

A CASE FOR MAJIMBOISM AND
CONSTITUTIONAL REFORM

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DEDICATION

To my family and especially Mum and Dad, for having been there for me whenever I needed you.

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

First and foremost, I wish to express my sincere gratitude to my superior Justice Mbaya for this enduring patience and guidance in the writing of this paper.

I also extend thanks to:-

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- (b) Antony Mulekyo and Muli Koli for your wise counsel.
- (c) Lilian Amogola and Peris Muriuki who worked so hard to produce this paper in its final form.

Finally, I assume liability for all the errors contained herein.

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A B B R E V I A T I O N S

E.A.C.A. East African Court of Appeal
C.L.O. Crown Lands Ordinance
KANU Kenya African National Union
K.A.D.U. Kenya African Democratic Union

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

In 1991, following the repeal of section 2A of the Constitution the calls for "majimboism" re-surfaced. These calls differed substantially from the idea of "majimboism" or regionalism (which is what the former was interpreted to be) espoused at the 1962 Lancaster house constitutional conference and later incorporated into the independence constitution. Whereas land has been a prominent feature of both, the latter day majimboism sought to create tribal enclaves or homelands through the expulsion of undesired "foreigners" and ideologies from these homelands. This generated a lot of heat politically culminating in the eruption of the infamous land clashes in 1992, and whatever the genesis of the clashes, damage had already been done. The idea of "Majimbo" left a bitter taste in the mouth of the common man in Kenya.

In July 1994, Prof Ali Mazurui in revisiting the "majimbo" issue emerged with a further classification of "majimbo" as political or economic. The former being linked to the creation of ethnic homelands and the latter referring to the redistribution of resources to correct historical imbalances. This then leads us to the question, what is "majimbo?"² Kiraitu Murungi³ in his article "Ethnicity and multi-partyism in Kenya states "Over the years, the term "majimbo" has become hackneyed and is so shrouded in Innuendo that it sends different political messages to different people in different circumstances".

B.C. Smith in "Regionalism in England"⁴ says, "The word regionalism has a wide variety of meanings and can refer to administration of government, advisory services and local government co-ordination. It has been employed in the context of local government reform in an attempt to rationalise a system which is considered outmoded and unable to serve a modern industrial society. Geographers have traditionally been concerned with the delimitation of regions and have employed the concept in studies of community development. Political scientists have dwelt with regionalism to show how the needs of

democratic economic planning can only be met by greater regional decentralisation in central administration. Generally, regionalism denotes a new tier of government between the national and local levels responsible for the formulation of policies for a full range of services in large areas. The size of these areas is constantly a matter of debate and different criteria are adopted by geographers, political scientists planners and so on. The working definition of regionalism is consequently difficult to formulate. Dependant as it is in the particular sphere of government or administration concerned". (Emphasis mine).

Regionalism has often been equated to federalism. However as D. Rothchild in "majimbo schemes in Uganda and Kenya"⁵ points out, "regionalism differs from federalism both in its allocation of powers and in its objectives. Whereas, federalism seeks to build a nation by accomodating various constituent parts, regionalism which is closer on the continuum to centralised (unitary) forms of government involves the devolution of limited powers upon a middle tier of government".

Regionalism therefore presents a political and institutional compromise between federalism and a unitary constitution.

For the purposes of this paper, the definition of "majimbo" to be adopted is that adopted at the 1962 Lancaster house conference ie "a system of regional governments, each having its own legislative and executive powers."⁶ The adoption of this system stemmed from the fear of domination of the minority tribes by the majority tribes. "The coming of independence changes the situation of minorities in significant ways. There is always a struggle for the control of the new state. The forces involved draw their support from tribal or regional bases and the goal for which they contend is the establishment of a state with highly centralised powers. There is little of the federal sharing of power and though alliances maybe struck between the groups to participate in the government, there is a

strong flavour of winner takes all about the spoils system that characterises these new states. To be a politically weak minority is therefore an unfortunate circumstance⁷". The reasons for its adoption notwithstanding, the majimbo strategy of 1963 has been described as "a daring act of constitutional engineering to promote grassroot democratisation to contain political dictatorship and reduce economic exploitation in independent Kenya⁸".

It is against this background of "majimbo" as a constitutional safeguard meant to contain excesses of power on the Government's part that this paper is written. Being a constitutional question, it must be addressed constitutionally "as part of a much wider offensive to redefine the country's constitutional order and not bureaucratically simply to satisfy the whims and interests of particular groups placed in positions of power.⁹"

In so doing, the paper attempts to trace the origins of the majimbo system in Kenya going back to the pre-independence constitutional deliberations, to its incorporation into the independence constitution, to its dismantlement, and finally to its revival in the wake of the repeal of Section 2A of the Constitution. An attempt is also made to study the link that exists between majimbo and the land question with a view of showing that what is called for is an overhaul of the land law and policies in existence which does not entail a change in the form of constitution. However, what does call for the adoption of the majimbo system is the abuse of the wide powers wielded by the central government and the executive which are a direct result of the adoption of a unitary constitution. In this respect, majimbo will be discussed as one of the models available for the exercise of the doctrine of separation of powers.

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CHAPTER 1

EUROPEAN SETTLEMENT AND LAND ALIENATION IN COLONIAL KENYA

The majimbo question cannot be fully addressed without a survey of the history of land ownership in this country. In this chapter, a general overview is intended of European settlement and its attendant effect on the local communities namely land alienation and the creation of a squatter community.

1:1

European settlement can be traced back to the creation of an East African Protectorate in 1895 and the subsequent creation of a Kenya colony in 1920. The underlying reasons for European penetration were religious, economic and political. The missionary movement was by 1880 bringing pressure to bear on British authorities to "truly join" the anti-slavery movement by protecting missionaries venturing inland. More globally, the economic reality of the region had been changed by the opening of the Suez canal in 1869. The port at Mombasa became a strategic stop on the route to India and the far East. The changing nature of industrialization in Europe also opened up intense rivalries allowing Germany and France to challenge Britian's industrial dominance. New railroad technology in particular allowed pentration of the African continent from the sea and in turn stimulated demand for markets.

British strategy in Kenya was to allow commerical interests to take the lead. In 1888, a privately financed company, the Imperial British East Africa company was awarded a royal charter to develop trade in the region. The company seemingly without policy and direction soon drifted into poor financial straits. This situation led the British government to assume control over the company's activities in the region in 1895 and to establish the East Africa Protectorate. A territory which included present day Zanzibar, Kenya, Uganda and a portion of Southern Somalia. This marked the beginning

of official British Rule in Kenya, a rule which endured until December 12th 1963.¹

The declaration of a protectorate over a people's territory meant that the subjects were under the protection of the protecting powers as against any other power which would threaten to take over jurisdiction.² However this was not to be interpreted to mean that the subjects were under the administration and control of such a power. The protecting power was expected to leave the subjects to the control of their own sovereign. In practice however, the British differed from this expectation. The declaration of a protectorate to them imported the right to assume whatever jurisdiction that was needed or necessary for its effectual exercise. This doctrine was embodied in the 1902 East African Order in Council which gave the commissioner extensive powers, "to make ordinances for the peace, order and good government of all persons in the protectorate, and establish a High Court with full criminal and civil jurisdiction over all matters and persons in the protectorate".³ This Legislation laid down the legal basis for the assumption of power over the East African Protectorate.

1:2 Land alienation

In order to achieve their objectives of finding alternative sources of raw materials and opening up of new markets, the colonial authorities needed to encourage European settlement within the region. In order to do this, they needed to make land available for the would-be settlers.

As early back as 1883 in the Ionian Islands Case the British government had been advised, that the power to protect did not extend to the power to alienate the land within the protectorate a fact that would not auger well with their plans to create a white settler community in Kenya. Thus, they were forced to devise ways to facilitate the alienation of land.

Land alienation took two forms (i) "voluntary or through treaties (ii) compulsory or by operation of the law.

I refer to the latter as "voluntary" in the spirit of the holding given by the East African Court of Appeal in the Maasai case. In this case, the E.A.C.A. held that the Maasai retained some element of sovereignty and thus could freely treatise with the British. However as to what sovereign attributes these were, is a question the court did not address itself to. Thus the effect was that being free to negotiate and treatise, the Maasai could not purpose to seek the courts intervention in the matter.

In the latter case, the colonial authorities used Legal Instruments to alienate land from the natives.

To set the wheels in motion was the 1897 land Regulations promulgated under an East African Order in Council of the same year. These regulations drew a distinction between land within the Sultan's dominions and land elsewhere in the protectorate. They further empowered the commissioner to sell the freehold of the crown within the sultan's dominion that was not the sultan's private property as well as offer certificates of occupancy for a period of 99 years for land elsewhere in the protectorate. This was not well received by the settlers, as the land they were interested in, was the land within the protectorate. All the certificates of occupancy were conferring was a licence to use the land.

The problem here it is to be noted arose because within the hinterland, there were those regions where protection was exercised by virtue of treaties as has herein been mentioned before, and as has been stated, this power to protect did not extend to power to alienate land. Thus, the commissioner had no power over these particular regions. In order to circumvent this, in 1899, the colonial officers suggested to the Government that the protectorates of African variety where protection was exercised under the treaties which did not specifically grant her majesty the right to deal with the land, the right to deal with that land, accrued to her majesty by virtue of her right to the protectorate." Protection in this

sense meant, that the crown had acquired control over all lands which hadn't been appropriated either by a sovereign or by individuals.⁵ The 1901 East Africa (lands) Order in Council gave voice to the above recommendations. Under this order, all crown lands were vested in the commissioner and counsel general and all such trustees as maybe appointed on behalf of her majesty. Subject to the directions of the secretary of state, the commissioner was empowered to make grants and leases under such terms and conditions as he considered fit. Under the 1902 Crown Lands Ordinance, the commissioner could sell land or grant leases for a duration of upto 99 years. This precipitated European settlement in Kenya. The rights of the indigenous people, were now seen in terms of 'mere occupational' and nothing more than that.

The 1915, Crown Lands Ordinance dispelled any doubts as to the extent of power the protectorate government was claiming under the 1902 Crown Lands Ordinance. This Ordinance redefined crown lands reserved by the governor for the use and support of members of the native tribes. Part IV of the ordinance stated that "such reservation of land for the use of native tribes shall not confer on any tribe or any member of any tribe the right to alienate the land so reserved or any part thereof."⁶ In addition, land reserved for the use of members of a tribe could at anytime be cancelled and taken away for alienation to European settlers.⁷ The Ordinance while purporting to give statutory safeguards to Africans such as reserving land for the use and support of native tribes, took away the same by making provisions for the cancellation of such land if the commissioner felt that the land was needed for the European settlers. Dilley in his book "British Policy in colonial Kenya" opines that

"the ordinance was interpreted to provide no legal right to land for natives either individually or tribally. Natives were held to be mere tenants of the crown and could be dispossed anytime....."⁸

The implications of the 1915 Crown Lands Ordinance were

addressed in the case of Isaka Wainaina Gathomo and Kamau Gathomo V Murito Indangara and another.⁹ The plaintiffs both members of the Kikuyu tribe claimed possession of land situated in Kabete in one of the Kikuyu reserves. They based their claim on the inheritance by them of a moiety of the rights alleged to have been bought by their father and uncle from a Dorobo for 900 sheep. They Attorney General an action against the defendants for tresspass. The Attorney General was also made party to the suit. They further alleged, that the defendants had been tenants at will of a portion of the land for some years and that the tenancy had been terminated by notice.

One of the issues before the court was whether the plaintiffs were entitled to occupation of the land as against the defendants? and having regard to the rights of the crown, were the plaintiffs entitled to bring this action?

It was held, that the land in dispute was crown land by virtue of sec 5 of the 1915 Crown Lands Ordinance as well as Article 2(3) of the Kenya colony - Order in Council and was therefore occupied subject to the provisions of part VI of the Crown Lands Ordinance 1915 which provisions specifically enacted that reservation shall not confer on any tribe or member of a tribe the right to alienate the land reserved or any part thereof. Counsel for the defendants went on to submit "in my view, the effect of the Crown Lands Ordinance 1915, and the Kenya Annexation order in council 1920 by which no native private rights were reserved, and the Kenya colony order-in-council 1921 as I have already stated is clearly inter alia to vest land reserved for the use of a tribes in the Crown. If that be so then all native rights in such reserved land whatever they were under the "Gathaka" system disappeared and natives in occupation of such crown lands became tenants at will of the crown of land actually occupied which would presumably include land on which huts were built with their appurtinenances and land cultivated by the occupier . . . sec 54 of the Crown Lands Ordinance 1915, puts a specific embargo on any alienation by such a tenant."

Ghai states in his book, "the disinheritance of Africans from their land was complete."¹⁰

In 1920, Kenya was made a colony under the Kenya (Annexation) Order in Council of the same year. The subsequent change in status did not translate into increase in powers of the administration or call for the implementation of different policies. As Ghai Asserts, "It is our contention that in the East Africa protectorate, such complete sovereign rights were asserted over the land, that when the title to the country was claimed in 1920, it made no difference at all to indigenous rights to land or lack of them."¹¹

Implementation of the 1915 Crown Land Ordinance provisions had been delayed however by indecision over the extent of the reserve boundaries, as the administration was caught between settler demands for restriction of the area of the reserves and the colonial office concern that they be adequate for an expanding population. It was not until 1926, that the administration finally gazetted 24 'tribal' reserves. This then marked the genesis of the squatter community and the generation of an African workforce.

More statutes were enacted by the colonial authorities in order to consolidate their position vis-a-vis that of the Africans discussion of which would be the subject matter of other discourses. However, what was intended here was a general overview of how the settlers came to be in occupation of land that was hitherto African and which was a cardinal issue in the independence constitution and revisited in the 'majimbo debate' following the 1992 multi-party elections in Kenya.

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CHAPTER II

The renewed calls for "majimboism" which preceded the 1992 multi-party elections in Kenya can be traced back to similar calls made by the Kenya African Democratic Union (K.A.D.U) one of the two main political parties contesting the 1963 independence elections.¹ A common feature of these calls is that land features prominently, and they are characterised by tribalism and a fear of domination of the so called "minority" tribes by the "majority" tribes.

This chapter, seeks to trace the origins of the "majimbo" system as advocated by KADU, its entrenchment into the independence constitution and its eventual breakdown. Attention will also be paid to the land question and its role in the independence constitution negotiations, and how the independence government sought to address this issue.

Land, has always been at the bedrock of Kenyan politics. However, with the dawn of colonialism and the drawing up of administration boundaries and the subsequent confinement of tribal units within these boundaries, tribes came to identify themselves via these units of administration. Such that, with the process of land alienation and the creation of squatters and landless people, those migrants who migrated into settler areas to look for employment were regarded as aliens by the original inhabitants of those regions. With the imminence of independence, the belief in certain quarters was that the original status - quo would be restored with the migrants going back to their original areas of habitation. This was contrary to the belief in other quarters that independence meant that the migrants in settler areas would be allowed to settle in these areas regardless of whether or not they were originally from there. The difference in opinion as to what independence meant, can be attributed to the colonial policy of divide and rule. As a result of the implementation of this policy, the colonialists were able to exploit the existing hostilities between the communities in order to foster their rule over the

colonized. This they did by zoning off certain areas making them inaccessible eg the Northern Frontier District developing certain communities and ignoring others and thus creating an air of suspicion amongst these communities. Vivid manifestation of this policy and its success can be seen from the nature of Kenyan politics in the 1960's.

2.1 The Road to Independence

Kenya's road to independence begun with the Lancaster House Conference held in London in 1960. In a way which was to become common place at subsequent constitutional conferences, but which was novel at the time, the gathering was marked by walk-outs, arguments on points of principle acrimonious exchanges and a flurry of releases, official and unofficial to the press.² The parties at the conference were representatives of Her Majesty's government and those from the two main political parties in Kenya at the time ie The Kenya African National Union (KANU) which boasted a large following from the two most populous tribes in Kenya, the Kikuyu and the Luo, and the Kenya African Democratic Union whose membership was drawn from the numerically smaller tribes.

What emerged from the conference was a compromise constitution. A general election was fought in January 1961 under the new constitution with a franchise complicated by various limitations but which nevertheless, brought a large number of black Kenyans to the voter's roll. The constitution gave recognition to the fact that Africans must be granted political power. This constitution was a compromise as it created a multi-racial framework in which the various people in Kenya could co-operate each having a place assured by the constitution.³ The election produced a majority for KANU. Protracted negotiations failed to get them to agree to form a government until their leader Jomo Kenyatta was released. The governor's decision was that until a government was working, he would not be released. The deadlock was eventually resolved by KADU when it agreed to take office. Mr. Kenyatta was released from detention in 1961. He made unsuccessful attempts to unite

the two parties. Subsequent events have shown the failure to have been due to tribal feelings and above all the fear of domination of the minority tribes by the majority tribes. Tribalism is a factor that has continued to plague the Kenyan scene to present day. This is evidenced by the composition of the political parties existing in Kenya today. Whereas they all try to portray a nationalist look in their agendas; the element of tribalism is evident from the composition of members of the various parties. KANU draws its support largely from the Rift Valley and the Coastal regions who feel that the introduction of multi-partyism is an affront on the President who hails from the Tugen, one of the communities residing in the Rift Valley and who would like to have the status-quo restored to what it was before the advent of multi-party politics in Kenya. On the other hand, the Democratic Party (DP) and Ford Asili draw their support from Central Province whereas Ford Kenya is predominantly Luo with a significant number of Luhya followers. William Ochieng in his article "The Gestation Period of tribalism in Kenya"⁴ points out that, "tribe must be discussed because it is a significant factor at the core of Kenya's two main problems of unity and identity.". He further points out that tribalism is a colonial creation in furtherance of their policy of divide and rule. He says, "For tribalism to thrive, you must legally or extra-legally bring together into a state, a number of negative or inward looking tribes. The freezing of zones of confluence between Kenyan tribes, was of great significance during colonialism as it changed the quality and quantity of interaction between Kenyan tribes"⁵. In line with this policy of divide and rule, the colonizers discouraged inter ethnic migration and even closed off certain areas. This resulted in African communities viewing each other with suspicion. Both the educational and the religious policies of the colonialists were designed to further this principle. Missionaries ventured into the so-called 'not hostile' communities and set up missions amongst them. They organised for classes to be taught in vernacular such that the colonized, had no neutral medium of communication. Further, graduates of these mission schools, were employed locally. The attendant

effect was that some communities progressed, while others were left in stagnation. This firmly entrenched inter-ethnic suspicions. Inter-ethnic boundaries couldn't be completely sealed off as the settlers needed African labour. However, they ensured inter-ethnic contact was kept to a minimum and their antagonisms kept aflame. To maintain these conflicts, residential areas for various communities on farms and even in towns were kept apart. Additionally, stereo-typed images of local communities were created and actively popularized and these became important in the determination of job allocations and other social opportunities.

The colonizers need for tribal control, led to the raising of tribal enclaves within the new tribal zones of confluence. "Nowhere was this clearer, than in the policy of encouraging colonizer controlled ethnic associations to pre-empt the evolution of nationally based political parties."⁷ By 1952, there was not a single nationally based party since time had stablized tribal units within administrative boundaries and policy had emphasized the district as a separate unit. This helped keep tribal groups from each other.

From the proceedings of the Lancaster House Conference and the failure of the political parties to compromise, it was evident therefore, that the colonizers had succeeded in their mission.

2.2 MAJIMBO

In 1962, the fear of domination combined with the continuing separation of KANU and KADU, was reflected in the party policy by KADU. KADU's plan for regionalism was to colour all future constitutional negotiations until and indeed after independence. The question then arises, what caused this split between the two nationalist movements. Gertzel⁸ observes, "It is difficult to avoid the conclusion that the fundamental source of divisions within the nationalist movement in 1960 was the land question. Tribal interests were based upon land and thus upon essentially economic interests. This

situation seemed to dictate an alliance between the Kalenjin in the Rift Valley, and the people at the coast all of whom were suspicious of the objectives of the Kikuyu's and their allies. This single most important factor leading to the division of the nationalist movement into KANU and KADU in 1960". N.S Carey Jones in his book. "The Anatomy of Uhuru "observes that the dawn of independence sent a wave of panic through the settler community with most of them ceasing to develop their farms and worked them to get what they could out of them at the quickest time and sent their money abroad. "Among the Africans, tribal feelings hardened and the protection of tribal interest particularly land took the chief place in their thoughts. They laid claims as tribes to different parts of European areas and often to the same parts many of the claims were by tribes which were not pressed for land. however, as unemployment grew, these tribes too begun to speak to seek possession of European Lands. They seem to have felt that possession alone would secure the land for them as the government was likely to be in the hands of the more populous overcrowded tribes." Ghai attempts to rationalize the call for regionalism as follows:

"It is a common feature of decolonization, that the imminence of independence is accompanied by the emergence of ethnic or minority problems with the prospect of independence the racial or tribal conflicts or as more often, the potential conflicts become obvious. Competition for political power with its many rewards becomes acute and the minority groups aware of their vulnerability and remotness from power in unitary type constitutions start to agitate for safeguards. These safeguards range from outright secession through federalism to Bill of Rights and the insultation of certain sensitive areas of administration from political control."

KADU wanted tribal spheres of influence to be recognised in resettling Africans. It sought a confirmation of tribal

interests in land. This was to be tied up with the regional structure. It is noteworthy that on striking a compromise with KANU on the provisions of the independence constitution and in settling for a central land board to deal with acquisition and alienation of land in the white highlands, KADU was accused of betrayal by its followers¹¹. This is because, they had been led to believe, that they would once again re-occupy those lands. In its rallying call for "majimbo", KADU stated " KADU has launched a campaign for regional authority government as a solution to mounting fears of domination by one tribe or a combination of tribes..... by regional authority government we hope to prevent the emergence of tyranny or authoritarianism and absolute rule in Kenya"¹² In this early form, KADU, was advocating for a federalist state which would guarantee each tribe a certain amount of autonomy. This regional plan was put forward by KADU at constitutional talks which were taking place in Nairobi. It was totally rejected by KANU, who were by this time, committed to the idea of a unitary constitution. The second Lancaster House Conference took place in 1962.

The conference came several times to the verge of a breakdown and ended in a KANU/KADU coalition government. The conference is significant as it dealt in detail with the proposals by KADU for a regional government as well as the land question. Save for a few minor amendments in respect of control of the police and provisions for alteration of regional boundaries the 1962 constitution may well be referred to as the Independence Constitution. Deadlock bederilled the conference and the cause was KADU's insistence, that the structure of government decided for Kenya should be regional and that the regions should have autonomy. KANU, made no secret of their belief that only with a strong unitary government could Kenya survive economically and administratively. They argued that apart from other considerations the creation of a series of regional administrations each requiring civil servants in a country with little money and a few trained administrators was not practical.¹³ Disagreement rose in detail over control of land and the police. The stalemate was broken by Sir Reginald

Maudling the colonial secretary who put forward his own proposals for a coalition government. On the face of it, the constitution gave to KADU a large measure of what they were asking for. The constitution provided for a strong central government and regional governments with autonomous power including control of land except the contentious white highlands. In respect of land, KADU had wanted, all land to come under the control of the regional governments. By so doing, they would have secured their tribal interests, however, in this instance, KANU and European interests coincided hence the establishment of a central land control board instead of regional land control boards. As was observed in the Times Editorial of April 6, 1962.

"The arguments between KANU supporters of Mr. Kenyatta and the KADU followers of Mr. Ronald Ngala, have been arguments about fundamentals, not about details and niceties of wording . . . the truism that constitutions are not worth the paper they are written on unless the right spirit pervades the people who have to work them applies with more force to Kenyans, than to most countries....."14

The maudling constitution having been projected as a workable reality had to be cloathed in the appropriate legal form. For months, the coalition government an uneasy marriage between KADU and KANU, mutually suspicious and out of sympathy wrangled in committee over the details of the drafting. Commissions were appointed to delimit the boundaries of the regions and the constituencies for the lower houses of the legislature.

The resultant constitution provided as follows:- seven regions were created. In each region there was a regional assembly with elected and specially elected members. The qualification of voters was such as to ensure that only those with a genuine connection to the region had a vote. No candidate for elections to the regional assembly could be

validly nominated unless he was registered in the region as a voter. The boundaries of the regions could not be altered by the Central Government acting unilaterally (this was later ammended at the 1963 Lancaster conference) Consent of the regions had to be obtained through what was a complex procedure. Administration of the regions was through committees and one could not be a member of more than one committee at the same time with the exception of the President of the region who was an ex-officio member of all of them. The President was elected from amongst the members of the committee or from people qualified to be such and could only be removed by an adverse vote of 75% of the members. The chief executive of the region was the civil secretary who was an appointee of the civil service commission in consultation with the regional President. Each region had its own separate establishment whose size and composition were determined by its finance and establishment committees though the actual appointments were made through the public service commission. The allocation of power was provided for in the constitution. It was elaborate and confusing. Matters within the legislative competence of the regional assemblies were to be found in part I. In part II were matters within the concurrent competence of the regions and Parliament and in part III were matters within the competence of Parliament, but to which the executive authority of the regions extended. The residual legislative powers were with the Central legislature. The regional governments could legislate on matters touching on land, archives, auctions, education, housing, medical facilities etc. Local government fell within the competence of the regions. The basic structure of the local government, was provided for in the constitution, however, considerable legislative and executive power was vested in the regions. The regional government had the power to make laws with respect to the local government within the region. The assembly also had the power to determine which areas within the region should constitute local government areas, what category of local authorities they should constitute and how they should be divided into electorate areas¹⁵. By virtue of their representation on the national security council, the regions shared in certain police

functions. In each region, there was a regional police contingent. Control was divided between the Centre and the regions. The legislative and executive powers of the region were however subject to the intervention of the Centre. As far as finance was concerned, parliament could provide loans and grants from Central finances for any purposes even though that purpose was outside its legislative competence vide Sec. 67. It could legislate to implement international agreements even on regional subjects.

1.2 LAND:

The land question had been a major issue in colonial politics. It was also at this time a vital economic issue since proper land use was vital to development. However, the context within which the land debate was argued since colonial times, had changed radically. Africans and in particular the Kikuyu had fought for the return of the land in the former scheduled areas from the Europeans to African ownership. Their victory had been established in 1959 when the white highlands were opened to African ownership. A radical change in the land policy as far as racial ownership was concerned had been achieved. At the time, the question of what system of land tenure should apply and which Africans should own these lands had not been in the mainstream of the debate.

Once the right of ownership of land had been won, and the policy of the Africanization of the European large scale farms gotten underway, this latter question became a major issue.¹⁶ On the key issue of land, both KANU and KADU recognised the need for reform. In its manifesto,¹⁷ KANU spoke of its aim in general terms. It pledged as early as 1960, to respect private property rights. While acknowledging that settlement of displaced persons and landless people was going to be its chief problem, the manifesto noted that resettlement should not be at the cost of the high standard of agriculture already attained. KADU was no clearer than KANU in its terms and policies. As Bennet observes, "The land policies were written in general terms, no party wished to make precise

statements before taking power".¹⁸ However, the two parties differed in respect of the position of the white highlands. KADU wanted the tribal spheres recognised in the settlement process. KANU, wanted the alienation of land in these scheduled areas to be on the basis of willing buyer willing seller. At the Conference KANU proposed "that land and property rights should be enshrined in the Bill of rights. KADU had quoted land tenure as one of the reasons of regionalism on the assumption that on independence some groups might take advantage of others. But land was so important to the economy, that it should be under the control of the central government....." It was resolved that a Central Land Board Control Settlement in parts of the former white highlands which were being bought for transformation into African farming areas. Whereas land in the other areas would fall under the control of the regional governments who would hold it in trust for the people from those regions. However, even then, the centre did not have absolute control. Its power over purchase of land was intended to safeguard European interests. It also had limitation on its power of disposition, which was intended to safeguard tribal or regional interests.

KADU, was forced to compromise on this question of land, thus going back on their promises to their followers. A factor that was viewed as betrayal, and one that has emerged as justification for the renewed calls of "majimboism". What the leaders did not know at that time, was that the land question was far from resolved, and what they had was a time bomb on their hands.

As Kenya entered the final stages before independence, the position was as follows. It had a strong KANU government determined to turn upside down the constitutional safeguards incorporated at the insistence of KADU. The first of these safeguards to be done away with was regionalism. They argued that it was expensive in terms of money and personnel and that it would prevent the growth of nationhood and retard economic development. They further argued that the constitution was based on artificially engendered fears considering the European

involvement in advocating for a regional government. In this regard, the KANU government set about trying to abolish this structure of government and via mesne Acts of parliament, this regional structure or "majimboism" was done away with.

2.4 Post - Independence Kenya

The first two years of independence were years of political re-adjustment. The opposition members of parliament (i.e KADU) were lured to join KANU, but ideological differences remained. There emerged within KANU a radical wing which accused KANU of betraying the pledges they had made to the electorate. Land policy became a major issue along with free education, medical facilities etc. Under the banner of freedom, from colonialism, most African leaders thought that they had an ideology which was based on the theory of social change and which they would use as an instrument of modernization. They were optimistic that in their collected effort they would come up with a definite and specific system of ideas and society based not upon the tribal past but the modern and highly organised industrial future. Such views came to have little in common with the reality of the independence Kenya. Even when some of such set of ideas were incorporated into the official ideology, leaders found themselves manipulating these ideas to suit their own political ends against the interests of the Kenyan masses.²⁰ This eventual split within KANU goes to illustrate that even on gaining independence, questions relating to national agenda and territorial nationalism had not been settled. "The underlying problems and tensions did not change with a change in government."²¹

2.5 C O N C L U S I O N

From the foregoing discussions of the origins of majimbo, its implementation and the eventual breakdown of the same, its difficult to avoid the conclusion that the fundamental source of conflict was the land question and the subsequent alignment of tribal and economic interests. It is this writers submission, that irrespective of the type of constitution ie be it regional or unitary, if it does not address the land question, then it is an exercise in futility.

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CHAPTER THREE

3:1 "MAJIMBOISM" REVISITED

The previous Chapter, dealt with the idea of "majimboism" envisaged in the pre-independence conference, its incorporation into the independence constitution its dismantlement and replacement with a unitary constitution. This chapter looks at the calls for the restoration of "majimboism" that resurfaced in the wake of the repeal of section 2A¹ of the constitution.

In 1991, following the repeal of section 2A, which had hitherto prohibited the formation of any other political parties in Kenya, some leaders re-introduced the calls for "majimboism" to a reaction of mixed feelings. What then, was the link between the repeal of section 2A the reversion to multi-partyism and the calls for the re-introduction of "majimboism"?

In the last chapter, mention was made of the split that occurred within KANU ranks in post-independent Kenya. KADU members had been lured to join KANU with promises of wealth and leadership positions, however, this did not mark the end of dissent within the KANU government. Within KANU, there was the radical wing who felt KANU had betrayed the pledges it had made to the electorate and were calling for reform in policies relating to land, education and health inter alia. Led by Jaramogi Oginga Odinga, they split to form the Kenya Peoples Union (K.P.U) a fact that did not auger well with the government of the day. Parliament passed an ammendment (Act no. 17 of 1966) that required a member who resigned from the party that had supported him at his election at a time when that party was a parliamentary party to vacate this seat at the end of that session. The Act was published on 30th April. When parliament reconvened, the President prorogued it almost immediately bringing to an end the current session. As a result, those members who had resigned had to seek re-election

in what has been referred as "Kenya's small election"² in 1966. Shortly thereafter, K.P.U. was banned and its leaders detained. Kenya thus became a De facto one party state. This remained the position until 1982 when in anticipation of elections, Oginga once again tried to register another political party. This attempt was thwarted by KANU who passed an ammendment introducing section 2A into the constitution, which section barred the formation of any other political party making Kenya a De Jure one party state. In similar vein, Oginga was placed under house arrest and his colleagues detained.

Thus, until 1991, Kenya witnessed a period in which political dissent was not tolerated. Meanwhile, pressure had been mounting globally in the new wind of change calling for new democracies and Kenya was no exception in this regard. Very soon the clarion call was taken up by lawyers, church leaders and other activists calling for the repeal of all laws which in anyway infringed upon the individuals rights including the offending section 2A which infringed upon the individuals right to freedom of association.³ They were met with rebuffals, threats and intimidation, but in the face of the growing pressure from the international community, the government soon bowed down to the pressure and repealed the offending section, thus paving way for the re-introduction of multi-party politics in Kenya.

The consequences of the re-introduction of multi-party politics was not lost on the leaders of the day. In December 1991, at a rally in Rift Valley, leaders from the area and KANU activists called for the re-introduction of "majimboism" in Kenya. These calls differed susbtantially from the calls for "majimboism" espoused in 1963 as they entailed the eviction of undesired 'foreigners' and ideologies from the Rift Valley and the creation of tribal homelands or ethnic enclaves. Hon Joseph Misoi M.P. Eldoret South is on record as having said:-

"Once we introduce majimbo in the Rift Valley, all the outsiders will have to move and leave the same to our children".⁴

In the spirit of these words, there erupted the infamous land clashes with the opposition and KANU pointing accusing fingers at each other. KANU leaders claimed that the clashes were instigated by the opposition with aim of showing that 'majimbo' could not work. Whereas, the opposition accused KANU of having engineered the same so as to prove that multi-partyism could not work as we were not "cohesive enough". A rhetoric previously used by KANU in its opposition to the re-introduction of multi-partyism. In the process, "Majimboism" developed a myriad of meanings distorting the original idea which referred to a system of regional governments meant to contain political dictatorship.

It has been argued that politicians exploited 'majimboism' for their own selfish ends.⁵ They feared that multi-partyism would result in their losing their seats of power as well as their illegally gotten wealth. Thus they sought to whip up tribal sentiments in much the same way as the British in their policy of divide and rule. Robert Molten and N.L. Whitehead state:-

"the stage for the current ethnic conflict was set by the colonial government whose economic policies created historic injustices through uneven development of different regions and ethnic groups. These seeds of violence were watered and nurtured by the post-colonial political elite who practised ethnocracy, a highly discriminatory distribution of economic and social benefits such as roads, schools hospitals in favour of their own ethnic groups thereby marginalising other ethnic groups."⁷

Kiraitu Murungi in "Ethnicity and multi-partyism in Kenya, further states:-

"Politicians politicise and perpetuate ethnic discrimination and entrench ethnic inadequacies through ethnocracy. Open conflicts arise between

privileged groups who have benefitted from a regime they seek to protect and perpetuate the oppressed economically deprived ethnic groups."

The root cause behind the "majimbo" debate is therefore economic. Behind these calls, is the struggle for control, use and distribution of natural resources. "Those who lose out in the struggle for state house lose out on both political power and economic privileges that go with it, they become economically marginalised ethnic connections are used to access economic resources on a preferential basis leading to ethnic privilege and nepotism."

These calls for the re-introduction of "majimboism" were met with stiff opposition from a cross section of the society who felt that it was an attempt to stem the tide of democracy. Advocates of "majimboism" were justifiably viewed with suspicion as they hailed from the Rift Valley as did the incumbent and had interpreted the calls for multi-partyism as an affront on the President and were thus felt to be resisting a change in the political leadership.

Due to the resistance the idea faced, it faded away into the background to be revived later by Prof. Ali Mazrui at a conference on "Democracy in a multi ethnic society"⁹ in which he classified majimbo as being either political or economic. In propagating for the latter he called for economic majimbo to correct historical imbalances through the redistribution of economic resources. "the neo-colonial character of the Kenya state tends to favour the President's own ethnic compatriots and those in expedient alliance with them in terms of access to Kleptocratic privileges and opportunities. Subsequently, the bureaucratic looters come to acquire a peculiarly ethnic configuration."¹⁰

Kiraitu Muruingi asserts that a possible reason for the foregoing is poor political leadership in Kenya. It is the writers opinion, that whereas this may very well be the case, this scenario is as a direct result of the immense powers

wielded by the President which have been conferred upon him by the unitary constitution. As stated by Lord Acton 1834-1902 "Power tends to corrupt, and absolute power corrupts abosutely".

3:2 Majimbo and the separation of Powers

Yardly D.C.M. in his book "Introduction to British Constitutional Law" says,"

"The three basic and essential functions in the administration of any independent state are legislative executive and judicial. From a realisation of this generally accepted opinion, has sprung up at various times and in *different countries* the idea that the agencies through which these functions are exercised should be kept separate from each other. The intention being to prevent the concentration of more than one of the powers in any single authority which might lead to tyranny. The constitution of the U.S which came into force on March 4th 1789 probably provides us with the most extreme example of a practical separation of the three most fundamental powers."

The doctrine of separation of powers was first advocated by John Locke based on his observations of conditions in (17th England. He advocated for the conferrment of the powers of the executive and the legislature on different organs. He felt that it was unwise to entrust the legislature with the power to execute as it was likely to construct the law to suit its own needs. Lockes idea was further developed by Montesquieu albeit on a misunderstanding of the former. In his treatise "L'Esprit des lois" he concerned himself primarily with the notion of political liberty and advocated for the doctrine of separation of powers so as to contain abuse of power. He said "Experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go To prevent this abuse, it is necessary for the nature of things that one power should be a check on the other. When the legislative and the executive powers are united in the same person or body there can be no liberty

..... Again there is no liberty if the judicial power is not separated from the legislature and the executive"

"A complete separation of the powers in the sense of a distribution of the three functions of government among three independent sets of organs with no overlapping or co-ordination would bring government to a standstill. What the doctrine must be taken as urging is the prevention of tyranny by the conferrment of too much power on any one person or body and the check of one power by another."¹²

This in principle is what the independence constitution set out to do via its system of regionalism. Kenya attained independence in an atmosphere of great mistrust. The colonial office, in an attempt to allay the fears of the minorities conceded to their demands for the georgraphical distribution of power in a quasi-federal arrangement and the entrenchment of basic human rights in the Bill of Rights.

Three legislative lists were drawn up, the first one defined the powers exercisable by the regional assemblies; the second list contained the powers exercisable by both the regional and Central Government. The last list, defined the powers of the central government which also had the powers of residual legislation.

The powers of the regional assembly were limited to matters of land, agriculture, housing and education. The broader issues of national policy were left to the Central legislature. The regional government was headed by a President elected from among the members of the regional Assembly. Executive power was vested in an executive committee. The chief bureaucrat was to be the civil secretary under the authority of the regional President. Each region was to have its own complete and separate civil service. Control of the police was divided between the regions and the Centre with the former taking part in the operational control of the force. The Judicial system was however to remain one.

Although the constitution gave the Central government powers to interfere with the regional Assemblies in the national interest, all the clauses in the constitution relating to them were entrenched and a regional Assembly could only be abolished with the consent of that region.

Further a bicameral legislature was established with the upper house designed to give the regional government a say in the Central government. The provisions establishing regionalism were vigorously entrenched. Any amendment to them, required a 75% majority in the lower house and 90% majority in the upper house.

Immediately after independence, KANU, never having been content with this structure of government set out to dismember the regional Assemblies to establish a unitary Republic with a strong Central government. It is this creation of a strong executive subject to abuse which has led to the institutionalization of Kleptocracy and ethnocracy.¹³

3:3 Strengthening of the Executive;

The KANU government having achieved a unitary state in 1964, chose to re-assert full administrative control over the whole country. This section briefly analyses some of the powers of the President vis a vis other institutions of government in Kenya. It aims to show his dominating position and how this state of affairs makes his position subject to abuse.

Section 23(1) of the constitution, vests the executive authority of the government in the President. (This does not however estopp, Parliament from conferring functions on persons or authorities other than the President. (see 23(2)2.) The President appoints the Vice President and the ministers, who together with him constitute the Cabinet whose function is to aid and advice the President. However, there is no constitutional requirement that the President abide by the

advice of the cabinet. Here, the constitution contemplates a position where the President differs with his cabinet on matters of policy. The doctrine of collective ministerial responsibility requires each minister defend the decisions of his government (cabinet) or resign. It is contended that were the President to differ with a majority of his ministers, he would have to give way. Constitutionally however, the cabinet which is the supreme executive of the country is subservient to the President. Although the ministers and other governmental departments are established by Parliament. (Constitution S 16(1)) they may be established by the President subject to any provisions made by Parliament. The President allocates these ministers at his sole discretion. The importance of this provision cannot be under-estimated. (Note the transfer of the Provincial administration to the office of the President so that, the government is able to co-ordinate more fully the implementation of government policies).

Appointment to the public service, provides another instance of the enormous powers wielded by the President. The Executive Public Service Commissioner plays a major role in the appointments to and the regulation of the civil service,¹⁴ however, Section 24 provides that:-

"Subject to this constitution and any other law, the process of constituting and abolishing offices of the Republic of Kenya, of making appointments to any such offices and terminating any such appointment shall vest in the President."

See 25(1) further provides that every person who holds office in the service of the Republic of Kenya shall hold office during the pleasure of the President. Bearing in mind the dominating position of the President generally, the powers of the Public Service Commission become meaningless if the President can appoint and dismiss any public servant at will. The powers of the President with regard to the Public Service Commission, are exercised by the Director of Personnel in the President office. This office has as a matter of fact,

gradually usurped the functions of the commission. The purpose of the commission is to see that the Public Service is not used for political ends, it should be able to control the 'spoils system' of using public offices for political patronage. It should also be able to dumpen the ethnic and regional influences on the public service provided it can exercise its functions without interference. It is the writers argument therefore, that by conferring too much power on the President, the constitution is self-defeatist. The question remains whether the civil service can be free of political influence being a direct lineal descendant of its colonial counterpart whose functioning revolved around politics.

In relation to the procedure of removal of Government the constitution provides that the Government may be removed on an adverse vote in a motion of no confidence by the National Assembly. Seven days notice of the motion must be given, and for its passage, there must be a majority of all the members of the House; this coupled with the Presidents unfettered powers, dissolution from office on a motion of no confidence remains a remote possibility indeed. The independence constitution had provided that on a resolution of no confidence being passed by the House of representatives, if within three days the Prime Minister did not resign or advise a dissolution, the Governor - General could dissolve Parliament. No special notice of the resolution was needed nor was a special majority required.

The President is empowered to undertake public security measures without previous parliamentary authorization. The period within which Parliamentary approval must be obtained is within twenty eight days. However, there is no obligation to recall Parliament if it is not sitting and indeed the twenty eight days do not begin to run until Parliament meets and stops running if Parliament adjourns. Thus enabling a Presidential declaration to operate for conceivably several months before Parliament has a chance to pronounce on it. "As for approval a simple majority is sufficient (At independence 65% of all the members of Parliament was necessary); for revocation, an absolute majority is needed. This makes it easier to grant

than to control the extensive powers that are thus conferred on the President.¹⁵

Finally, the dominance of the Executive in all facets of public activity is apparent in the unwillingness of the courts to question the actions of the executive even though the constitution provides for the independence of the judiciary. This stems from the power of the President to appoint Judges and though their tenure of office is secure it is doubtful just how far the courts can go in sustaining a confrontation with an executive that is all powerful in all other spheres of national life.

What is evident from the foregoing is that the Executive and especially the President occupies an extremely powerful position in the institutional structure of the republic a situation made possible by the erosion of a regional government structure and the desire to create a strong Central government. This is with the result that, the Presidents powers have been manipulated to access economic resources along ethnic lines. It is therefore no wonder that voting in the 1992 multi party elections was along ethnic lines. Kiraitu Murungi states in this respect that "such ethnic explanations aren't entirely correct and have masked the economic logic in the voting behaviour of Kenyans, They did not vote for them blindly on ethnic grounds, they voted for them on the basis of traditional economic theory, that "inoragia aria igwite"¹⁷ that is it benefits those on whom it has fallen. Therefore, the Luo voted for a Luo Presidential candidate because he was best placed to access and allocate national economic resources to the Luos and the same applies to the other Presidential candidates who happened to be Kikuyu's and Kalenjin.

3:4 The Land Question

The land question which had plagued Kenyan politics since colonial times once again re-emerged in the renewed calls for 'majimboism'. However, unlike at the 1962 constitutional

conference when it had been a mere bargaining tool, it assumed a different dimension resulting in outright violence. In what has been termed as political "majimbo", tribes which were considered to be "foreigners" in the Rift Valley as well as in the opposition were to be expelled in an attempt to create an ethnically and ideologically homogenous society. This move was prompted by the old adversaries of Kenyan society namely inter-ethnic suspicion and fear of domination.

The opposing the system comprised largely the Kikuyu's and the Luo's who had been the majority in KANU at independence and who had opposed the implementation of a "majimbo" system" then as they now did. Whereas, on the other hand its proponents who also happened to be KANU activists were drawn largely from KADU which at independence had advocated for the system. What emerged then, was a re-play of Kenya's independence politics. KANU leaders being faced with the opposition threat sought to ensure that they maintained their parliamentary seats and thus took up the call for "majimboism". Capitalising on the fear of domination and inter-ethnic suspicion "majimboism" was marketed as the solution to counter any such eventually and hence the re-emergence of the land issue. Taking advantage of the unresolved issue of equitable land distribution in Kenyan politics as well as the contention by some communities that they were shortchanged during the constitutional deliberations at independence these politicians took up the land issue to stir up support for the "majimbo" system. It is thus safe to conclude that the land issue was once again being used as a pawn in the struggle for political leadership. Thus, whereas the writer acknowledges that the land question is one that is of importance in its own right and one that warrants attention, emerging as it did, alongside the calls for "majimboism" relegated it to the position of scape - goat in the power struggle.

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C O N C L U S I O N

In the foregoing chapters, the writer has attempted to trace the origins of "majimboism" from the pre-independence constitutional deliberations to the latests calls for its re-introduction.

As has been seen, "majimboism" has assumed a myriad meanings during this time distorting the original meaning which entailed the diffusion of power between the central government and the regional governments.

The system of Government in Kenya since December 1964 that followed the abolition of regionalism or "majimboism" has been characterised by the manner in which power has been concentrated in the Central government and by extension the President. At the time of its introduction, it was felt to be desirable as Kenya was a young nation that needed the presence of a strong Central government and a strong Presidency. It was therefore an honest attempt to forge a strong united Kenya. However, with the passage of time, this power has been subject to abuse whenever the government or the Presidency was in threat. It is because of this realisation, of the all powerful position of the President that the idea of "majimbo" was re-introduced in the wake of section 2A of the constitution. Those calling for "majimboism" sought to cushion themselves against possible political and economic marginalization in the event of the Presidency changing hands to one of the Presidential candidates fielded by the opposition - It is the writers opinion, that the circumstances that prompted the need to create a strong central government and presidency have been over taken by events with the introduction of a plurastic society. Instances of abuse of the Presidential powers also call for a curtailing of the same and this can be done effectively through the regional system of government. "The strength of the various force within society changes with the passing of time it can scarcely be hoped

that the instrumentalities will keep pace with the changing pattern of social relations and as a result, the pattern of instrumentalities tends to lag behind society itself. This is complicated further by the fact that once put into operation, the instrumentalities become rigid and acquire a status of their own. (They become substantive instead of merely adjectival). They become ends in themselves instead of merely means to other ends....."1

The writer also sought to trace the link that exists between the land question and "majimbo". What emerges from the discussion is that whereas the land question is a genuine grievance that is in need of a redress, it has been exploited by advocates of "majimboism" in order to capitalise on the negative aspects of tribalism and inter-ethnic suspicion whenever their positions of power were in threat. Resulting in what has been termed as "political majimbo" which refers to the expulsion of undesired tribes and ideologies from certain geographical areas.

Professor Ali Mazrui's idea of 'economic majimbo' cannot go unmentioned to the extent that it is aimed at correcting historical imbalances through the redistribution of economic resources. To this end, he advocates for regional governments who will take control of their regional resources and exploit these for the benefit of the people residing in those areas. As the saying goes "it is the wearer who knows best where the shoe pinches". Similarly, it is the local authorities who know best the problems afflicting their jurisdictions and their priority needs. This is unlike the present system where say the ministry of Education formulates policies from its "ivory tower" which policies are meant to be implemented at the local level and which policies may not take into account local circumstances. It is therefore desirable that there be regional government with legislative and executive powers to formulate policies that reflect the needs and circumstances of the local populace.

"Majimboism" it has been argued, will only serve to accentuate tribalism. In this writer's opinion, tribalism is a

fact that must be faced squarely for what it is. What is called for here is honesty after which it should be exploited for its advantages. As W.S. Livingstone points out, "Every nation or society is more or less closely intergrated in accordance with its own peculiar cultural, economic and other determinants. Each is composed of elements that feel themselves to be different in varying degrees and this requires a means of self-expression there is no identifiable point at which a society ceases to be unified and becomes diversified The differences are of degree rather than of kind all communities fall within a spectrum which runs from a wholly intergrated society to a theoretically wholly diversified society at the other end. As one moves across the spectrum, the more the societies become diversified and greater is the necessity for providing some means of articulating these diversities."² Finally, an extract from a commentary on McCulloch V. Maryland³ effectively summarises the writers argument for "majimboism" - - - -perhaps the most difficult situation faced by a government of a large nation is the reconciliation of local and national interests. To be strong, a country must have a strong central government. To be strong, it must also have the support of its people and this support will only come if people are allowed to solve at the local level those problems they regard as local in nature. . . ."

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