Kelsen's Grundnorm in modern Constitution-Making: The Kenya Case*

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A. The problem and the background

In this paper, Kelsen's concept of the grundnorm is used as a framework of enquiry into the location of the foundation of the Kenyan legal system. In his formulation of the normative system, Kelsen was in search of the ultimate locus of the foundation which confers validity on the norms of a legal system. He was concerned with, whether in every legal system there will be found a common element, at all times, and at every level of cultural and political and legal development.[1] He wanted to answer the question as to what constitutes the unity in diversity of legal norms.[2] The answer to this question was the basic norm, or the grundnorm.

According to Kelsen, a legal system consists of hierarchically arranged norms. The norms do not exist as a »helter-skelter of unco-ordinated individual norms but as a system in which each norm has its proper place.«[3] All norms traceable from the grundnorm form a system of norms. They exist in a hierarchy with the grundnorm at the top.

What then is the grundnorm? Is it law, fact, hypothesis, presupposition or assumption? Kelsen argues that the grundnorm is »not created in a legal procedure by a law creating organ.«[4] It is not created by an act of will, nor is it created in a particular way by a legal act.[5] It is not a norm of positive law. Whereas norms of the legal system are created by real acts of will, of a legal organ, according to the procedural requirement of norm creation, the grundnorm is not.

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1 William Ebenstein - »The Pure Theory of Law: Demythologizing Legal Thought« (1971) 59 California Law Review 623, 625.

2 Hans Kelsen - »The Pure Theory of Law 11« (1935) 51 Law Quarterly Review 637.

3 Ebenstein - Loc.cit n. 1 p. 637.

4 Hans Kelsen - The General Theory of Law and State. (Harvard Univ. Press, (1949) p. 117.

5 Ibid.

Kelsen's answer as to what the grundnorm is, is that it is a norm presupposed in juristic thinking and is at the top of the pyramid of the norms of each legal order. The grundnorm of a legal system is the postulated ultimate rule.[6] One may conclude that the grundnorm is an assumption, a presupposition or a hypothesis.[7] Although the grundnorm is a norm presupposed in juristic thinking, its choice is not based on opinion or impulse. It is not selected arbitrarily. The legal scholar chooses it on the basis of the principle of efficacy.[8]

The presupposition of the grundnorm is made clear if we consider Kelsen's exposition of the grundnorm in constitutional terms. He proffers a constitution in a positive – legal sense and a constitution in legal-logical sense.[9] The constitution in a positive-legal sense is a norm of positive law. It is a norm created by a real act of will of a legal organ. The constitution in a positive-legal sense is therefore the document promulgated by conscious acts of a legal organ exercising its powers of law creation. For instance, in Kenya, Act No. 5 of 1969 is the constitution in a positive-legal sense. It occupies the top position in the pyramid of positive legal norms. However, at the apex of Act No. 5 of 1969 lies the grundnorm which is presupposed. This is the constitution in a legal-logical sense.

Using Kelsen's concept of the grundnorm to investigate the foundation of the Kenyan legal system provides food for thought. This is especially so having regard to the particular lines of constitutional development in Kenya. The problem becomes more thought-provoking if we consider this development against Kelsen's concepts of revolutions and change of the grundnorm.

In Kelsen's terms, a revolution occurs wherever there is an abrupt political change. The change must not have been within the contemplation of the existing constitution. The change must destroy the entire legal order except what is preserved. The new constitution and government must be effective.[10]

If the revolution succeeds, then the grundnorm changes. A successful revolution is tantamount to a »breach of legal continuity and will be treated as laying down legitimate foundations for a new constitutional order . . .«[11]

A successful revolution, therefore results in the destruction of the entire legal order and the replacement of the same by a new order. It results both in the displacement of the constitutional head of state and the break in constitutional-legal continuity. It results in the start of a new legal era.

Investigating the locus of the Kenyan grundnorm will mean, first, a consideration of the pre-colonial customary law era. Here, we shall examine whether the imposition of the colonial legal system destroyed the customary law grundnorms. If we place our norms in a hierarchy, all being traceable back to a postulated grundnorm at the apex of the

6 Ibid. p. 113.
7 Hart, H.L.A. The Concept of Law – (The English Language Book Society and Oxford U. P. 1961) p. 245.
8 Lord Lloyd – Introduction to Jurisprudence (London – Stevens and Sons 1979) p. 284.
9 Hans Kelsen – »Professor Stone and the Pure Theory of Law« (1965) 17 Stanford Law Review 1128, 1141.
10 Hans Kelsen op.cit n. 4 at p. 117.
11 S. A. de Smith – Constitutional and Administrative Law (2nd Ed. Penguin Books 1973) pp. 68–89.

system, can we say that the grundnorm can still be founded within the framework of the customary law system?
However, this is only given a brief and general consideration, having regard to somewhat elementary character of the traditional customary law systems before the advent of the Europeans. At this time, the Kenyan ethnic groups had no universal or common traditional rules or even permanent regular judicial systems. (But, if it is assumed that Kelsen's concept were universally acknowledged and applied, and that Kenya was not subjected to colonial rule, then the proper province for the search of the Kenyan grundnorm would be within the framework of the pre-colonial customary law era.)
After the pre-colonial period we move to the colonial era. Here an examination of the evolution of the colonial legal order is made. This will involve a consideration as to whether, with the imposition of colonial rule and the establishment of the British legal system, a new grundnorm was created – divorced from the customary law era. This will mean an analytical discourse on the legal effect of the imposition of the British legal system on the Kenyan pre-existing customary law system. The major question is hence: Wherein lay the ultimate legal authority for the Kenya colony, and more so, what was the source of validity of the imperial legislations?
However, during this colonial period Kenyans did not completely acquiesce in the colonial rule and its legal system. There existed nationalist movements which operated to dislodge the colonial authority. This culminated in a state of emergency, declared in 1952, and subsequent preparations, including negotiations for independence. There was thus a struggle between the British crown and local peoples for the right to rule the Kenyan territory. In Kelsenian terms one would say that a revolution had been set in motion.
But if we consider the stages through which we achieved independence, against the Kelsenian conception of a revolution, several jurisprudential problems arise. Our independence, and the promulgation of the independence constitution, was gained through negotiations and compromises in constitutional conferences, a process which took some time. Can this process be described, in Kelsenian terms as an abrupt political change? What length of time should the change take, in order to be considered abrupt? Since the negotiations formed the basis of the final draft of the independence constitution, could we say that the change was not *unconstitutional?* Was the change within the contemplation of the existing constitution? What then would be the fundamental difference between a change within the contemplation of the existing constitution and a revolutionary change? In the Kenya case, do we throw into oblivion the struggles and pressures provided by the local inhabitants, and argue that what happened amounted to a mere transfer of power from the British crown to the local rulers and therefore no revolution took place so as to change the base of the legal order? If this is the position, then under what circumstances would the submission that the revolution need not be characterised by bloodshed, mutiny and violence apply, that it can wholly be peaceful?
For countries that were subject to colonial rule, the theory of the grundnorm and revolutions, raises further questions. Kenya is one such country. When Britain granted

Kenya independence; could this be considered to have been a revolutionary change? Would it be proper to argue that there was no legal consequence in the grant of independence? Could we say that this grant amounted to a mere transfer of power? Did it amount to a mere change of constitutional heads, with no legal consequence to the legal system? These are some of the questions to be answered in this paper. In the final analysis, I will attempt to consider whether the legal steps that led to the promulgation of the independence constitution, could be described within the Kelsenian concept, as a revolution. I will therefore consider whether a new grundnorm was created on December 12, 1963. If that was not done, then I will investigate the precise point in time when the revolution can be said to have succeeded.

B. The pre-colonial era

The »Kenya Society« before independence was made up of diverse ethnic groups, most of them segmentary while some were centralized Kingdoms. The communities were basically egalitarian. The daily affairs of the society were managed on a communal basis. The institutions that carried on the daily affairs of the society were multifunctional in nature.[12] Religion for instance had a bearing on the economic political, and legal institutions. The religious leader was in most instances the political head. He also had legal functions.

However, the institutions in these communities varied. There were no traditional rules common to all the communities. There were no permanent regular judicial systems. There were no separate law-making bodies, no courts and no specific machinery for enforcing rules as known to the western world. One cannot, therefore, conceive of law in these communities as a systematic codified body of rules.

On the other hand, members within each ethnic group shared the same basic institutions, legal, political, economic and religious. Disputes were solved through essentially informal procedures. Every individual in each community accepted at least in principle certain codes of law, usage and convention.

However, since the communities were heterogeneous, their legal systems were also diverse. Searching for the grundnorm during this era would involve a study of each community's customary legal system. It would entail identifying norms of each customary legal system, arranging them in a hierarchy and situating the grundnorm at the apex of each. The result of such a study would inevitably be a finding of multifarious grundnorms.

On the whole, it is plausible to argue that the codes of law, usage and convention, if identified in each community, could be placed in a hierarchy. At the apex of each of these, one could presuppose the grundnorm. It may, thus be concluded that each com-

12 Hilder Kuper and Leo Kuper – African Law: Adaptation and Development (Univ. of Calif. Press 1965) p. 4.

munity had its own grundnorm at the apex of its customary law system. In the next section we therefore consider whether, with the imposition of colonial rule these numerous grundnorms were destroyed and a new one set up.

C. The colonial era

The encroachment of the Europeans on African territories and that of the British on »Kenyan« territory led to the subjugation of the once autonomous tribal communities. The British then started creating a new political unit. The traditional communities were then to form one national frontier and a single territorial organization. The British also came with a new legal conception, and new forms of law enforcement. The legal system was to have a single conceptual frame. It was to be uniform, and of universal application within the territory.

The date of investigating the Kenyan grundnorm will be taken as 1886. This date marked a critical point in the scramble for territories on the African continent. It is then that the General Act of the Berlin conference of 1885 was ratified.[13] The Act set out rules of international character regarding acquisition of territories and the establishment of authority over them.[14] Subsequently, Britain, Germany and France delineated areas which were to form their spheres of influence. The area that eventually formed the Kenya territory fell under the British sphere of influence.

Initially the area was administered by the British East Africa Association. The Association was succeeded by the chartered imperial British East Africa Company. Eventually, the British claimed prior and exclusive interests in the territory. Britain established a protectorate in 1896 and in 1920, annexed the territory as a colony. The chartered company derived its powers from the British government. The latter, hence, influenced and controlled the company's activities.[15] However, the charter enabled the company ». . . to promulgate laws and establish and operate courts of justice . . .«[16] We can therefore safely say that as of 1888 the legal basis for the British rule in Kenya by the Company was through the Royal Charter.

However, the declaration of protectorate[17] marked the beginning of direct British government administration.

At this point the more fundamental question we ask ourselves is as Ghai and Mc Auslan pose it:

> ». . . whence came the power of the crown to exercise jurisdiction in a foreign land either directly or via a company to which it had given a Royal Charter authorizing it

13 Y. P. Ghai and Mc Auslan – Public Law and Political Change in Kenya (Oxford Univ. Press 1970) p. 5.

14 Ibid. p. 4.

15 Ibid. p. 7.

16 Ibid. p. 8.

17 Chanan Singh – »The Republican Constitution of Kenya: Historical Background and Analysis« (1965) 14 International and Comparative Law Quarterly 878, 882.

to acquire by purchase cession or other lawful means foreign lands and to set up a system of government therein.«[18]

In other words wherein lay the foundation or the legal basis for the British rule in the East Africa Protectorate? Where could we locate the grundnorm during this period? Originally, it was assumed that the exercise of jurisdiction in foreign territories by the crown was by virtue of the prerogative.[19] In England the Queen is considered to be the source and fountain of justice and all jurisdiction is derived from her. In legal contemplation, by virtue of the prerogative the sovereign is bound to cause law and provide authority for the administration of foreign lands. The Royal Prerogative, therefore, assumed the position of the ultimate norm, from which the crown found a legal basis for exercising jurisdiction in foreign lands. However, as doubts arose as to whether the crown had power under the prerogative to legislate either for its own subjects or others as residents in a foreign country, a clearer legal basis was needed for the exercise of jurisdiction by the British in these foreign lands.[20]

In 1843, therefore, a foreign jurisdiction Act was enacted forming the groundwork of legislation that was to provide the legal foundation for the exercise of jurisdiction abroad.[21] Thenceforward, the legal basis for the British exercise or jurisdiction was the Foreign Jurisdiction Act, and not the prerogative. (It has been argued that the Foreign Jurisdiction Act was not merely to remove doubts regarding the crowns rights of jurisdiction in foreign lands but it was to confer powers on the crown that it had not had before.[22] In 1890 a consolidating foreign jurisdiction Act was passed.[23] It provided the basis for His Majestys jurisdiction in foreign territories acquired by treaty, capitulation, grant, usage sufferance and other lawful means. At the time of the declaration of protectorate in Kenya the 1890 Act provided the legal basis for British rule.

Application of the Kelsenian concept of the grundnorm at this stage raises jurisprudential problems. Problems arise because of the relationship between the protecting state and the protected territory. Could we say that the declaration of protectorate converted the Kenyan territory into part of the dominions of the crown? If the answer is in the affirmative, then our legal system would form one chain with that of the British. We would have no problem in locating the grundnorm that would necessarily be found at the root of the British legal system.

However, available literature and decided cases give a contrary position. Regard is to be given to the distribution of authority within the Kenyan territory – as between the protecting state and the rulers of the once autonomous communities. Answers may be found through a consideration of mode or degree, in which sovereignity is distributed as

18 Ghai and McAuslan op.cit n. 13 at p. 15.
19 District Commissioner of Nairobi v. Wali Mohamed (1913–1914) 5 East African Protectorate Law Reports p. 175, 176.
20 J.E.S. Fawcett – The British Commonwealth in International Law. (London, Stevens and Sons 1963) p. 124.
21 Ghai and McAuslan op.cit n. 13 at p. 15.
22 Fawcett op.cit n. 20 p. 125.
23 Ghai and McAuslan op.cit n. 13.

between the British government and those holding authority in the communities J. E. S. Fawcett has submitted that:

> »The fundamental characteristic of a territory under British protection from which all else flows is that it is not part of Her Majesty's dominions but is a foreign territory. The crown in right of the United Kingdom therefore has jurisdiction but not sovereignty in territories under it's protection.«[24]

It follows, therefore, that the crown has the right and power of dealing with, but is not the absolute and uncontrollable power over the protected state. The protected State »remained a foreign country«.[25] The inhabitants are not considered as British subjects.[26] Any acts done by the British are, »with regard to the inhabitants, acts of state which cannot be questioned in the courts.[27] Agreements with the Chiefs are not justiciable in international or in English tribunals.[28]

This relationship is well illustrated by the case of Ole le Njogo v Attorney-General.[29] Briefly, the facts were that in 1904, the Laibon of the Masai, together with some other senior members of the tribe, were induced to agree, on behalf of the Masai, to vacating some of their traditional grazing grounds, and to being re-grouped in two other areas. The agreement lasted seven years, but well before its formal termination and replacement in 1911, the settlers were pressing for the Masai to be moved once again. The protectorate government subsequently concluded another agreement with the Masai under which the latter agreed to move from the area the settlers wanted.

The plaintiff, on behalf of some of the Masai who had been compelled to move in 1911 brought an action for breach of the 1904 Agreement on the ground that that agreement was a civil contract which was still subsisting, the agreement of 1911 not having been made with those Masai capable of binding all the tribe. Damages were also claimed in tort for the wrongful confiscation of some cattle. The court of first instance and the court of Appeal for Eastern Africa dismissed these contentions. Hence the agreements of 1904 and that of 1911 were treaties and not contracts. The confiscation was held as an act of state. Neither the treaties nor the confiscation was cognisable in a municipal court.

The Masai were considered as a foreign tribe living under the protection of the protectorate government.[30] They were therefore not subjects of the crown. In the words of the court, »East Africa being a protectorate in which the crown has jurisdiction, is in relation to the crown a foreign country under its protection and its native inhabitants are not subjects owing allegiance to the crown, but protected foreigners who in return for that protection owe obedience«.[31]

24 Fawcett op.cit n. 20 p. 118.
25 Ghai and McAuslan op.cit n. 13 p. 17.
26 Halsbury's Laws of England 3rd. Ed. vol. 5. p. 545.
27 Ibid.
28 Fawcett. op.cit n. 20 see his footnote No. 53 at p. 119.
29 (1914) 5 East African Law Reports. 70.
30. Ibid. p. 78.
31 Ibid. p. 77.

The East African Court of Appeal found that the Masai still had a remnant of sovereignty, and that the Governor had to recognize the jurisdiction of the tribal Chiefs.[32] The Masai were thus considered to be sovereign and independent, subject to their local Chiefs and local government.[33] One can therefore safely say that this applied to all the other communities. This position, however, raises one fundamental question. This arises from the fact that one could see that there were two authorities having concurrent jurisdiction in the East Africa Protectorate. On the one hand was the crown which had jurisdiction over all the tribes. On the other were the local chiefs, whose jurisdiction was considered to be pre-existent to, and apart from jurisdiction confered by the Orders-in-Council.[34] The question hence is: Where could we find the grundnorm during this protectorate period? It is possible to argue that it underlay the English Legal system, as the British had started establishing their rule, in the framework of their legal system. On the other hand it could also be argued that if the local people still had a vestige of sovereignity, then the grundnorm could still be said to underlie the customary law system. Or, could we say that the grundnorm had been split? If the answer is in the affirmative, then it would mean that we had two grundnorms at the same time. One could be found at the apex of the customary law system, another attached to the English legal system. Or could we say that the British, having established their rule and having introduced a new legal system, destroyed the customary law grundnorms and replaced them with a new one; the new presupposed grundnorms being at the root of the English legal system? It is undoubted that in the protectorate, the protected state only has a residual sovereignty. The crown is considered to have unlimited jurisdiction. However, the actual operation of the crown's jurisdiction can be said to obliterate the vestige of sovereignty left to the local chiefs. As Lord Denning put it in the case of Nyali Ltd v Attorney General:[35]

> »Although the jurisdiction of the crown in the protectorate is in law limited jurisdiction nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government . . . The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the crown may have extended its jurisdiction. The courts rely on the representatives of the crown to know the limits of its jurisdiction and keep within it. Once jurisdiction is exercised by the crown the courts will not permit it to be challenged.«

This manifests a situation where the crown's administrators had the sole responsibility of determining the extent of the crown's jurisdiction. Once their power was excercised, to whatever extent, the courts would only have to look for legal justification for such action. The remnant of authority left to the local chiefs was therefore a fallacy. Their powers were only such as had not been taken by the crown's administrators.

32 Ibid. p. 93.
33 Ibid.
34 Ghai and McAuslan op.cit n. 13 p. 21.
35 (1910) 2. K.B. 576, 609–610.

The position is made much clearer through the Orders - in - council which conferred authority on the officers of the crown. The 1902 East Africa Order - in - Council, for instance, empowered the protectorate's commissioner to make ordinances and regulations for the peace, order and good government of the protectorate.[36] It also established a High court with full criminal and civil jurisdiction over all persons and matters in the protectorate.[37] The commissioner hence occupied the highest authority in the protectorate exercising powers on behalf of the crown.

> (He) ». . . had overriding powers in the protectorate. He did not have to act in consultation with any local body, nor was he responsible to a local institution. The legislative and executive functions were combined in him and there were few limitations on the powers granted to him.«[38]

The commissioner's power to legislate were, however, limited. His activities were subject to the instructions of the secretary of state. The latter could disallow, in whole or in part, legislation passed by the commissioner. The commissioner's source of authority therefore emanated from Britain.

Customary laws were left as a guide to the courts, and their application was subject to the repugnancy clause.[39] English law can be seen to reign supreme over the customary laws. One can therefore conclude that the basic authority or the ultimate norm during this protectorate status resided within the British legal system. This position subsisted even after the declaration of colony in 1920.

The change from protectorate to colony transformed the East Africa Protectorate, making it part of the dominions of the crown which hitherto had been considered as foreign territory. The constitutional implication of the change was that the legal base for the British jurisdiction in the East Africa Protectorate changed from the Foreign Jurisdictions Act 1890 to the British settlements Act 1887. The latter provided the legal base for the jurisdiction of settled colonies. In strict theoretical terms the change from protectorate to colony transformed the Kenyan territory into part of the dominions of the crown.

In jurisprudential terms the locus of the grundnorm could now properly be said to be found within the confines of the English legal system. If we consider this change against the Kelsenian conception of change of the grundnorm, we find that the imposition of British rule was not within the contemplation of the existing customary law system. Perhaps we can also say that it was an abrupt change. The communities had not expected the change. Indeed the colonial Act could be seen as the act of usurper and dictator, establishing a new grundnorm.

36 Article 12(1).

37 Article 15(1).

38 Ghai and McAuslan op.cit n. 13 p. 38.

39 Article 20 of (1902) E. A.O-in-C. (This meant that the applicability of customary laws depended on value standards derived from English law.).

40 The declaration of a colony was through the Kenya (annexation) Order - in - Council 1920.

Once the English legal system was imposed, the customary laws that were applied were only those permitted as a guide for the courts. The customary laws that continued to apply were only those that were preserved. The crown's administrators were also effective in their administration of the territory. A new grundnorm was therefore presupposed with the change from the customary to the colonial era.

D. The post-independence era and the grundnorm

Here, we consider whether the events leading to the attainment of independence, and the promulgation of the independence constitution, might be seen as a revolution, leading to a change of the grundnorm. An alternative question is whether the events amounted to a mere constitutional transfer of power and authority. If the latter question is answered in the affirmative, then we should consider whether this change of personnel had any legal effect. Did the change ensure legal continuity or was there a break in the legal chain? If there was no break, then the Kenyan grundnorm could still be said to reside within the British legal system. However, if the change could be described as legally revolutionary, then a new grundnorm was created to reside within the Kenya legal order. In our examination, we therefore consider whether the progress towards independence can be fitted into the Kelsenian conceptual frame of a revolution, and a change of the grundnorm.

Kenyan nationalists started a struggle and resistance against the British at the inception of colonial rule.[41] However, since these resistances were isolated, unco-ordinated and weak, they were defeated and the British established their rule.[42] It has been asserted that »the lowering of the Union Jack in Kenya on December 12, 1963 was unquestionably the combination of political forces set in motion by 1953–1956 peasant revolution called the »mau mau«. This means that the agitation and violence waged by the mau mau movement contributed to the achievement of independence. The mau mau movement ». . . quickened the pace of political development and independence«.[44]

It should be noted, however, that of late, certain scholars have made contrary submissions with regard to the view that mau mau was a national movement engaged in the search for independence in Kenya. For instance it has been asserted that:

> »the mau mau was definitely not a Nationalist movement . . . it had no nationalist programme . . . (further) the central committee that managed the mau mau

41 E.g. the Kalenjin put up a strong and bloody resistance against the British for ten years before they were eventually defeated by the British forces. See Gideon S. Were – East Africa Through a Thousand Years (London – Nairobi – Evans and bros. 1968) p. 120.

42 For an account of internal organisation and incidences of war waged by the Mau Mau against the British see Donald L. Barnett and Karari Njama – Mau Mau from within. (Monthly Review Press – Newyork and London 1966).

43 Barnett and Njama op.cit note 42 p. 492.

44 Mohamed Mathu – The Urban Guerilla. The quotation is found in unpublished work by Maina wa Kinyati.

movement contained representatives from Muranga, Nyeri, Embu and Machakos ... It is therefore important to correctly evaluate mau mau as a primarily Kikuyu (tribal) affair«.[45]

Professor B. A. Ogot has also argued that »what emerges from a study of mau mau war songs is a strong sense of Kikuyu nationalism«.[46] If these arguments are true, then one can conclude that there was no mass movement that could be said to have provided a violent resistance a kin to a nationwide united front against British rule. This would mean that our consideration of the progress towards independence would be left to the negotiations and compromises at the Lancaster House constitutional conferences of the early 1960s. One would essentially be saying that the progress towards independence was through a peaceful process. This would have substance, in so far as the mau mau movement disintegrated and was eventually defeated in 1956.[47]

The first constitutional conference was held in 1960.[48] The delegates included parties who had interests to safeguard; hence the strong case made for the constitutional protection of these interests. At these conferences the Kenya delegates put foreward their demands for independence in no uncertain terms. As Chanan Singh argues: »the stage had been reached when the British government would no longer dictate (terms) but would accept whatever Kenyans asked for by general agreement amongst themselves«.[49] In Kelsenian legal parlance this would be tantamount to an assertion that a peaceful revolutionary process had been set in motion.

At the 1962 meeting, the conference delegates from both sides had to adopt many compromise solutions on difficult problems. However, at the end of this conference, a draft constitution emerged which was »... the product of vigorous bargaining on various sides and with minor modifications formed the basis of the independence constitution«. Subsequently the British government granted Kenya internal selfgovernment – on June 1, 1963. The self-government constitution substantially reproduced major characteristics of the Westminister form of government – hence an export model.[51] Although the office of the Prime Minister was established, to which a Kenyan was to be appointed after the grant of self-government, the colonial office still retained crucial powers such that »... the governor ... continued to be recognisable for defence, external affairs and internal security in respect of which he had extensive legislative and executive competence, the Governors veto over legislation was retained and there remained limited powers of disallowance«.[52]

45 William Ochieng – Review of Kaggia's Roots of Freedom 1921–1963 found in Kenya Historical Review vol. 4 No. 1 – Nairobi. pp. 138–140.

46 Ogot B. A. – »Politics, Culture and Music in Central Kenya: A study of Mau Mau Hymns 1951–1956« (Nairobi 1976). Found in Historical Association of Kenya Annual Conference Papers 1976) p. 10.

47 Donal Barnett and Karari Njama op.cit n. 42 p. 142.

48 Chanan Sing – Loc.cit n. 17 p. 893.

49 Ibid.

50 Ghai and McAuslan op.cit n. 13 p. 178.

51 Ibid. p. 178.

52 Ibid. p. 178.

From the above, the only logical conclusion one can draw is that upto the time of the grant of self-government and the bringing into effect of its constitution there was still a substantial link with the British legal system. This can justify the submission that the legal chain had not been cut and that the grundnorm still resided in the English legal system.

A third constitutional conference was held at Lancaster House from September 25, 1963 to October 1963,[53] where »the constitutional arrangements for the grant of independence were finalized.«[54] For our purposes the most significant decisions reached were: first that the next stage in constitutional progress should be *dominion* status - rather than the declaration of Republic right away.[55] This implied that the Queen would continue as the Head of State.[56] Secondly, it was decided that the date for the declaration of independence be set in advance. It was stated in the *Kenya Sessional Paper No. 2* of 1963, that:

> »Having regard to the date envisaged for the inauguration of the federation and subject to the necessary steps being completed in time Kenya will become independent on December 12, 1963.«

The two decisions are crucial for our purposes, considering the Kelsenian concept of *change* of the grundnorm. Taking the decision of the date on which Kenya would be independent in advance leaves a question as to whether the change would be termed »abrupt«. What length of time should the change take to qualify as »abrupt?« Must the change be unknown to everybody other than those who effect the change? We also realise that during the constitutional conferences, *negotiations* and *compromises* were made. At the end of the day, these formed the basis of the independence constitution. This means that at the time independence was declared, the constitutional form of independent Kenya *had been decided on in advance.* Could we therefore say that the change was within the contemplation of the existing constitution?

It would also be important to consider the legal instruments with which Britain divested itself of sovereignity and authority, and vested the same in the Kenyan government. These legal instruments are important, as they will assist us in examining whether there was a break in legal continuity with the past.

The first legal instrument is the Kenya Independence Act, 1963. This Act was enacted by the British parliament and it »renounced Britain's rights of government and legislation in Kenya and replaced all the limitations on the competence of Kenya's legislature.«[57] The Independence Act, therefore, removed the conditions of dependency that were imposed on Kenya's legislature during the colonial period. The inhibitions on the local legislature to enact laws either with extraterritorial effect, or laws inconsistent with imperial legislation applicable to the colony, were also removed by the Act. The crown's powers of veto

53 Chanan Singh Loc.cit n. 17 p. 898.
54 Ghai and McAuslan op.cit n. 13 p. 178.
55 Ibid.
56 Chanan Singh Loc.cit n. 17 p. 898.
57 Ghai and McAuslan op.cit n. 13 p. 178.

and disallowance too, were removed. The local executive was no longer to perform its functions in conformity with Royal instructions.
As Ghai and McAuslan put it, »the independence Act removed the marks of dependence«.[58] Section 1 of the Act provided that on or after December 12, 1963 Her Majesty's government in the United Kingdom shall have no responsibility for the government of Kenya. Section 2 provided that no Act of parliament of the United Kingdom passed on or after independence shall extend to Kenya. »The more specific limitations on Kenya's legislature were the provisions of the first schedule which disapplied the colonial laws validity Act 1965 to legislation shall be void or inoperative »on the ground of repugnancy to the law of England including the independence Act itself.«[59] From these provisions we can conclude that Kenya was on the move to sovereignity. It was eventually to have full capacity of dealing with external and internal matters of its concern.
The second legal instrument with which the transfer of power was effected was the independence order - in - Council,[60] which dealt with transitional matters. For our purposes, the most important provisions dealt with the continuance in force of existing laws. It expressly provided that laws that were in force were to continue to apply. The English legislation that applied henceforth had the independence order-in-council as the legal base for their application.
However, at this time still, total links with Britain had not been severed. The governor - general, as a representative of the Queen appointed a Prime Minister - a member of the Lower House who in his opinion was likely to command the support of a majority of its members.[61] The executive powers were still vested in the Queen. These powers were delegated to the Governor - General, wo exercised the same only on the advice of the cabinet. These reveal that Kenya had not attained full sovereignty.
On the other hand questions arise with regard to the legal instruments with which the British transferred power to Kenya government. In the first place, one questions whether the same United Kingdom parliament which enacted these legislations could not repeal them. If these Acts were intended to grant autonomy and sovereignity to Kenya, could it also not be true that the same parliament could revoke them at its pleasure?
There are several points which leave doubts in our minds as to whether the grundnorm changed on December 12, 1963. They leave questions as to whether the peaceful revolutionary process which had been set in motion succeeded on the same date. When Kenya attained independence it still had dominion status. Was this compatible with absolute and unlimited sovereignity? The constitutional form in which Kenya was to attain independence was drafted in advance. The date on which Kenya was to be declared independent was also agreed on beforehand. Moreover, appeals to the Queens Privy

58 Ibid. p. 179.
59 Ibid.
60 Statutory Instruments 1968/1963.
61 Ghai and McAuslan op.cit n. 13 p. 180.

Council as ultimate court subsisted until 1965.[62] There was still remarkable continuity of law and institutions from the colonial era. I submit that at the time independence was declared, there was still substantial link with Britain. The grundnorm had not changed. However, the peaceful revolutionary process that had been set in motion had not been interrupted. This process had not been concluded but was still in progress. The question then is: did this »revolution« succeed, and if so at what point in time did it become »succesful«?
The present writers view is that the revolution was completed when Kenya was declared a sovereign Republic on December 12, 1964.[63] The constitution of Kenya (Amendment) Act 1964[64] removed the links that subsisted between Kenya and Britain. The country ceased to form part of the dominions of Her Majesty.[65] The Act provided for the establishment of the office of President.[66] The privileges and prerogatives of the Queen, in relation to Kenya, were transferred to the new Republican Government – to be exercised by the president. An important accompaniment to the declaration of Republic was that the Act expressly provided for the continuance in force of the existing laws. The saved laws were to »continue in force as from December, 12 1964 as if they had been made in pursuance of the amended constitution.[68] The existing laws were formally adjusted to conform to the Republican status which the country was assuming.[69] References in the existing laws to Her Majesty or to the Crown, in respect of Kenya, were henceforth to be read and construed as if they were references to the Republic of Kenya.[70] References in an existing law to the Governor – General or the Prime Minister were to be read and construed as if they were references to the president.[71]

E. Concluding remarks

We can now focus a reflection on the jurisprudential implications of the constitution of Kenya (Amendment) Act 1964 within the Kelsenian conception of change of the grundnorm. The Act was passed by the Kenya parliament. It needed no sanctioning authority of the British government. Its provisions show clearly that from then on, the ultimate legal authority resided within the Kenya legal system. The Kenya independence order-in-

62 Appeals to the Judicial Committee of the Privy Council were abolished by Act No. 14 of 1965 – see section 15.
63 The Republic was declared through the constitution of Kenya (Amendment) Act. No. 28 of 1964. (see section 4).
64 Act No. 28 of 1964.
65 Sect. 4.
66 Sect. 8.
67 Sect. 16.
68 Sect. 14.
69 Sect. 15.
70 Ibid.
71 Ibid.

council, 1963, could not be said to have contemplated the enactment of the Amendment Act.

Most of the laws that apply in Kenya today were initially enacted at the time Kenya had protectorate and colonial status. They had as their legal base the English legal system. However, we have seen that the laws that continued in force after the declaration of independence were to be construed as having been made in pursuance of the Amended constitution. One can therefore say that after the declaration of Republic, the validity of legislation in Kenya derived from the amended constitution. The Act, therefore, severed the legal links with Britain. It formed the legal base founding the validity of all legal norms in Kenya.

The institutions in Kenya also now had a legal base deriving from the Kenya legal system. The amended constitution provided for the continuity of existing offices. Those who held or acted in any office before December 12, 1964 were to be deemed to hold or act in pursuance of the amended constitution.[72] They were considered to have taken any necessary oath under the amended constitution.[73] The logical inference to be drawn from this is that these Public offices were the creation of the amended constitution. It was as if they had been established a new.

In Kelsen's terms it is clear from the above that the Amended constitution formed the basic law of Kenya to which all other laws from whatever source, were to conform. The 1964 amended constitution formed a new legal base, the foundation upon which a new grundnorm is presupposed.[74]

The position is made clearer but the present constitution.[75] Section 3 of this constitution provides that:

> »This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to section 47 (dealing with amendement procedure), if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of the inconsistency be void.«

It is undoubted from this provision that the present constitution, Act No. 5 of 1969, forms the highest norm in the pyramid of positive legal norms of the Kenya legal system. All the other laws derive their validity from it. It forms the ultimate norm in the hierarchy of positive legal norms. It is the constitution in the positive legal sense.

However, as we saw earlier on, Kelsen also proffers a constitution in the legal-logical sense. The latter is presupposed at the apex of the constitution in the positive legal sense. It is the grundnorm. Applied to the Kenya legal system, the constitution in the legal logical sense is presupposed at the apex of Act No. 5 of 1969. It is no longer within the British legal order. Kenya therefore, provides a classic example of a situation where the change of the grundnorm is through a peaceful process.

72 Sect. 19.

73 Ibid.

74 For an account of the essential differences between the 1963 constitution and the amended form of 1964 – see – Ghai and McAuslan. op.cit n. 13 pp. 209 et. seq.

75 Act No. 5 of 1969.

ABSTRACTS

Kelsen's Grundnorm in modern Constitution-Marking: The Kenya Case

By *J. O. Rachuonyo*

The emergence of new states in the era of decolonization created new questions, especially about the realtionship between continuity and change in respect of legal systems and constitutions. In order to answer some of these questions, this paper analyses the development of the roots of the Kenyan legal system and its quest for the *grundnorm*. According to Hans Kelsen, the *grundnorm* is the norm at the apex of the hierarchy of a legal order. Since all norms which are part of that system can be traced back to the *grundnorm,* the concept also allows to differenciate between mere changes and developments within the existing system on one hand and revolutionary disruption on the other hand. This is especially significant, since revolutions are not generally characterized by bloodshed and armed uprisings. For Kelsen, a successful revolution is tantamount to a »breach of legal continuity and will be treated as laying down legitimate foundations for a new constitutional order . . .«

Following the lines of constitutional development in Kenya, the search for the ultimate locus of the Kenyan *grundnorm* has to start with the pre-colonial era of customary law. The survey reveals that due to the decentralized state of the communities, which were made up of diverse ethnic groups and kingdoms with various multifunctional institutions, there was neither one common and permanent judicial body nor any homogeneous legal thinking. Therefore numerous *grundnorms* existed.

Colonial rule has to be divided into different stages. Whereas the declaration of colonial status in 1920 undoubtedly imposed the English legal system on the new dominion of the Crown, the prior period of settlement and proclamation of a protectorate in 1896 left a vestige of sovereignty on the local chiefs and did not fully remove the customary law. Still, the investigation shows that the remnants of the old legal order were only valid under the supremacy of British jurisdicition. Thus, there was no »split« grundnorm but a unified one to be found in the English legal order. The post-independence era was initiated by the Lancaster House Conferences of the early 1960s. The influence of the Mau Mau peasant movement may be disputed, but its defeat as early as 1956 provides clear evidence that it did not exert any substantial or even revolutionary pressure on the conferences. Negotiations and compromises led to a final text of the new constitution of Kenya. Independence under its provisions meant that Kenya remained a dominion of the Crown. Only a year later, on December 12, 1963, the ties and links to the former head of state and the British legal order were terminated by an amendment to the constitution, marking the end of a period of peaceful change of the *grundnorm*.