words, what are the legal or historical origins of the constitution? With reference to historical origin, the answer remains in the negative. The foregoing discussion indicated that the Republican Constitution of 1964 can be historically traced to the very first institutions set up by the imperial power for the colonial government. The Republican Constitution is but the maturation of those early embryonic institutions of the Governor, the Executive Council and the Legislative Council.

Even the legal origins of the Republican constitution rob it of any claim to autochthony. The 1960 Constitution was promulgated by an Order in Council in 1958. The Kenya Independence Act, 1963, was passed by the British Parliament, which renounced Britain's rithts of government and legislation in Kenya and repealed all the limitations on the competence of Kenya's legislature. The provisions of the First Schedule disapplied the Colonial Laws Validity Act 1865 to legislation passed in Kenya after independence. The Act also gave the legislature of Kenya full power to make laws having extra-territorial operation. Yet another Constitutional instrument was the Independence order in Council[42] which provided for transitional matters, including the continuation in force of the existing laws. Its Second Schedule was its most important part: it contained the Constitution for the independent Kenya. It is therefore irrefutable that Kenya's Independence Constitution owes its validity to United Kingdom's parliament and consequently is not autochthonous on the criterion of legal origin.

(v) CONCLUSION

In conclusion, it is submitted that Kenya's independence constitution is adventitious: it is neither procedurally nor substantively autochthonous. The colonial process eroded all or most of the pre-colonial values which basically verged on socialism. It introduced a new morality based on the concept of individualism. The form of government, viz the Westminister Model, and mode of production, viz, capitalism, which Kenya inherited are bastions of exploitation. The legal system reflects the power structure and production relationships which are basically exploitative in nature.

In Chapter three, we examine the basic tenets of a constitution which we shall argue verges on substantive autochthony and which is a pointer as to the direction best suited for Kenya to follow.

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CHAPTER III

AUTOCHTHONY IN TANZANIA: A Comparative Study

1. INTRODUCTION:

The emphasis in the last two chapters in regard to the nature of autochthony has been on the substantive rather than the procedural nature of an independence constitution. In this chapter it is not intended to give a detailed examination of the independence constitution of the Republic of Tanzania. Rather, it is a study of a comparative nature, the purpose of which is to explain more explicitly our definition of substantive autochthony. For this reason we shall confine our study to those areas of dichotomy betweeen the independence constitution of Kenya and Tanzania (Tanganyika at independence before the union with Zanzibar in 1964). This is not to suggest that the Tanzanian independence constitution is a model substantively autochothonous constitution. The more accurate position would be that the discussion will be illustrative of the indigenous nature of the content of that constitution. It will be an example of a genuine attempt to harmonise the constitutional framework of a country with the social and political-economic conditions of a country.

Below, therefore, is a brief examination of the Tanzanian independence constitution of 1961 and its supercedent, the Interim Constitution of 1965.

2. THE INDEPENDENCE CONSTITUTION

Tanganyika became independent on December ninth 1961 and the constitution coming into effect then was in many ways the "Standard Form"[1] constitution evolved in, and produced by the colonial office in consultation with the country concerned for achieving independence within the Commonwealth.[2] Its basic features were as follows: First, it was modelled on the Westminister type. It provided for the executive, the judiciary and the legislature. A second feature was its provision for a Governor General,[3] a Prime Minister with executive powers vested in the former who was Her Majesty's representative. There also were provisions for a Public Service Commission[5] with executive functions and in addition, two thirds majority was required for a constitutional amendment by the legislature.[6]

As McAuslan points out, one of its important features was that the constitution was highly flexible. Further still, it was easy to change in the sense that a large area had been left for the growth of constitutional practises and conventions. This contrasts sharply with its Kenyan counterpart which had certain entrenched provisions and was comparatively inflexible because its amendment required a majority of ninety per cent.

Yet another area of dichotomy between the two constitutions is that Kenya's purpoted to contain a Bill of rights while Tanzania's made no such pretence. These differences are to a major extent responsible for the very diverse nature of the development ideologies which the two countries persued after independence was granted. It should

be noted, however, that with the exception of its flexibility, Tanzania's independence constitution was more or less adventitious both in content and procedurally. Below, we look at how this shortcoming has partly been righted.

3. TOWARDS SUBSTANTATIVE AUTOCHTHONY: THE 1965 INTERIM CONSTITUTION AND THE 1977 CONSTITUTION

Subsequent to the merger of the states of Zanzibar and Tanganyika in 1964, a new instrument, the 1965 Interim Constitution was promulgated to cater for the resultant merger state.

Two main features appear in this constitution. First, it provides for all the features of the 1960 constitution in respect of the executive, the legislature and the judiciary as well as the Public Service Commission for both the mainland and the island. The second, and most important, (for this discussion) feature is its First Schedule. This incorporates the Constitution of Tanganyika African National Union, then the Mass-based mainland political party. Before we examine the T.A.N.U. constitution and its relevance to autochthony in the context of Tanzania it is needful here to restate our basic arguement. We contended that the emergence of new states in Africa, particularly in the Commonwealth states was attended, and characterised by the adoption, if not imposition, and/or both, of the Westminister Model constitution, a bastion of the (so-called) liberal democracy. This, it was avered, was a deliberate manourvre to facilitate continuity of the system with all its trappings. We noted that the result has been the creation of neo-colonial states heavily depended on,

controlled, sustained and exploited by international capital. We observed further that international capital manifests itself and imposes several roles of dependencey, to wit, provision of markets for foreign manufacturers, exploitation and exportation of primary agricultural products and provision of diverse investment outlets for foreign capital. It is therefore not incorrect to state that these rotes facilitate and perpetuate underdevelopment. When we look at the T.A.N.U. constitution/manifesto and the subsequent 1967 Arusha Declaration, we shall discover that the two have made a serious attempt to declare and institutionalize a philosophy more compatible with the needs of a newly independent and indeed, underdeveloped country. This philosophy is socialism.

Tanzania's national creed, "Ujamaa", as espoused in T.A.N.U. Manifests[8] is an attempt at shading the yoke of neo-colonialism and its exploitative manifestations which are characteristic of the Kenyan situation. A further development in regard to the institutionalisation of this philosophy took place in 1977. Then, political consolidation took place in the merger of the two political parties representing the mainland and the island respectively. Afro Shirazi Party (A.S.P.) for the island and T.A.N.U. for the mainland merged to create a new party "Chama Cha Mapinduzi", a Kiswahile name which translates to "The Revolutionary Party' in English.[9] A joint congress of the legislature of the two parties promulgated a new constitution which reafirmed the country's commitment to the Arusha Declaration.

The Arusha declaration provides certain basic principles

which serve as a guideline to the direction of the country's development. It, inter alia, affirms:[10]

> "the equality of all human beings;
> the right to dignity and respect;
> equal participation in government
> at local, regional and national
> level;
>
> the right to freedom of expression,
> movement, religious beliefs and
> association within the context of
> the law and the right to receive
> just return from one's labour"

In addition the manifesto declares in its 'aims and objectives of T.A.N.U.' that

"To ensure economic justice, the state must control principle means of production. The state's responsibility lies in interfering in the economic life to prevent exploitation, prevent accumulation of wealth to an extent inconsistent with the existence of a classless society."[11] And in its 'The Policy of Socialism'[12], the paper maintains that the policy of self-reliance must be persued vigorously; that external aid in the form of gifts loans and other capital investments must undergo incisive scrutiny before acceptance.

In persuance of these goals, various strategic industries were nationalised by the government.

A radical difference, therefore, between Kenya's and Tanzania's present constitutions is that the one is silent on the economic and social rights of its peoples - at best it makes declaratory remarks in its Bill of Rights - while the other attempts to ensure the people's economic welfare through the principles of socialism.

In conclusion, we may argue that if the raison d'etre

of our definition of autochthony has been the content, and not, the legal originality of the independence constitution, then it is suggested that Tanzania's 1965 and 1977 constitutions coupled with the Arusha Declaration of 1967 reflects an ongoing process of achieving complete substantive autochthony. We may conclude that the insistence of placing all the major factors of production under state control has denied liberal democracy its most cherised bed-fellow, viz free enterprise. Thus, in Kenya, decolonization gave birth to political independence while the colonial social economic structures have remained intact. Tanzania, has, on the other hand introduced structural changes more consonant with its development needs, both human and economic. It is for this reason that we submit that Tanzania's constitution as of present has achieved a large measure of autochthony while Kenya's remains adventititous.

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CHAPTER IV

CONCLUSION

1. LEGAL THEORY AND THE CONCEPT OF AUTOCHTHONY

The objectives of this work, as set out in the introduction were basically as follows. First it was intended to postulate the hypotheses and definitional aspects of the concept of autochothony in constitutional law. Secondly, our major task was to examine the Kenya Independence Constitution, its genesis, emergence, adoption and finally, the degree to which it may meet the basic principles of autochthony. The final part of this work attempts a summary and discussion of the implications of the suggestions arrived at in the foregoing chapters and proffers conclusions arising therof.

But before we attempt any conlusions, it is intended to examine autochthony as it is related to jurisprudence or in other words, the science of law.

It is suggested that jurisprudence may be divided into two[1] very broad branches in terms of its interpretation of what law and its role in society is. These two, for the sake of convenience may be classified as the bourgeois school of thought which consists of a plethora of lesser schools; on the other hand we have the Marxist school of thought. Further, the bourgeois school of thought may be said to have two broad definitions as to the essence of law.[2] The first of these is the positivist school which regards law as a command of the sovereign (a definition made popular by Austin).[3] This command is enforced through sactions. This

school further posits that law can not have an existence outside the framework of a properly constituted legal system. In addition it avers that law consists of normal and no other metajuridical factors may be infered in its making or operation. The other broad definition of law in bourgeois jurisprudence is the sociological school of thought which considers law as a social phenomena. That law develops spontaneously with other societal superstractures.

The Marxist school of thought deffers drastically from the bourgeois schools in its conception of law. "The system known as Marxism, elaborated by Karl Marx and his collaborator Friedrich Engels, is based on the principle of the primacy of economics over politics, law and the state."[4] By this, it is meant that the state, the law and politics (the struggle for power) were human institutions which arose at a specific time in different human communities as a result of changes in economic relations, or in the relations between producers and consumers. This school is of the opinion that there was a time when there was no state, and therefore no law and no struggle between competing classes of the population - a period of primitive communism".[5] But over time classes with conflicting interests began to emerge: exploiting and exploited classes developed. The exploiters saw a need for an apparatus of compulsion in order to protect their exclusive ownership and this apparatus was the state. Thus, since pre-historic times, there have always been exploiting and exploited classes; in the ancient world there were the slave owners and the slaves; in the feudal times they were the lords and the serfes; and in the modern era, they are the capitalists or the bourgeoisie and the workers or the proletarians. Like the infra-structure, law developed

in accordance with changes in the means of production, reflecting production relations but not being a reflector of them. The Marxists thus foresaw a situation in which the working class (proletarian would ultimately throw off the domination of the capitalists, and establish its own society. This would be a classless society. It Not being possible to establish this at once, for the interim period the state would still be necessary, and this would be a proletarian state exercising the dictatorship of the proletariat. The main task of the dictatorship of the proletariat would be to crush for ever the remnants of the former oppressing classes, and once this had been done, true communism could be established, and the state and the law no longer being necessary, would"wither away".[6]

How and/or why is an understanding of jurisprudence essential and relevant to the subject of autochthony? It is the purpose of this section of chapter four to try and answer this question.

While classifying constitutions into various autochthonous types, we noted that various definitions obtain. Almost all these classifications tended to approach the question of autochthony from a legalistic point of view. That is, whether or not there was legal continuity at the time of independence may determine whether or not a constitution is autochthonous. The pesitivist class of bourgeois jurists, for instance, regard law as an independent and self-sufficient entity devoid of any mystical, ethical, moral or other metajuridical overtones. The law, properly so called is the "is" and not the "ought". Basing their arguements on this concept of the law, bourgeois

jurists have therefore argued that where an independence constitution has its legal origins or empowering force in the local legislature, then it is autochthonous. This is what we refered to in chapter one as procedural autochthony. It is no wonder that positivists find this classification attractive. For does it not mean that the contents of the constitution are irrelevant so long as the correct adoptive/ legal procedures were taken? An understanding of Marxist concept of law brings to fore the folly of the above classification on the basis of the positivists concept of law. It is pretty obvious that the laws inherited at independence were not meant to resolve class conflicts rather to buttress the ruling class and keep the oppressed in subjection. Thus any attempts to legalise/legitimise or popularise independence constitutions on the basis of procedural autochthony must be viewed with disbelief. For the law, in the context of emergent states in the Commonwealth, is the root of modern economic, cultural, military and even political imperialism. Thus, from the very start, of the process of colonization, the law was used in arguements justifying acquisition of colonies. Where military conquest was not the mode of acquisition various promulgations[7] were used to effect such acquisition or legalize it. At independence, peaceful transition meant an "independent" legislature which then would "enact, adopt and legalise" the independence constitution, its foreignness notwithstanding.

We further set out to define the theoretical framework within which to evaluate the phenomena of autochthony in British Commonwealth Africa. We submitted that

autochthony, to be genuine must necessarily satisfy certain prerequisites. We said that basic socialist principles of the equality of man and the equal sharing of national wealth must be guaranteed by the constitution. For this reason, it was argued that it is only through the framework of the Marxist concept of law that we could best understand the definition of an autochthonous constitution and the transition from a colony to statehood. It must be emphasized that the phenomena of colonialism can only, at best be interpreted in material terms. The immigrant community together with the local elite, comprising, in addition to the multinational companies, the exploiting classes were interested in alienating property for their exclusive use. The laws promulgated during the colonial era were therefore a reflection of this desire.

Substative autochthony we avered, must therefore reflect the economic, social, cultural and political aspirations and needs of the people. Reference was made to fundamental rights as a derivative of natural law. It was pointed out that these fundamental rights are contained, in, inter alia, the United Nations Charter of 1948, and other declarations and Conventions on Human Rights. Among the more important organs of the U.N.O. are the International Labour Organisation, (I.L.O.), the United Nations Educational Scientific and Cultural Organisation (U.N.E.S.C.O.), the International Court of Justice (I.C.J.), to name but a few. All the conventions of these organizations are declaratory in nature. As Professor Lee[8] argues in his article "Human Rights", the purpose of these instruments are merely declaratory: that human rights are valid and applicable, ratification nothwithstanding: that they are rights natural to man and no municipal law may purport to

exclude them. It is therefore our suggestion that many independence constitutions failed to take cognisance of these basic rights inherent to man and to that extent fail to meet part of the criteria of substantive autochthony as set out in the introduction. OUr conclusion is therefore that bourgeois jurists' interpretation of autochthony fails to bring out the fact that law in bourgeois societies is a reflector of production relations and it is used to enhance the dominance of the expropriating class.

2. KENYA: THE REALITIES OF THE PRESENT

The most important task of this work was to determine and evaluate the significance and relevance of Kenya's independence constitution of 1963 and its supercedent, the 1964 Republican one. What conclusions can be drawn from the said evaluation?

The first conclusion we reach is that the initial objective of the immigrant community in Kenya was to turn Kenya into a colony in the orthodox sense along the lines of Australia, South Africa, Canada and the United States of America. They failed - and with this failure there emerged a change in objects and tactics: the politics of adaption, co-option and pre-emption. Accomodation was sought with the emerging African elite. Laws were passed to permit them to take part in national politics. Others were geared at creating a propertied class - a landed class - thus alienating it from the rest of the African community. The independence constitution was a result of such accomodation and resultant compromise. The elite class was intended to safeguard the interests of international

capital and enchance the continued exploitation of the oppressed classes.

Thus, in Kenya, the new state is composed of the dominant economic class comprising of the multinational companies and their watchdogs, the local petty - bourgeoisie on the one hand, and the exploited class on the other. The petty-bourgeoisie are wholly dependent on international capital. They are not, on their own, capable of generating capital. Only the bourgeois class is capable of accumulating capital. The sad reality for Kenya is therefore that the petty-bourgeoisie mans the neo-colonial state, Kenya, on behalf of and in alliance with international capital. This situation does not facilitate structural development. Rather, it results in underdevelopment.

Thus what resulted out of Kenya's colonial experience is a microcosm of the modus operandi of imperialism. It represents a highly generalised model which Fanon[9] describes. At the apex of the pyramid we have a tiny group of representatives of the international bourgeoisie. These are represented by finance capital pervading all spheres of the economy. Secondly is the class of petty-bourgeoisie stratum consisting of immigrant communities in those states that have their Africans on the higher achelons of the civil service, commercial and other sectors. The African ruling class rightly belong to this category and may be designated as the "comprodor" stratum of the petty-bourgeoisie who are direct agents and open supporters of imperialism. Thirdly, are the largest section of citizens comprising of peasants and workers who are exploited by international capital and cheated by the

petty-bourgeoisie, and in particular the comprodor strata.

The independence constitution of Kenya of 1963 and its supercedent Republican constitution of 1964, in addition to the numerous other laws clearly reflect the exploitative nature of post-independence Kenyan society. Section 75 of the Kenya Constitution[10], for example incorporates the principle of the inviolability and sanctity of private property. Numerous other laws relating to commerce, business, matrimony, succession, et al, have, by virtue of the Judicature Act, 1967, been imported from England. Even the casual task of shaping and reforming these imported laws to accomodate them to the local situation has been absent. The total effect of these laws has therefore been to ensure the continuance of an exploitative system based on the doctrines of capitalism and liberal democracy.

3. SUGGESTED REFORMS

Arising from the above discussions, what then are the areas most urgently needing reforms? It is submitted that the Kenyan socio-political and economic system is structurally weak and reforms at a superficial level cannot remedy the situation. In chapter 2 we examined the pre-colonial African society. We observed that principles ofsocialism were the basis of production, distribution and consumption of resources. It is therefore suggested that the supreme law of the land, viz, the Constitution should be restructured to reflect a system which is more compatible with fundamental human rights. We suggested in the introduction that fundamental human rights cannot be created by municipal law; that they are prima facie applicable. A restructured constitution would therefore

commit itself to, reaffirm and ensure basic rights such as economic rights, political, social and cultural rights. Emphasis should be placed on economic and social in the light of the fact that Kenya, as an underdeveloped nation must husband its scarce natural and human resources for maximum benefit to all Kenyans. The debate as to whether or not capitalism or communism are best suited to Kenya's needs is largely academic. What the constitution should ensure is a direct and effective participation of the masses in political leadership and policy and decision making from grass-roots level. Political education should therefore be stressed. Social and cultural education as supplements to political and economic equitability will ensure human development compatible with the basic rights of man.

In respect of legislation, this should be geared to ensuring substantive justice, not just procedural justice. Laws should reflect the society's need for equitability in all respects. The law should encourage the development of a national ethic reflecting honesty in the performance of one's duty and self sufficiency and reliance. An institution should be created (ombudsman) to serve as a watchdog for the ordinary citizen against administrative excesses by those in direct control of the government machinery and its organs.

The suggested reforms are in no way exhaustive but they point in the direction which, we submit can best be followed by Kenya.

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