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Author(s): H. W. O. Okoth-Ogendo
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THE POLITICS OF CONSTITUTIONAL CHANGE IN KENYA SINCE INDEPENDENCE, 1963–69

by H. W. O. OKOTH-OGENDO
University of Nairobi

CONSTITUTIONAL SYTSEMS IN Anglophone Africa have not had a happy history, especially during the last decade. Almost without exception the independence documents have either ended up in military dustbins or have undergone change so profound and rapid as to alter their value content and significance beyond recognition. Scholars trained in the Westminster tradition, who tend to view constitutions simply as 'a body of rules which define *and limit* governmental power *and regulate* major political activity in the state', have explained this phenomenon primarily in terms of the inherent inability of Africans to run constitutional systems.[1] There is a strong temptation to give generalized explanations for the widespread breakdown of constitutions in Africa; explanations which tend to leave unexplored certain basic factors in the operation of constitutional systems in the new nations.[2]

Of these we may single out three relevant points. The first is that all 'Westminster constitutions' imported into Africa were almost exclusively concerned with state institutions, power distribution and limitation; none of them contained normative definitions prescribing the purposes of government. Bills of Rights were written into constitutions not as minimum prescriptions of justice and good government but as limitations on governmental power—this notwithstanding the fact that if they survive alteration they might eventually come to perform normative functions, particularly as legitimating factors.

The second is the very 'home-grown' nature of customs and conventions of government and their operation both as definitions of purpose and limitations of excesses. African governments which have attempted to administer Westminster principles have shown fantastic confusion as to what these are and as to their efficacy.

The author, who is shortly to take up a lectureship in law at Nairobi University, is at present a student at Wadham College, Oxford. This is a revised version of a paper presented in January 1971 at St Antony's College, Oxford. It was also discussed on 22 April 1971 at the Netherlands School of Economics, Rotterdam.

1. See for instance Friedrich, in *Patterns of African Development*, edited by Spiro (New York, 1967), as interpreted and criticized by Professor Y. P. Ghai in his inaugural lecture 'Constitutions and the Political Order in East Africa', Series No. 18 UCD.
2. Drastic amendments as a method of constitutional change are predominantly an East and Central African phenomenon. The major factors contributing to constitutional breakdowns (leaving aside eccentric internal colonial systems such as South Africa) have been military coups which have ravaged at least 28 African countries, civil wars (Chad and Sudan), and outmoded forms of monarchical rule (Ethiopia and Morocco).

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The third factor relates to the logic of constitutional transplantation itself and the nature of the individual constitutions which were transplanted. Although these showed little interest in normative processes, they nevertheless showed remarkable sensitivity to the compromise nature of African political activity before independence. As the minimum and necessary adaptation, the colonial powers imposed upon the new African regimes constitutions which were inherently fragile and which depended for their stability largely upon the maintenance of good public relations in politics—the one thing which most ruling elites were not prepared to guarantee.

Apart from these factors, any account which purports to give an explanation of constitutional change in African countries must also examine the pressures operating upon the new power elites, the direction in which they were manipulating constitutions, and the motives underlying the manipulations.

In Kenya there has as yet been no major breakdown of public order, nor any discontinuity in constitutional government. But there have been such drastic changes in the 1963 constitutional document that a proper explanation may well provide a clue to the general problem of legitimizing constitutional systems in Africa. The period considered here has seen ten constitutional amendments which divide roughly into two phases: the first from 1963–5, the second from 1966–9. Closely linked with these are certain aspects of the law of public order whose operation is complementary to the major constitutional amendments, and which will also be considered here.[3]

In this article it will be argued that both the constitution and the process of amendment were used almost exclusively to solve political problems, some of which were of a public and defensible nature, others private and indefensible. The major themes to be discussed will be centralization, stability and legitimation on the one hand; and political survival, public participation and succession on the other. In tracing these themes the pattern as far as possible will be first to set out the political circumstances within which any particular amendment took place, followed by the amendment itself, and in discussing the constitutional debate an attempt will be made to separate public rhetoric from private motivation.

Colonial foundations of the 1963 constitutional document

In order to give proper foundation to the argument two colonial legacies must be briefly examined—the first of a political nature and the second administrative.[4]

In political organization and expression, Kenya has been remarkably lacking in innovation and has remained loyal to the patterns of organizational behaviour

3. These include the operation of s.52 of Penal Code (prohibited publications); Public Order Act (Cap. 56); Preservation of Public Security Act (Cap. 57); Chiefs Authority Act (Cap. 128—formerly Native Authority Act).

4. For the best treatment of these legacies, see generally the following:—C. Rosberg and J. Nottingham, *The Myth of Mau Mau* (New York, 1966); C. J. Gertzel, *The Politics of Independent Kenya* (Nairobi, 1970), and J. J. Okumu, 'Charisma and Politics in Kenya' in *E. Af. Journal* (February 1968).

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and the political values of the later part of the colonial period. The pattern of political organization may be traced back to the administration's creation of 'Local Native Councils' in the 1920s and 1930s. These Councils were never intended in Kenya to function as political forums in any independent sense; being controlled and manipulated as they were by the colonial administrative officers, especially the District Commissioners who were their ex-officio chairmen. But they did have a nucleus effect in concentrating African political awareness. They were the first attempt at 'representational' administration in African areas and consequently were closely associated with the emergence of local leadership.

With the formation of Kenya African Union in 1944, the Local Native Councils in many areas ceased to represent African political expression, although its hierarchy contained some 'LNC-trained' men whose grass-roots support was basically district-oriented.[5] KAU and African political activity generally were banned in 1953 following the declaration of the Emergency in the previous October. The ban created a vacuum in African political life and once again LNCs assumed constitutional significance; being used as late as 1954 in the Lyttleton Constitution to advise the governor on African representation in the Legislative Council. The mainstream of African political expression however continued outside them; being either underground, or largely subsumed in the activities of the African trade unions in the Nairobi area.

In 1955, the colonial government began to encourage simple and orderly development of African political life, which was—except in Central Province—to be organized district-wise. By 1957, when the administration was ready for the first African elections, at least seven major 'district' parties were in existence, each of which was tribal and led by a tribal personality.[6] This was the framework for the 1957 and 1958 elections, for the Lennox-Boyd Constitution of 1958, and in the period leading up to the Lancaster House Conference in 1960. Against this background, what the formation of the Kenya African National Union in 1960 signified was not the emergence of a new political culture or ideology, but simply—as stated in its inaugural manifesto—'to bring unity of purpose and action, so necessary in the national structure of any country for freedom and independence.'[7] The inaugural meeting which was held in Kiambu was attended by leaders of thirty political organizations.

During the whole of this period there is likewise a complete absence of the

5. See generally George Bennett, *Kenya: A Political History; the colonial period* (London, 1963). Prominent among these LNC-trained men was Oginga Odinga.

6. See the list given by J. J. Okumu in 'Charisma and Politics', *loc. cit.* Okumu has excepted the Nairobi District African Congress from 'tribal' leadership but A. J. Hughes, in *East Africa* (Harmondsworth, 1969) notes at p. 118 that 'the repatriation of Kikuyu, Embu, and Meru from Nairobi . . . led to an influx of those from other tribes, in particular the Luo. And so it was that political leadership in Nairobi became a contest between two Luo.'

7. Declaration for proposed 'Uhuru Party of Kenya', March, 1960. Of the original 14 Africans elected in 1957–8 seven were members of the 1971 Cabinet, and were still looked upon as political chieftains in their home areas

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expression of any fresh values, distinct from those which were part of the logic of colonialism. Once settlerdom had been accepted as a fact, the original message by Harry Thuku's East African Association based on a rejection of the fundamental premises of white rule and on the restoration of alienated land was converted into a general demand for equal distribution of settler rights and privileges or its corollary, the removal of disabilities imposed upon the Africans, especially in land distribution and agriculture.[8] There is nothing new in this pattern, which is a common phenomenon in nearly all systems based on racialism as a philosophy of government: much of the political activity becomes centred on the demand for equal opportunities, and this is nearly always defined as giving the oppressed what the oppressor already enjoys.

The upsurge in political activity after 1955 saw an interesting shift. The politics of the African elected members were now organized around the transfer of power; the new political idiom being '*Uhuru Sasa*'. Much activity accordingly went into organizational tactics, especially the creation of a united front; correspondingly value thinking and political education were significantly deemphasized. The late T. J. Mboya stated this explicitly:

> 'For the effective struggle against colonialism . . . it has come to be accepted that you need a nationalist movement. I use these words advisedly, as opposed to a political party. A nationalist movement should mean the mobilization of all available groups of people in the country for a single struggle . . . . Mobilization is planned on the assumption that for the time being what is needed is to win independence and *gain power* to determine one's own destiny.'[9]

This shift in priority also puts into proper perspective the early split in the ranks of the African elected members, especially the eventual formation of the Kenya African Democratic Union[10] (and the African Peoples' Party) and the case they finally took up—that of minority safeguards in the event of power transfer. The split with KANU can be explained as a problem of organizational tactics, in which case KADU's strange alliance with Euro-Asian communities becomes simply another facet of the pre-independence power struggle. Or it can be explained in terms of an absence of strong common fundamental values; hence Ronald Ngala, the KADU leader, was able to elevate ethnic fears and animosities into a political principle which was in fact given constitutional form. In either view, KANU, which remained the dominant stream of political expression,

8. See Rosberg and Nottingham, *Myth of Mau Mau*, pp. 35ff., where this change could imply the pre-eminence of rural over urban politics.
9. T. Mboya, *Freedom and After* (London, 1963), p. 61. See also Odinga's views in *Not Yet Uhuru* (London, 1966), and also J. J. Okumu, 'Odinga and the Purpose of Independence', *E. Af. Journal* (October 1967).
10. KADU's forerunner was probably the Kenya National Party formed in May 1959 with the objectives of regionalism and independence in 1968. Its leaders were Masinde Muliro (Chairman), E. V. Cooke (Vice-Chairman); Ronald Ngala (Secretary) and Arwind Jumidar (Treasurer).

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was not only devoid of an ideology of values but partially failed in its attempt to create a 'united' front.

It is in agrarian land law that the administrative legacy is especially apparent,[11] but it is also to be discerned throughout the whole of the administrative machinery. The institutions inherited at independence were heavily weighted towards the protection of settler interests, and, in the case of governmental institutions, they were particularly well adapted for the control of African political activity at the provincial level. Hence from the beginning law was used as an instrument of class domination, particularly since the colour differentia was co-extensive with the economic stratification.

The full implications of this point are only appreciated when read together with the political legacy already mentioned. In the focusing of attention on 'power transfer' in the abstract, no attempt was made to examine the institutional basis of that power in the hands of the colonialists. Once that transfer was achieved not only the values but also the institutions of colonial rule were received. This led to a mere formal substitution of colour groups (and hence of economic groups) leaving unaltered the class interests and hence the corresponding administrative power which must sustain them.[12]

The problem against which this analysis of the 1963 constitution and of the subsequent changes is based may therefore be stated as the persistence of institutions and values which were extremely ill-adapted to new operative demands. The political parties reached independence as mere federated ethnic loyalties grouped around individual personalities. Their immediate concern was, for KANU the transfer of power, and for KADU its limitation in the interests of ethnic minorities. The administration espoused no tradition of government by rules as a legitimate system, much less a constitution as a sacred and basic law laying down the major institutions of state and prescribing the norms by and within which they must function.[13] The idea of a constitution was therefore largely alien to the history of government in Kenya and, even more significantly, it was at variance with the authoritarian structure of the administrative set-up which was inherited from the colonial period and which was left virtually unshaken by the process of democratization that had been the political pre-occupation since 1954.[14]

The constitutional document that finally led Kenya to independence was

11. See the present author's outline views in 'Law Reform and African Law in East Africa', *E. Af. Journal* (December 1970).

12. See Y. P. Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya* (Nairobi, 1970), pp. 506ff. on the role of law in the colonial system, and A. Mohiddin, 'The Changing of the Guard' (review of Professor Ghai's book) *Mawazo* **20,** 2, 4 (December 1970). A similar argument is outlined in my paper to the University Students Association of East Africa in 1969, 'The Role of Universities in the African Revolution', in *Focus* (1969).

13. The Lennox-Boyd Constitution of 1958, the only attempt to lay down extensive rules of government activity and political behaviour, was also the least permanent and fundamental.

14. For the structure and role of the provincial administration see C. J. Gertzel, 'Provincial Administration in Kenya', *J. Com. Pol. Studies,* **4,** 3 (1968).

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published in March 1963. Y. P. Ghai and Patrick McAuslan have emphasized that it showed remarkable distrust of power; and like many of its Westminster predecessors, it showed extreme sensitivity to the compromise nature of African politics prior to independence.[15] It thus institutionalized and entrenched the colonial political legacy while at the same time imposing on the new central government severe limitations on its exercise of the powers inherited under the administrative legacy.

The basic framework offered by KADU was designed to accommodate two broad categories of people. There were the Euro-Asian communities whose interest in aligning themselves with KADU was to establish principles of compensation for settlers and civil servants who wanted to leave Kenya; and of property rights and protection against discrimination for those who wished to stay. And there were 'the minority groups' amongst Kenya's own peoples. In their case, the fear on which KADU's propaganda was centred was the domination of KANU by the Kikuyu and the Luo, and their alleged intention to take over the lands of these 'minority' groups. Within this category there arose two secessionist movements—the Somali in the Northern Frontier District demanding complete secession and the Arabs in the coastal strip prepared to settle for autonomy. The Masai moreover even requested the British government to stay in Masailand after other parts of Kenya had become independent[16]

In the event, the constitutional document contained two elaborate schemes of power limitation—the first provided through the regional system itself and the other by the Bill of Rights provisions.

The basic characteristic of regionalism was its geographical distribution of power and the general benefit allocation following that pattern. The regions were so far as possible delineated in such a way as not to split up any ethnic group between different regions.[17] The constitution then proceeded to prescribe an extremely detailed power distribution between the centre and the regions. The former, it is true, retained important powers of intervention, for example, over grants and loans, the implementation of international agreements, and emergency situations.[18] There was also the omnibus clause:

> 'The executive Authority of a Region shall be so exercised as . . . (a) not to impede or prejudice the exercise of the executive authority of the Government of Kenya, and . . . (b) to ensure compliance with any provision made by or under an Act of Parliament applying to that Region. . . .'[19]

15. Ghai and McAuslan, *Public Law*, p. 190. The fact that KADU was then leading a minority government did not in my view substantially affect its structure.
16. On minority fears see Y. G. Ghai, 'Independence and Safeguards in Kenya', *E. Af. Law Journal* 3 (1967), pp. 79ff.; *Report of the Northern Frontier District Commission*, Cmnd. 1900 (HMSO, 1962); *Report of the Commission on the Kenya Coastal Strip*, Cmnd. 1585 (HMSO, 1962).
17. *Report of the Regional Boundaries Commission*, Cmnd. 1899 (HMSO, 1963), published during the first week of January, 1963. This did not prevent the sparking off of tribalism in Western Kenya by the readjustment of boundaries.
18. Ref. ss.67–9 of 1963 constitution.
19. Ref. s.106 especially sub-section 2 thereof.

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The general philosophy nevertheless was that the greater the detail, the tighter the control over the centre.[20]

The exercise of powers and functions was classified roughly in the following ways:[21]

(i) as to those matters which were within the *exclusive* legislative and executive competence of the regions. This included such matters as agriculture, primary, intermediate and secondary education (except certain 'national' institutions); housing, medical (except for certain hospitals) and local government.

(ii) as to those matters which were within the *concurrent* legislative competence of parliament and regional assemblies. This included power over various aspects of the list in (i) above, e.g. certain agricultural matters, public examinations at primary and secondary level schools.

(iii) as to those matters which were within the legislative competence of parliament (including those areas to which sometimes the executive authority of the regions might extend). All residual powers were also left with the centre.

As political supervisor over the regional institutions an Upper House (or Senate) was provided for and in it were vested significant powers over governmental conduct including crucial delaying powers over legislation.[22] Senatorial representation was distributed over 40 districts and the Nairobi area; and, given the ethnic delineation of regional boundaries, and also the fact that each senatorial district consisted predominantly or wholly of a single group, that house became a very close approximation to a forum for tribal representation as such in Kenya's political and governmental system.[23]

As a scheme of power limitation vis-à-vis the centre, the regional system was therefore external and structural. The Bill of Rights, on the other hand, provided for limitations on governmental power which were internal and normative.[24] Moreover, the general scheme of limitation, which makes clear a distinction between *proprietary* and *personal* guarantees, reflects interests which KADU and its allies sought to sanctify within the regional structure: interests basically economic on the one hand, and related to political victimization of particular groupings on the other. The subsequent history of this part of the constitution is a strong argument for discrediting written guarantees against the exercise of state power. The governments of new states need greater powers than

20. Ghai and McAuslan, *Public Law*, p. 197. See pp. 197ff. for a more detailed description of regionalism.

21. Ref. Schedule I Parts I–III. Cf. Schedule II which covered similar ground but was couched in 'exclusive' terms. See also s.66 of 1963 constitution.

22. Generally s.61.

23. See J. H. Proctor, 'The Role of the Senate in the Kenya Political System', *Parliamentary Affairs*, **18**, 4 (1965), pp. 309–415.

24. To take this view is not to devalue the significance in general of Bills of Rights as fundamental principles and normative sources of basic tenets of good government. The Kenya Bill of Rights probably has its origins (via Uganda and Nigeria) in the 1950 European Convention of Human Rights and Fundamental Freedoms, extended to Kenya by Cmd. 9045 of 1953 (and later suspended).

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those of old states in order to put their systems on the path of legitimacy, and therefore severe limitations, even if framed in terms of bills of rights, are an invitation to unconstitutional action. A more fundamental objection is that to write guarantees into the constitution is to quantify and make finite the aggregate of individual rights and freedoms; hence derogation becomes mechanical and respectable if carried out by way of procedural—and therefore constitutional—propriety, unless they are put beyond the pale of legislative power.

These internal limitations were attached to the exercise or possible exercise of power over a large number of things and situations. The first was property. Euro-Asian communities (the propertied class before 1963) were afraid that independence would be followed by widespread and arbitrary nationalization and Africanization of land ownership and business control. For these communities KADU's scheme appeared to provide a respectable umbrella within which they could argue safeguards for their interests.[25] The colonial power machinery was on their side and consequently proprietary safeguards became perhaps the most elaborate and stringently entrenched of the Bill of Rights provisions. Provision was made against all expropriation or compulsory acquisition of property save under the most rigorous conditions—including prompt and full payment of compensation. These guarantees were not subject to the derogation provisions contained in s.19 (now s.83) of the constitution, and although this section now covers nearly all of the personal guarantees the property section remains intact.

The next clauses, which related to discrimination,[26] complemented the proprietary limitations in that they were a system of personal guarantees which were an important ancillary protection particularly against administrative action in such things as the granting or withdrawal of trade licences. They were defined however sufficiently widely to cover ethnic fears institutionalized in the scheme of regionalism and thereby provided a system of non-proprietary personal (individual and group) guarantees. It is true that the constitution expressly sanctioned discrimination by *legislative* action in certain significant proprietary and personal circumstances both against citizens and non-citizens. Discrimination by *administrative* action was, however, outlawed in all its forms unless it was 'expressly or by necessary implication authorized . . . by such provision of law as is previously mentioned'; no distinction being made between citizens and non-citizens.[27]

Express personal guarantees were contained in a declaration of liberty and 'freedoms'; religious freedom, freedom of expression, of assembly and association, and of movement. It is suggested however that in view of the close correlation

25. It is to be noted however that, on land, European interests coincided not with KADU policy but with KANU's demand for central control.
26. s.26 (now s.82) of the constitution. The section also defines 'discrimination'.
27. See s.26 (1) (4) (now s.82 (1) (4)) to which the operative part of the section does not apply when exercised in areas of personal law specified in s.82 (4) (b–d). Legislative discrimination against non-citizens is absolutely without restriction and can extend to any matter whatsoever. See Ghai and McAuslan, *Public Law*, pp. 421ff.

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between political expression and ethnic loyalties on the one hand and the strong association of the entire framework with individual local leadership on the other, there was a strong possibility even in 1963 that these freedoms would become the casualties of political conflict. In this respect it is interesting to note that whereas in 1963 none of the freedoms were subject to the derogation provisions as they then stood, with the extensive widening of the latter provisions, all except freedom of conscience are now subject to derogation. Similarly the guarantees attached to personal liberty were purely nominal since most of what relate to the meaningful exercise of personal liberty were in fact subject to derogation right from 1963.[28]

The supervisory power over these internal and normative limitations was vested in the High Court. Any person could apply to the court upon allegation that 'any of the provisions . . . have been, is being or is likely to be contravened.' Thus the High Court was made to perform vis-à-vis the centre functions similar to those which the Senate performed with respect to the external and structural limitations.[29]

In order to complete the system of limitations, parliament itself was 'limited' in a manner that corresponds to the schemes already described. An extremely rigid amendment procedure was established, particularly for 'entrenched clauses'—those dealing with citizenship, fundamental rights, senate provisions, regional structure, the judiciary, and land; to change these a 75 per cent vote in both second and third readings in the Lower House, and a 90 per cent vote in the Senate, were needed. Besides this, parliamentary control was tightened over security legislation and powers. Security powers could be exercised in special circumstances only, that is when Kenya was at war or when a state of emergency existed; and very stringent conditions were prescribed for the declaration and continuance of a state of emergency. As Professor Ghai has pointed out, these parliamentary restrictions were meant to prevent the giving to the executive of certain powers—or alternatively as a safeguard against skilful manipulation of parliament which would have tended to undermine the regional and Bill of Rights limitations.[30]

But behind its apparently neat arrangement the constitutional document was defective in many respects. Its provisions were extremely complicated and, as it later turned out, made it a cumbersome system to understand and operate; in consequence it was never really implemented. Furthermore, the decentralization of power reflected in the external limitations was a potential drawback to

28. The 'freedoms' are to be found in ss.2–25 (now ss.78–81). Under the 1963 Constitution 'liberty' and 'discrimination' provisions were subject to derogation in any case. The rest of the rights and freedoms sounded more like a denunciation of colonial forms of oppression than limitations of powers.
29. See now s.84, but the effectiveness of this supervision is doubtful.
30. Y. P. Ghai, 'The Government and the Kenya Constitution' *E. Af. Journal* (December 1967). Note that while the 'structure of the regions was entrenched, by some fatal oversight to the system, their 'powers' were not! Under current provisions *no* declaration of emergency is necessary nor are there any fetters in the exercise of security powers. See p. 27.

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central planning, financial co-ordination and the proper formulation of policies on for instance such important issues as health, education and agriculture. In fact, it did not solve the one prominent problem it ought to have solved, the political debate that had been going on since 1954. The 1963 document, particularly the regional system, was therefore out of date even before it came into force. It was bound to be dismantled.

The first phase of change, 1963–65: centralization, stability and legitimation

It is with the dismantling of regionalism that the first phase of change—from 1963 to 1965—is fundamentally concerned. As a starting point, however, it is necessary to explain the politics of this period as three aspects of a projection of pre-independence issues into the public political debate of post-colonial Kenya.

The first aspect concerned the establishment of regionalism itself in the constitutional document of April 1963—a victory won before independence by KADU, aided by Euro-Asian interests, by the colonial power machinery, and also by the fact that Kenyatta had been content to compromise for the sake of speedy power transfer. But KANU did not conceal its hostility towards the regional constitution. In Oginga Odinga's words, it was 'the latest product of the wicked design of imperialists and their stooges'. Kenyatta himself, as president of the party, gave hints of the possibility of substantial changes in the regional structure; hints which were carried further by the late Tom Mboya, and by Mwai Kibaki. Kibaki specified amendment procedure and fiscal provisions as first priority targets; adding that for KANU, the constitution which was published on 19 April, 1963 was meant to lead Kenya to self-government and not independence. KANU therefore treated the May elections of 1963 as a referendum on regionalism. The elections were in fact preceded by a lengthy and detailed statement of what amendments KANU would make on coming to power.

The second aspect concerned the intrinsic demerits of regionalism for Kenya, particularly the strong security implications of its ethnocentric character—especially in border flare-ups and general political irredenticism. It was during the first half of 1963 that Luhya-Kalenjin clashes over the transfer of Kitale District to Rift Valley Region occurred; and serious border clashes flared up between Luo and Luhya over Maseno Division, resulting in deaths and extensive damage to property. This was also the period when the Kenya-Somali question ripened into an international problem. The seriousness of the situation was reflected in Kenyatta's reply at the end of July to a parliamentary motion moved to debate a tough line speech he had just made in Kisumu:

> 'I spoke as I did last Sunday because some people are talking about shedding blood, making war, autonomy—it looked to me that while I was labouring hard to bring confidence in this country some people who call themselves nationalists were destroying that which I was trying to build.'[31]

31. *E. Af. Standard*, 26 July 1963.

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Thirdly, the charisma of Mzee Kenyatta was itself a major factor in giving KANU greater credit with the public than their regionalist opponents could hope to have—a factor which even KADU leaders accepted without question.

What finally precipitated a crisis was KADU's refusal to co-operate with the government on emergency measures following a Cabinet declaration of a state of emergency in the Northern Frontier District on 27 December 1963. At first vote in the Senate the government only received 60·5 per cent affirmation instead of 65 per cent required to approve the declaration, KADU's excuse being that they were not consulted. This particular stalemate—which was resolved only by inter-party negotiations—dramatically highlighted the dangers of regionalism as a system of power limitation and up-graded the merits of centralism.

The government suddenly became attracted to the one-party system both as an answer to weaknesses of executive power, and as a way of eliminating trivialities in serious national issues.[32] When these issues were put to public debate, KADU lost out. In any case KADU had been noticeably weakened by the dissolution of its partnership with the African Peoples' Party (APP) led by Paul Ngei—ostensibly on the issue of regionalism. This was followed by what started as a trickle, then became a flood of cross-overs which made the institutional dissolution of KADU on 10 November 1964 a simple matter of course.

Throughout the first phase of change regionalism continued to dominate public political debate, and whereas KADU for its part was fighting a rearguard battle, KANU sought public support for a centralized system of government even if to do so meant the introduction of a one-party state. The pre-requisite of this was the elimination of the regional structure and with it the 'external' power proscriptions.

The constitutional changes of this phase in effect amounted to creating the situation that KANU would have liked to see in 1963. With the dissolution of KADU the ruling party had no trouble in achieving its purpose. By the first amendment[33] Kenya was declared a republic with a presidential government devised in such a way as 'to embody the fact of national leadership as seen in the eyes of the people, the concept of collective ministerial responsibility and ... supremacy of parliament.'[34] This enactment, which marked the erasure of the last marks of political dependency, was further used to de-regionalize a large part of the system through the deletion, by carefully drafted clauses, of key provisions of the 1963 document. Nearly all the non-entrenched regional provisions, and in particular Schedule 2 which dealt largely with areas of concurrent

32. See Kenyatta's lengthy statement on arrival from England, *E. Af. Standard*, 24 February 1964, and Mboya's speech in Australia, *E. Af. Standard*, 21 August 1964. Also *E. Af. Standard*, 15 and 18 August.

33. Act No. 28 of 1964, see Schedule 1, which deleted Chs. VII and IX, Schedule 2, s.121; and also made extensive amendments to Schedule 1 and Ch. XIII of the 1963 Constitution.

34. These words were used by Kenyatta when introducing the amendment, *Kenya Debates*, Vol. II, Part II Col. 1208, 14 August 1964. For changes relating to the presidency, see the discussion on succession reform, pp. 29–32 .

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central and regional powers over some agricultural and veterinary matters, and aspects of educational standards, were deleted. The entire financial arrangements between the regions and the centre, especially those concerning regional taxation powers, were revised. Provisions for the control and operation of the police force, and in particular those relating to the maintenance of regional contingency forces, were deleted; and finally the regional powers over the establishment and supervision of local authorities were transferred to parliament.

The second amendment[35] re-designated the regional 'Presidents' as simply 'Chairmen'. It also effected further changes; transferring to parliament powers to alter regional boundaries formerly vested in Regional Assemblies, and exercizable by them in consultation with one another; permitting the delegation of executive authority of the regions—previously vested in their Finance and Establishments Committees—to persons other than those serving in the establishments of the regions; and repealing the remaining provisions for independent regional revenue, thus making the regions entirely dependent on grants from the centre.

If this amendment confirmed the contempt with which KANU treated regionalism, it also reflected Mboya's concept of what role the regions should play in their constitutional relationship with the centre. In a key speech to the Nyanza Regional Assembly in March 1964 he said:

> 'I see the position of regional assemblies as one which includes the translation of government policy and promotion of government programmes at the regional level, as well as giving of guidance and assistance to County Councils in their efforts to serve the day-to-day needs of our people at home. *The regional authorities are not governments in themselves.*'[36]

The third amendment[37] was perhaps the most significant of the trio. Not only did it complete the process of de-regionalization and demotion but it went to the extent of amending the procedure for constitutional amendment itself so as to lower the required majority, from 90 per cent in the Senate and 75 per cent in parliament, to 65 per cent in both houses for all purposes. This was achieved with considerable subtlety. Amendment procedure itself was one of the specially entrenched clauses in the constitution; by repealing *in toto* the schedule dealing with specially entrenched clauses, the majority required for *all* purposes became subject to the 75 per cent rule. This was then reduced to 65 per cent in a miscellaneous amendment. By this means the government avoided the more

35. Act No. 38 of 1964 which by Schedule 1 wholly deleted Parts 2 and 3 of Ch. VIII, enacted new provisions to Ch. XIV, and amended s.105 of the 1963 constitution.
36. *E. Af. Standard*, 20 March 1964, where the full text is published. The emphasis is mine.
37. Act No. 14 of 1965, which by Schedule 1 not only deletes *in toto* Schedule 4 of the constitution but also amends s.71 thereof by reducing the procedural requirements and also to reflect the first mentioned deletion. With the deletion of Schedule 1 of the Constitution, legislative and executive competence now rested completely with the centre.

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direct but politically troublesome route of having to bring a specific amendment affecting amendment procedure.[38]

By other provisions of the amendment the name 'Regions' was altered to the colonial term 'Provinces', and 'Regional Assemblies' became 'Provincial Councils'. The whole of the part dealing with exclusive legislative competence of the regions was deleted—concurrent competence being vested in parliament in all such areas; those provisions relating to the exclusive executive authority of the regions were deleted outright. The general effect of these three amendments was to reduce the regional system, from early in 1965, to something purely nominal.[39]

Essentially the politics of this period—reflected in the first three amendments —were a continuation of the independence struggle.[40] Only after the third amendment had been enacted can it be said that Kenya became 'politically independent' in the manner that the former party's (and in a wider but looser context, the radical) elite wanted it to be. From December 1965, when 'power transfer' politics effectively ended, we can begin to examine critically the developmental aspects of post-colonial political thinking among Kenya politicians. This point also marks the end of a theme which while it lasted had eclipsed other political issues, both national and personality-oriented. At the same time a power re-arrangement had taken place within the constitutional framework; in particular, the process of de-regionalization had re-invested much legislative power in parliament, so that it was clear that any subsequent power struggles would centre there. The removal of the serious administrative handicaps imposed by the independence constitution correspondingly strengthened the executive, particularly its provincial administrative wing. In many respects this was a reversion to the pre-1963 situation, based on a framework essentially colonial and authoritarian. The second phase of change is inextricably linked to these bases.

The second phase of change, 1966–69: political survival, public participation and succession to the presidency

If during the first phase of change, from 1963 to 1965, an attempt was being made to stabilize the governmental system through the centralization of power and politics, it was a grave error, in Kenya's conditions, to assume that legitima-

38. It might be added in mitigation that the amendment was severely criticized by parliament; one of the objections being that it would give the government too much power—although initially the government got the requisite majority under the 1963 system!

39. See Ghai and McAuslan, *Public Law*, p. 213. Generically certain aspects of the seventh amendment (discussed below), together with the ninth amendment, belong to the first phase. The former abolished the Senate; by the latter it was consequently possible to perform the last rites of the phase by legislating the regional system—senators and all—out of the constitution.

40. Indeed President Kenyatta's New Year's Day speech in January 1966 was more in the tone of an 'independence' speech than an appraisal of past developments. *E. Af. Standard*, 1 January 1966. Cf. *E. Af. Standard*, 13 December 1963 and also Odinga's comment on the latter in *Not Yet Uhuru*, p. 253.

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tion of the constitutional form would automatically follow. For one thing, the institutional dissolution of KADU did not signify the centralization of politics, but rather a shift in the field of operation of 'Kadu-ism'. For another, regionalism was simply the problem singled out by the government and presented to the nation for debate and solution. The solution of this particular problem revealed KANU as a party without a coherent ethic to convey to the public. The debate about the meaning and practice of African socialism which had been briefly popularized in 1963 continued to emphasize the ideological cleavages within the party and government hierarchy. When this debate had erupted in 1964 it was summed up, dismissed and passed over with the publication of Sessional Paper No. 10—a document which was neither a political philosophy nor a plan but a simple answer to public clamour for an ideology of government.[41] Nor did the party command sufficient force to hold its framework together. In fact it was clear that for some time a rapid decline in the effectiveness of the central organs of the party had been taking place. To this the fluidity resulting from the merger with KADU contributed a further factor, as did the emerging presidential charisma—a phenomenon functionally external to the party and not dependent on it for inertia.

It was not only the party, but the whole political discipline of the state, as embodied also in parliament and government, that suffered. Members of parliament suddenly lost real interest in the Assembly except on occasions when their personal interests were affected. They were moreover often quite prepared to disobey the party whip, as was shown in the Pinto elections when independent candidates triumphed over party nominees.[42] The MPs (all of whom were now KANU) began to express discontent and disillusionment with the party and thereby reinforced the attitudes of the party branches which were already restless and demanding a reorganization. The public likewise showed their discontent, for instance by electing independent candidates over party nominees in the Senate elections of 1965. The possible formation of opposition parties was freely discussed.[43] In the government the lack of party ethic and

41. See initially Kenyatta's speech accompanying the KANU manifesto of 1963, *E. Af. Standard* 19 April 1963 (and note editorial on that occasion). Specific aspects of the African socialism debate in 1964 revolved around land, nationalization, foreign policy, and education. In a foreword to Sessional Paper No. 10 President Kenyatta states: 'There has been much debate on the subject and the Government's aim is to show very clearly our policies and also explain our programme. *This should bring to an end all the conflicting, theoretical and academic arguments that have been going on*' (emphasis mine).

42. The assassination of Pinto in February 1965 had created two vacancies, one as Specially Elected Member in the National Assembly, another as a member of the Central Legislative Assembly. In both cases KANU's candidate was defeated in spite of a three-line whip. For another view of these elections see Odinga *Not Yet Uhuru*, p. 292. See also parliament's initial refusal to pass the Income Tax Bill in January 1966.

43. For these debates see *E. Af. Standard*, 22 June 1965, 8 July, 1965, and *Daily Nation*, 4 January, 22, 25 February, 2 March, 1966.

Dr Gertzel's comment on the Senate elections of 1965 does not answer the question of political discipline *qua* party i.e. the fact that a 'KANU' independent could win over the *official* candidate is itself a comment on the Party's organizational weakness rather than its popularity (see *Politics of Independent Kenya*, op. cit., p. 59).

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proper ideological reference led to open clashes between senior ministers both inside and outside parliament.[44]

These problems, unveiled by the ending of the politics of regionalism, were really—except possibly in their ideological dimension—political problems within KANU itself. The solution required, therefore, was a political rather than a constitutional one. But in fact the attempt was made to deal with them by constitutional mechanisms, and this may perhaps be regarded as the transitional point when the effort—albeit unsuccessful—to shape the constitution towards stability and legitimacy gave place to a drive towards a regime based on survival and a corresponding concern with problems of succession to the presidency. The use of constitutional mechanisms also perhaps explains why no attempt was made to tackle directly the governmental implications of indiscipline.

Parliamentary indiscipline was presented by the government as a constitutional issue: that the electorate must be protected from political careerists whose interest in parliament was simply the securing of allowances and other fringe benefits. Such was, ostensibly, the significance of the fourth amendment, passed in 1966.[45] In the event, the result of the amendment was something quite different.

The amendment provided that a member who without having obtained the permission of the speaker failed to attend eight consecutive sittings of a session of the National Assembly, or was sentenced to a period of imprisonment exceeding six months, would lose his seat in parliament. But its real intention appears to have been not so much to protect the electorate as to strengthen the personal control of the President over the system. Evading the first limb of the amendment if one had to was a matter of sheer arithmetic; and it was further provided that

> 'the President may in any case, if he thinks fit, direct that a member shall not vacate his seat by reason of his failure to attend the Assembly as aforesaid.'

Certainly there is little evidence that MPs showed a greater readiness to attend parliament thereafter.

Concurrently with efforts to remedy parliamentary indiscipline attempts were being made to solve the wider problem of party indiscipline generally. In this connection the conference held at Limuru in March 1966 to discuss the reorganization of the party was a major milestone. To appreciate its significance a brief mention is needed of Oginga Odinga and the 'communist witchcraft' which had been linked with his name ever since he had entered politics in the early 1950s, and which turned out to be the successor to regionalism in public political rhetoric.[46]

44. Instances of such clashes are reported in the *E. Af. Standard*, 11 and 16 February 1966 (over Rhodesia); 17 February 1966 (over 'confidence motion'); and 31 May, 2 June 1965 (Odinga/Mboya polemics).
45. Act No. 16 of 1966. Amending what is now s.39 (1) (b–c). See also s.35 (1) (b).
46. For note 46, see next page.

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As Minister for Home Affairs (to December 1965) Odinga had been repeatedly accused in the foreign press of trying to build up a communist force for the overthrow of the President. Although he became Vice-President in December 1964, his functions were steadily whittled away until by February 1966 his office was in charge only of 'affairs of the National Assembly, Africanization and training, and public holidays'. In public and in parliament there were allegations of communist plots and intended coups tacitly associated with Odinga.[47]

It was against this background that Tom Mboya as Secretary General suddenly announced reorganization plans to be ratified by a convention at Limuru. The announcement was preceded by an equally sudden motion of confidence in the government in parliament, moved by Mboya without the knowledge of Odinga who was then in charge of government business. During the debate, the two ministers clashed violently and the latter walked out of the Assembly.[48] The debate, as Dr Gertzel has put it,

> 'proved to be a dress rehearsal for a full-scale KANU conference at which the conservatives established their ascendancy in the party hierarchy as well .... [In] the process Kenyatta himself tacitly entered the arena on the side of the conservatives by his decision to hold the convention.'[49]

What could and should have been proper party reorganization became merely a way of getting rid of Odinga and his supporters. The main feature of the new party constitution was the abolition of the post of Vice-President (then held by Odinga) and the creation of seven provincial vice-presidencies. The most significant aspect of this change, however, was that it recognized the *de facto regional* nature of the party's internal structure and therefore *ex hypothesi* could not have solved it. At the same time by failing to accommodate Odinga and the radical wing of the party, the changes triggered off a situation which led to the first real test of constitutional durability in Kenya and to the emergence of political survival through the constitution as a primary motivation.

On the day following the Limuru Conference a group of KANU MPs met and announced that they would form a new party. A month later Odinga resigned, taking with him 28 MPs and a large section of the trade union movement. The rift merely made explicit a situation which had existed in KANU since its

46. The description 'communist witchcraft' was in fact used by Mboya in a speech in Kisii, *E. Af. Standard*, 19 February 1966. For an interesting account of this as a colonial legacy see Gertzel, *Politics*, pp. 64ff. Much of the debate on Communism was officially labelled as 'rumour' but there is no doubt that the politics of this period equated communism with subversion, hence the expulsion of Russians and Chinese and the banning of communist literature.

47. See e.g. *E. Af. Standard*, 11 July, 28 August 1964 (Odinga press statements), 1 April 1965 (Uganda arms issue); 29 January, 2 and 13 February 1966 (Soviet and Chinese relations etc.). Also June 1965 Budget debate.

48. The 'confidence' debate is reported in *E. Af. Standard*, 17 February 1966. The government later denied that there was any such office as 'Leader of Government Business'!

49. See Gertzel, *Politics*, p. 71; also the second part of William Attwood, *The Reds and the Blacks* (New York, 1967).

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inception; for the first time ideological differences were seeking expression in institutional terms. The resignations thus also represented a frontal challenge to, if not partial failure of, presidential charisma as a substitute ethic for party ideology. The executive itself was threatened with disintegration. It is illuminating that KANU's campaign theme during the 'Little General Election' which followed was that by his resignation Odinga had challenged the wisdom of Mzee Kenyatta. The idea of 'survival' as used here is therefore an analysis of how the executive as a 'political institution' survived in circumstances where the party and parliament were ill-adapted to assist it.[50]

With the possibility of further defections from the party, the choice then was whether to strengthen the executive through the public by ordering new elections, or through parliament by strengthening the 'parliamentary' party. That the executive chose the latter course was a desperate attempt at survival and that the solution was found within a constitutional rather than a political framework was a remarkable tactic of crisis postponement. The formula used was the 'turn-coat rule', a device borrowed from the constitutional system of Malawi where it was first used in 1964 when the executive was faced with substantially the same situation as it now was in Kenya.[51] Its substance as contained in the fifth as read together with the eighth amendments[52] was that an MP who

> 'having stood at his election . . . with the support of or as a supporter of a political party . . . either (i) resigns from that party at a time when that party is a *parliamentary party* or (ii) having after the dissolution of that party been a member of another *parliamentary* party resigns from that other party at a time when that other party is a *parliamentary* party shall vacate his seat at the expiration of the session then in being or if parliament is not in session at the expiration of the session next following . . . unless . . . that party of which he was last a member has ceased to exist as a *parliamentary* party.'

The immediate effect was instantaneous. Thirteen of the 29 MPs who had resigned rejoined KANU and were welcomed back by the President, although as it later turned out this did not save them from the operation of the rule!

The official justification for this rule was to ' . . . stop these political acrobats from fooling about with the public.' And yet in 1964 when KADU members had crossed over Mboya had congratulated them for their bravery and conviction and had explained to the public that MPs were representatives and not delegates. Even if the rule did protect the sovereignty of the electorate, it was difficult in those circumstances to determine who remained true to the original

50. It is true that subsequent decisions were made in the name of KANU but in fact as explained below, the personnel of the party executive coincided also absolutely with the 'inner' cabinet.

51. Constitution of Malawi (Amendment) Act No. 1 of 1964, which was used to deprive certain former ministers of their seats when they resigned from Malawi Congress Party soon after independence. Dr Banda subsequently made Malawi a one-party State.

52. Acts No. 17 of 1966 and No. 4 of 1967 now contained in s.40 of the Constitution. The fifth amendment was published, tabled, debated, passed through all its stages, and given presidential assent in less than 48 hours.

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mandate and who betrayed it. Odinga's case was that it was the post-Limuru KANU leadership and not his followers who had broken that party's electoral pledges, and consequently it was they who were the real deviationists. And in fact the fundamental changes which took place between 1966–9 and which resulted *inter alia* in the drastic concentration of security powers in the hands of the executive, the postponement of elections for two years, the assignment of constituencies to people who were never elected in those areas, were indeed a violation of electoral sovereignty in as much as they were never referred to the electorate. It is also significant that the amendment gave no indication as to what a 'parliamentary party' meant—this being left to the Speaker's discretion, which might itself be broadly directed by standing orders. In any case why should a violation of a pledge to the *electorate* cease to be such when the party ceases to be a parliamentary party or is dissolved during the same session?[53]

These are questions which the turn-coat rule, as enacted in Kenya, Malawi, Ghana and subsequently in Zambia,[54] has not adequately answered. In Kenya any doubt as to the 'survival' function of the rule was removed by the eighth amendment which declared that

> 'the references . . . to a member who in certain circumstances resigns from a party at a time when that party is a parliamentary party include and *have always* included references to a member who before the commencement of [the fifth amendment] resigned in those circumstances . . .'

Three days after the passing of the fifth amendment the President prorogued parliament and the dissidents lost their seats. The 'Little General Election' showed just how effective strengthening the party *in* parliament rather than outside it was. KANU won more seats than KPU, although the latter polled more votes; an electoral minority had nevertheless produced a parliamentary majority.[55] The fifth and eighth amendments were thus designed, like the fourth, to strengthen the party—in this case, the party in parliament.

The timing, substance and operation of the sixth amendment[56] follow hard upon those of the fifth. Its timing was significant. At the time the amendment

53. Some of these questions are raised by Ghai and McAuslan, *Public Law*, pp. 320ff. The art of limiting the Speaker's discretion by amending Standing Orders was in fact used to deprive the KPU of status as an official opposition party after the Speaker had recognized it as such.

54. For Ghana, see National Assembly Act No. 300 of 1965 s.2(2), the provisions of which were indeed much more extensive. Although at this time Ghana was a one party State, technically parliamentary representation was not dependent on party membership. For Zambia, see Constitution of Zambia (Amendment) (No. 2) Ordinance No. 47/1966.

55. On the 'Little General Election' see Gertzel (with J. J. Okumu), *Politics*, pp. 73ff.; Bennett, 'Kenya's Little General Elections', World Today (1966), p. 336. Broadly speaking, KPU polled 73,000 to KANU's 36,000 votes in the Lower House, but won only 7 to KANU's 12 seats, polled 79,000 to KANU's 62,000 in the Upper House but won only 2 to KANU's 8 seats!

56. Act No. 18 of 1966. The Bill passed through all its stages in the Senate in just under 4 hours. The preoccupation with political security can be amply illustrated from the daily press during 1966. See especially *E. Af. Standard*, 15–26 March; 17–23 April; 23 June; 4, 22, 29 July; 5 August, *Daily Nation*, 25, 26 May, 2 June.

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was introduced, debated, and brought into operation, the dissidents were no longer in the Assembly, having lost their seats through the operation of the fifth amendment. Moreover it was deliberately subordinated, so far as the public was concerned, to the different and more sensational theme that the country was on the brink of subversion and Communist intrigue; in the various public statements the KANU parliamentarians explicitly indicated that the intention was to use the powers therein to control the current political situation.

The amendment had the effect of enormously enlarging the government's emergency powers. In the first place, it completely wiped out existing legislation relating to parliamentary control over emergency legislation and the law relating to public order. Existing constitutional provisions were repealed and replaced by one which gave the President a blank cheque '*at any time* by order in the *Kenya Gazette* [to] bring into operation generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any provisions of that part of that Act.' The possible duration of such emergency powers was extended from seven to 28 days (in some circumstances longer), and they could be approved by a simple majority; whereas to repeal them, unless by the personal decision of the President, a majority of all elected members of the Assembly was required. Similarly, detention orders made under those powers, which previously had to be renewed every eighth month, could now unless revoked by President or parliament remain in force indefinitely.[57]

At the same time the Preservation of Public Security Act (1960) was drastically amended to define the full scope and operation of the new constitutional powers. That Act now distinguished between public security measures and 'special' public security measures; the former, available under Part II of the Act, could be brought into operation by a declaration of the President which did not require approval of the National Assembly; the latter, under Part III by an order under the new constitutional powers. But in fact in either case the President could invoke *all* or some of the powers provided for in the Act and for the whole or part of the country. He could do this when in his opinion such powers were necessary 'for the preservation of public security'—a term which could be very widely interpreted. They included power to make subsidiary legislation on the detention, compulsory movement or restriction of persons, the acquisition of property, and conscription for labour or into the armed forces.[58]

The rapidity with which the new powers were brought into operation and the political circumstances surrounding the first detentions hardly bear out the official explanations that public security was threatened. Just over a month after the presidential assent s.85 of the constitution was invoked; the regulations

57. What was the old s.29 was wholly repealed (now s.85). By the schedule to Act 45/1968 sub-sections 4 and 7 of the original s.29 as amended by the sixth amendment were deleted. By a miscellaneous clause in the tenth amendment detention orders now remained in force indefinitely. See Ghai and McAuslan, *Public Law*, pp. 430–56.

58. See Cap. 57 (Laws of Kenya). It is a little misleading to describe this as an 'amendment' since the original provisions were entirely superseded. s.2 of Part I and s.4 of Part III respectively are the definitive and operative provisions.

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providing for detention and restriction being simultaneously promulgated. The next month, nearly all the trade union leaders who had joined the KPU—all of whom held prominent positions in that party—were detained.[59] By this method, and by other forms of 'political censorship', the KPU was virtually crippled in the attempt to reach the public. It was clear that, with the choice of parliament as the crucial 'survival area', the KPU was being stopped from its endeavour to survive at large.[60]

The sixth amendment also marks the final stages of the dismantling of the power limitations imposed by the 1963 Constitution. In this case the internal normative limitations (except those relating to property and freedom of conscience) became subject to derogation in a manner that left individual liberty entirely dependent on the subjective assessment of the relevant minister. The function of the High Court—like that of the Senate—was reduced merely to that of ensuring compliance with procedural requirements of the Constitution.[61]

The process of reshaping the constitution towards the political survival of the ruling party was completed by the seventh amendment,[62] which was passed ostensibly for the abolition of the Senate—an institution which had long ceased to fulfil useful constitutional functions. It is rather on the consequential provisions following the abolition that attention must be focussed. These were far-reaching. Not only were all the former members of the Senate absorbed into an enlarged Assembly to represent constituencies to which they were constitutionally assigned, but the life of parliament (which was due to expire in June 1968), was extended for a further two years until June 1970, 'unless sooner dissolved [by the President].' At the same time 'specially elected' members became nominated members—the power to nominate being exercizable by the President, and the number fixed at twelve instead of one in every ten MPs as previously.

The reasons given for these provisions were unconvincing. Mboya argued that it would be unfair to those senators due to retire in 1969 if the life of the enlarged Assembly was not extended; that extension was necessary to coincide with the new revised Plan period (1966–70); and that elections were in any case tiresome and expensive. The *East African Standard* added that

59. The first detentions, gazetted in LN Nos. 2983–8, 3094–5 and 4101 of 1966, included 2 Administrative Secretaries, 3 Executive Members (including National Treasurer and Nairobi Branch Secretary), the Youth Wing Leader and Organizer of the KPU, and the Party President's private secretary and bodyguard.

60. During the Little General Election there were only six KPU reported rallies in the three weeks campaign period to KANU's 22. For further control methods see Public Order (Amendment) Act No. 12/1968 which prohibits the use of flags or emblems signifying association with political parties or leaders; the notorious Local Government Elections of 1968 when all 1,800 KPU candidates were disqualified—ostensibly for filling election forms wrongly but reputedly on orders from the President.

61. As the court held in a case brought by one of the detainees, 'the truth of those grounds [i.e. alleging threat to security] and the question of necessity or otherwise of .... continued detention are matters ... ultimately for the Minister rather than for this Court ...' *P. P. Ooko v. Republic of Kenya*, Civil Case No. 1159/1965 (unreported).

62. Act No. 40 of 1966. See *E. Af. Standard*, 25 May 1966.

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'a general election would unleash a vociferous political campaign with consequent interruption of economic endeavour and all the disturbances caused by heated electioneering. After all that time and expense, the KANU government would be re-elected.'[63]

All these reasons ignored the principle on which public justification of the fourth and fifth amendments had rested, that the sovereignty and rights of the electorate must be safeguarded. It is interesting to note that a functional re-arrangement resulting in further accretion of power from parliament to the President had once again been achieved.[64] With the seventh and eighth amendments, a distinct era is completed, the full significance of which will now be reviewed.

It is clear that the process of political survival did not in Kenya take as extreme authoritarian forms as many African countries have witnessed. Indeed the executive was scrupulous in its conformity to technical legality throughout this period. But more significantly, the end of regionalism, and the political and constitutional changes subsequent to it, led to a situation where Kenya politics were almost completely 'parliamentarized'; a deliberate attempt had been made to centralize all the major activities of the state in such a manner as to produce an abnormal concentration of political activity on the floor of parliament. All matters, from domestic party squabbles and personality friction to policy formulation and elections, became part and parcel of and were resolved as parliamentary business.[65] Correspondingly, since all public activities of the state were concentrated in parliament, there was reduced public participation in the processes of government through loss of interest in political activity and the absence of a strong and freely functioning opposition party; but what is even more important, the parliamentarization of politics led to increased executive control over parliament itself. 'It is significant,' Professor Ghai notes, 'that while legislative competence has increased, its control over the executive has decreased.'[66]

In Kenya, where the politics of charisma have been the dominant feature, parliamentarization in fact led to presidentialism. The power link in the equation: the leader=the party=the government, was the parliamentary party, over which President Kenyatta had strong personal influence. The net result was the negation of the concept of government by discussion. Moreover, it is strongly argued that when the succession to the presidency came up for debate in 1968, neither the public nor parliament as such were any longer capable of finding an acceptable successor to the present incumbent.

The succession to the presidency

Succession and leadership is perhaps the most critical political problem in independent Africa today, for bound up with it is the problem of the legitimation

63. *E. Af. Standard*, 20 November 1966.
64. See Ghai and McAuslan's study of the Kenya executive, *Public Law*, Ch. VI pp. 220ff.
65. Note especially debates on the Limuru Conference, notably as reported in *E. Af. Standard*, 4–10 March 1966.
66. 'The Government and the Kenya Constitution', *loc. cit.*, p. 12.

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of socio-political systems as opposed merely to styles of individual governments.[67] This has been demonstrated again and again in military take-overs, which have not only deposed governments but also revealed the frailty of the base structure of political power in these areas. The lack of political recruitment through channels in which the public freely and effectively participate is the essential missing link. In Kenya the disappearance of this link was the logical by-product of KANU's survival complex, especially after the KPU had during the 'Little General Election' demonstrated that a large section of the public were disenchanted with the former party. More especially, parliamentarization of politics, resulting as it did in the direct convergence of political activity on the President, emasculated any form of political recruitment: hence by 1968 there was no obvious successor to President Kenyatta. The political reasoning behind treating the succession issue as a constitutional one was that to institutionalize the personality of the President was more desirable and feasible than to invert the political process in such a manner as to elevate KANU above him.

Two preliminary attempts to achieve this institutionalization foundered in the teeth of parliamentary opposition, when even Cabinet Ministers raised voices of protest. By the first attempt it was provided (as in the USA) that whenever the President vacates office or dies before the expiration of his term, the Vice-President would automatically succeed to full presidential powers for the remainder of the unexpired term. The second modified the first by providing for automatic succession to full presidential powers for a period of six months only, after which presidential elections must take place. During such subsequent elections only persons above the age of 40 (instead of 35 as previously) were to be eligible. Objections in both cases ranged from the lack of reference to the public involved in elevating a person to the presidency even for six months, and fears that such a person might use security powers to perpetuate himself in office, to complaints that raising the age limit was a deliberate attempt to keep some potential candidate from the presidency.[68]

The third attempt, which became the tenth amendment,[69] in part simply repeated the main features of the old system introduced by the first amendment in 1964 (although not applied in the case of the first President); but it also made fundamental additions in other directions. The earlier system had provided for two methods of presidential election:

(a) During a general election any citizen, being a registered voter, 35 years of age *and* a parliamentary candidate, could offer himself as a presidential candidate provided that his nomination was supported by at least 1,000

67. For discussions on the problem of succession see J. P. W. B. McAuslan: 'Succession and Elections in East Africa', *E. Af. Law Review* (1969) and R. B. Seidman, 'Constitutions in Independent Anglophonic Sub-Sahara Africa: form and legitimacy', *Wisconsin Law Review* (1969), p. 83.

68. See Assembly *Debates* Vol. XV Cols. 90ff. on Constitution of Kenya (Amendment No. 2) Bills published on 29 March and 10 May 1968.

69. Act No. 45 of 1968 superseding Act No. 28/1964 (see above). For the ninth amendment, see note 39 above.

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persons registered as voters in elections to the National Assembly. Every other parliamentary candidate was required—on pain of having his own nomination rendered void—to declare his preference for one of the presidential candidates. The candidate who received preferential declaration from a number of members elected to the Assembly (including himself) *exceeding half of all the constituencies into which the country was divided*, and who was himself an elected MP, was declared President.

(b) At any other time, or if the first method did not yield any results, or if for any other reason the presidential office fell vacant before dissolution, then parliament itself became an electoral college. Any elected member could offer himself as a candidate provided his nomination was supported by at least 20 MPs. A person was declared President if he obtained an absolute majority of all members qualified to vote: in the event of failure two further ballots could be taken. Beyond that parliament stood dissolved and fresh elections would take place.

The major defect in both cases, from the point of view of those in power, was that the procedure did not guarantee loyalty to the President. This defect the new provisions of the tenth amendment sought to remedy.

These specified that during general elections nominations could only be made by political parties taking part in elections. Indeed it was imperative for a 'political party' taking part in any general elections to put forward a presidential candidate. During elections only one ballot paper was to be used and this must be so arranged as to pair the parliamentary candidate with his party's presidential candidate. The candidate who received the greatest number of direct electoral votes and was himself elected as a constituency member was to be declared President.

At any other time during which the Vice-President led a caretaker government, elections must take place within 90 days of the vacancy occurring. A party *might* nominate a candidate from any of the elected members of parliament, provided that such nomination was not valid unless supported by at least 1,000 persons registered as voters in elections to the National Assembly. The candidate who received a greater number of valid votes cast in the ensuing presidential election than any other candidate would be declared President.

As in the old system, so with the new one, 'where only one candidate for the President is nominated (and that candidate is in or is elected to the Assembly) he shall be declared to be elected as President.' The effect of this was that there were no presidential elections in the 1969 elections.

The tenth amendment introduced into the succession process a new dynamic factor—political parties

> 'duly registered under any law which requires parties to be registered, and which has complied with the requirements of any law as to the Constitution or rules of political parties nominating candidates for the National Assembly'.

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These are not to be confused with the 'parliamentary party' introduced by the fifth amendment. Our interest here is with the legal and political aspects of this new factor within the succession process. By the National Assembly and Presidential Elections Act 1969, and the regulations made thereunder,[70] the presidential candidate must be proposed and seconded by a person who is both registered in some constituency as a voter in elections to the National Assembly *and* is a national official of the party. Although the parent statute provides for 'preliminary elections' in respect of parliamentary candidates, none is required for presidential candidates, presumably because such a candidate will in any case have gone through the preliminaries in his attempt to capture a parliamentary seat or simply because of the unappropriateness of the system in election to the Presidency. In respect of parliamentary elections a supporting declaration of compliance with party rules is necessary and this must be made 'not earlier than one month before the nomination day'.

The effect of these provisions is *inter alia* to give constitutional effect to routine decisions of the party executive not only in respect of the presidency but also of parliament. Similarly party directives right down to the administrative and procedural requirements of the party secretary take constitutional effect as soon as they are made. Moreover, whereas the regulations merely require a supporting declaration from a party, in the 1969 elections KANU made its own rules after the banning of the KPU that it would give no such support unless the prospective candidate had been a member of the party during the six months preceding the elections for which the support is sought. In legal terms, the tenth amendment as read together with the 1969 Act and regulations give to political parties unlimited rule-making power and thereby the ability to determine who may or may not participate in the leadership of the country.

The political aspects of this legal power cannot be under-estimated. It means in effect that the final decision as to who the President will be, particularly in cases where only one party qualifies to participate in elections, will be the party Executive Committee. The implications for parliamentary candidacy are even greater, since strong and effective direction will in the final analysis lie with the executive and consequently a parliamentary career under this system will depend on the maintenance of good relations with the party executive rather than with the party at large or with the public. In 1969 when the last of these measures was passed, of the nine Members of the National Executive Committee of KANU seven were Cabinet Ministers and one was an Assistant Minister.[71] At the very least the proposals could be seen as an attempt to

70. Act No. 13 of 1969 and LN 221/1969. The form of declaration is set out in Form 10 in the schedule to the Regulations.

71. The members were (1) Sagini, *Nyanza* (Minister for Local Government), (2) Khasakhala, *Western* (Ass't Minister, Education), (3) Khalif, *North-Eastern* (the only non-cabinet member), (4) Moi, *Rift* (now vice-president and Home Affairs), (5) Nyagah, *Eastern* (now Agriculture), (6) Ngala, *Coast* (now Power), Gichuru, *Central* (now Defence), (7) Kibaki, *Nairobi* (now Finance) and then there were the President and Mboya the Secretary-General. The Acting Secretary-General, R. Matamo, is an Assistant Minister. In the 1969 elections Sagini and Khasakhala lost their parliamentary seats.

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transfer the processes of political recruitment and the inevitable succession struggle from the public and parliament to the privacy of the Cabinet. If as we suggest, the Cabinet itself throughout this period used the constitution predominantly as a survival tool, the tenth amendment and facultative legislation were merely the grand finale to the second phase.

Conclusion

This article has tried to investigate the extent to which political behaviour has dictated constitutional change in Kenya. The emphasis on politics rather than on the constitution stems from the belief that African countries are going through a transitional period during which the constitution must not be looked to as an impartial arbiter over the political activity of the state. Such a view is ruled out by the character and force of the colonial legacies; by the nature and content of the independence constitutions and their normative and institutional assumptions; by the behaviour of the political elites after independence, and by the fluidity of variables operating upon them. Yet this merely states the dynamics of but not the answer to the problem which it poses: what governmental system or model would best achieve stability and legitimacy in these fragile constructs? To answer this question is beyond the scope of this article, nor do we think that a general model for Africa is possible. But it may at least be suggested that the Kenya experience brings out two general conclusions.

The first of these is that the reception of the Westminster-type constitution in former colonial territories was a mistake, for on the one hand they represented institutions which had little 'home-grown' character outside England, and on the other, they were inevitably used as frameworks for the limitation of power in an attempt to protect interests which were largely adverse to the new nations. Once the power to initiate change either within or outside the constitution had passed to these nations change was a mere question of time. When that change occurred—quite apart from the rise of militarism in many African states—an obsession with technical legality overtook the political process. Whereas many of the factors prompting change need not have been treated as constitutional problems, it may well be that by so treating them better public and perhaps international relations have been achieved than if extra-legal political ruthlessness had been preferred.

Secondly, the processes of change in whatever form have paradoxically committed these countries to the notion of constitutional government—particularly that of written constitutions. It is interesting that not only have constitutions re-appeared in some form or other after being swept away by military regimes, but countries like Upper Volta are now beginning to protect themselves from the phenomena of *coups* by bringing the military into partnership with civilian authorities within a constitutional framework.[72] At the same time some of the

72. See *Keesings Contemporary Archives*, 1971. The new Upper Volta Constitution permits free elections but at least one-third of the members of the cabinet must come from the military.

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constitutional doctrines evolved through this *ad hoc* system have, as in the case of Ghana,[73] outlived the political circumstances in which they originated, and they may well prove useful tools in the search for stable and acceptable principles.

In Kenya, the first hurdle in the process of legitimation would seem to be the colonial background which has not only had a continuous effect upon post-colonial development, but whose norms have also been re-injected into the new governmental system; both aspects being the result of the fact that there never was an alternative system or normative form in 1963. The failure of KANU to fill this vacuum led after regionalism to a three-fold re-arrangement of power. Full legislative power was restored to parliament; full administrative authority was revived in the hands of the executive, while political power was re-directed from KANU to the President, bringing about a weakening of the party. Attempts to solve party indiscipline led only to the institutionalization of political differences which contributed directly to the emergence of a survival complex in politics. This complex found constitutional form, through the fourth, fifth and eighth amendments, in presidential control over MPs by possible exercise of the 'equity' jurisdiction thereby given to him, and over parliament through personal influence over the parliamentary party, respectively. The sixth amendment led to aspects of political censorship by detention and restriction in non-emergency circumstances and under reduced parliamentary control, powers which were backed up by the entire machinery of the state including the Penal Code. The seventh amendment, while clearly indicating a reluctance to face elections, further deprived parliament of some of its powers by vesting them in the President.

The final stages of this phase show an attempt not only to devise a constitutional form to solve the succession problem but also to do so in a manner depriving the public and parliament of effective choice. The tenth amendment is on one interpretation a genuine step towards solving the political ineptitude of parties in Kenya, in as much as it has brought them into the constitutional process. But it assumes for its successful operation the presence of an organized and disciplined party and a tradition of government by discussion at all levels of the political structure. Can such an assumption be made for KANU and Kenya in the 1970s ?

73. The 1969 Busia Constitution has retained the 'turn-coat' rule first used by Nkrumah.

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