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Transnational Movements, Human Rights and Democracy:  
Legal Mobilization Strategies and Majoritarian Constraints in Kenya, 1982 – 2002

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy

in

Political Science

by

Maureen Catherine Feeley

Committee in charge:

Professor Arend Lijphart, Chair  
Professor Ann Craig  
Professor Clark Gibson  
Professor James Holston  
Professor Richard Madsen

2006

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Chair

University of California, San Diego

2006

*For Bill, Hannah, and Atticus*

Never doubt that a small group of thoughtful, committed citizens can change the world.  
--Margaret Mead (1901 – 1978)

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## List of Acronyms

AI	Amnesty International
APP	African Peoples' Party
CKRC	Constitution of Kenya Review Commission
COTU	Central Organization of Trade Unions
CPP	Coast Peoples' Party
DP	Democratic Party
ECK	Electoral Commission of Kenya
FIDA-K	Federation of Women Attorneys in Kenya
FORD-A	Forum for Restoration of Democracy – Asili
FORD-K	Forum for Restoration of Democracy – Kenya
FORD-P	Forum for Restoration of Democracy – People
GAP	Green Party of Africa
ICJ-K	International Commission of Jurists, Kenya Section
IPPG	Inter-Party Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KENDA	Kenyan National Democratic Alliance
KNC	Kenyan National Congress
KSC	Kenyan Social Congress
KPU	Kenyan Peoples' Union
LDP	Liberal Democratic Party
LEAP	Legal Education Aid Programme
LP	Liberal Party
LPD	Labour Party Democracy
LSK	Law Society of Kenya
NARC	National Rainbow Coalition
NCA	National Convention Assembly
NCEC	National Convention Executive Council
NCKK	National Council of Churches of Kenya
NDP	National Democratic Party
NEMU	National Election Monitoring Unit
NPUA	Nyanza Province African Union
PICK	Party of Independent Candidates for Kenya
POS	Political Opportunity Structure
RPP	Rescue Political Prisoners
RRP	Republican Reformed Party
SDP	Social Democratic Party
SMO	Social Movement Organization
SPK	Shirikisho Party of Kenya

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lives. Even in very remote areas, like where I lived and worked, it was believed (whether it was true or not) that government “informants” were “everywhere,” and stories of disappearances of those who dared speak politically or critically of the government were pervasive. Moreover, the government controlled almost all information reaching Kenya’s rural areas through its monopoly of Kenya’s radio airwaves. It was at this time that I first truly appreciated the social and political value of free speech and freedom of information.

Once I returned to the United States from Kenya, and began graduate study in Political Science, I avidly followed news of Kenya’s political opening in the early 1990s through newspaper and journal accounts, as well as through correspondence with Kenyan friends. To then be able to return to the country I had grown to love so much, and to be able to witness Kenyans practicing political speech, campaigning and voting in multiparty elections, and engaging in civil disobedience to demand state accountability, was an unforgettable and awe-inspiring experience, to say the least. That such profound social and political change could be accomplished over the course of a decade, especially given Kenya’s long history of authoritarian rule (dating to the colonial period in the late 1800s), cannot help but make one optimistic about the potential for human and democratic rights movements in our world, and the power of ordinary citizens to accomplish extraordinary feats –against tremendous odds.

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## **ABSTRACT OF THE DISSERTATION**

Transnational Movements, Human Rights and Democracy:  
Legal Mobilization Strategies and Majoritarian Constraints in Kenya, 1982 – 2002

by

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Doctor of Philosophy in Political Science

University of California, San Diego, 2006

Professor Arend Lijphart, Chair

What explains the emergence of human and democratic rights in historically authoritarian and dependent regimes? Based on interviews with movement leaders and participants, as well as longitudinal analysis of news media, and policy and movement documents, the study's central finding is that certain fundamental human and democratic rights became more widely recognized, practiced and protected in Kenya between December 1991 and December 2002 due to the political impact of a transnational social movement dedicated to these goals. This finding challenges central assumptions in dominant theories of human rights and democratization in political science.

To explain the puzzles posed by the Kenyan case, the study puts forth a new theoretical framework that integrates state, societal and international levels of analysis, and builds on social movements and legal mobilization theories. Specifically the

study argues for the analytical value of three social movements concepts -- mobilizing structures, political opportunity structures and framing process-- to explain movement emergence and development. To explain movement impact, the study examines how legal mobilization strategies enabled movement actors to: (1) sustain a common reform agenda and sense of collective identity among diverse movement actors; (2) increase citizen awareness of internationally and constitutionally recognized human and democratic rights, and the role of state institutions in protecting them; (3) facilitate institution-building at state, societal, and international levels to promote rights protections; and (4) ultimately force a resistant regime to concede important human and democratic rights reforms.

Despite the impressive achievements of this transnational movement, the study also finds that at each stage of its development, majoritarian features of Kenya's Constitution constrained movement reform efforts. Particularly detrimental was Kenya's majoritarian electoral system. Not only did this system directly contribute to large-scale ethnic violence leading up to and following Kenya's 1992 and 1997 multiparty elections, but it also largely explains Kenya's protracted democratic transition. Based on evidence dating to Kenya's independence in 1963, the study concludes that the more closely Kenya's emerging democratic system approximates a liberal democracy with consensus, rather than majoritarian, institutions, the greater the likelihood that Kenyans' human and democratic rights will be promoted and protected by this system.



## Chapter One

### **Transnational Movements, Human Rights and Democracy: Introduction to the Kenyan Case, 1982 - 2002**

It's very easy when dealing with Africa to despair and ask when Africa will ever get its act together. But it is important not to lose hope, particularly because Africans themselves are doing so much to try to change things. They are working tremendously hard against huge odds to change their lives.

--Maina Kiai, Kenya Human Rights Commission

The basis of a democratic state is liberty.

--Aristotle, *The Politics*

After nearly three decades of post-colonial authoritarian rule in most of sub-Saharan Africa's forty-seven states,<sup>1</sup> quite unexpectedly, in and around 1990, citizens in at least twenty-eight of these states took to the streets and demanded that their governments concede democratizing reforms and protection of their fundamental human rights.<sup>2</sup> By mid-decade, these emergent citizen movements appeared to be radically transforming the face of African politics. Whereas in the five years prior to 1990, only nine of forty-seven sub-Saharan states had held competitive legislative elections,<sup>3</sup> between 1990 and 1994, this number had more than quadrupled to thirty-

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<sup>1</sup> Eritrea became sub-Saharan Africa's forty-eighth state on April 27, 1993, after a more than fifty-year long struggle for independence from Ethiopia.

<sup>2</sup> Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, Cambridge: Cambridge University Press, 1997, pp. 117-119.

<sup>3</sup> Following the work of Bratton and van de Walle, this study also defines competitive elections as "elections in which an opposition party obtained a presence in the national legislature." Ibid., p. 7. As Bratton and van de Walle also note, however, in four of these nine regimes – Liberia, Madagascar, South Africa, and Sudan – "competitive elections were not only irregular but seriously compromised by electoral malpractice, a restrictive franchise, or continued military interference in civilian politics." Ibid. Of the other five regimes, only three – Botswana, the Gambia, and Mauritius – held reasonable fair multiparty elections since independence. The other two states --Senegal and Zimbabwe – held multiparty elections beginning in the late 1970s and early 1980s, respectively. Ibid.

eight,<sup>4</sup> and by the end of the decade, only three of forty-eight states had not held multiparty elections.<sup>5</sup> Of these thirty-eight elections, twenty-nine were considered “founding” elections in that “the position of head of government [was] openly contested following a period in which such political competition had been denied.”<sup>6</sup> Remarkably, during this short five-year period, fourteen African national executives were democratically replaced, more than during the entire preceding three decades of independence rule.<sup>7</sup> Although it is important to note that many of these elections were compromised by electoral violence and fraud,<sup>8</sup> it is also significant that “[o]pposition parties won legislative seats in 35 of these elections, and the average share of legislative seats held by opposition parties rose from . . . 10 percent in 1989,” to over thirty percent in 1994.<sup>9</sup>

By mid-decade, most observers and analysts of African politics concurred that a

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<sup>4</sup> Although only slightly more than half of these elections were recognized as “free and fair,” as Larry Diamond notes, “the mere fact that dictators felt compelled to legalize opposition parties and submit at least to the appearance of democratic competition represents a sea change in the post-independence politics of Africa.” Larry Diamond, “Introduction,” in Larry Diamond and Marc F. Plattner, eds., *Democratization in Africa*, Baltimore: The Johns Hopkins University Press, 1999, p. xi. Moreover, as Diamond also points out, many of the transitions witnessed on the continent during this period did represent significant political openings. Ibid.

<sup>5</sup> The only three countries that failed to convene competitive elections during the 1990s were Somalia, Swaziland and Congo-Zaire.

<sup>6</sup> Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, footnote 14, p. 15.

<sup>7</sup> Ibid., p. 8.

<sup>8</sup> Bratton finds that of 54 separate presidential and legislative elections in 29 states, 30 (or 55.5 percent) were determined “free and fair” according to judgments by international and domestic election observers. Michael Bratton, “Second Elections in Africa,” in Diamond and Plattner, eds., *Democratization in Africa*, p. 22.

<sup>9</sup> Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, p. 7.

profound political transformation had taken place. Whereas twenty-nine African nations were governed by some form of single-party constitution in 1989, by 1994, as Bratton and van de Walle point out,

[n]ot a single *de jure* one-party state remained in Africa. In its place, governments adopted new constitutional rules that formally guaranteed basic political liberties, placed limits on tenure and power of chief political executives, and allowed multiple parties to exist and compete in elections. To all appearances, the African one-party state was not only politically bankrupt but – at least as a legal entity – extinct.<sup>10</sup>

These developments were heralded as Africa’s “second liberation,” “the rebirth of African liberalism,” and as “Africa’s renaissance.”<sup>11</sup>

By the close of the decade, however, analysts began to radically revise these initial optimistic assessments, and a tone of decided pessimism dominated most analyses. In an influential article published in mid-1998, for example, Richard Joseph announced that the continent had moved “from *abertura* to closure,”<sup>12</sup> and there appeared to be a general consensus that the wave of democratization that had swept the continent beginning in the early 1990s had “crested.”<sup>13</sup>

The following case study of Kenya’s contemporary human rights and democracy movement stands in marked contrast to these largely pessimistic analyses.

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<sup>10</sup> Ibid, p. 8.

<sup>11</sup> For example, see: E. Gyimah-Boadi, “The Rebirth of African Liberalism,” *Journal of Democracy*, vol. 9, no.2, April 1998, pp. 18 – 31, Richard A. Joseph, “Africa: The Rebirth of Political Freedom,” *Journal of Democracy*, Fall 1991 and *Time: The Weekly News Magazine*, vol. 151, no. 12, March 30, 1998.

<sup>12</sup> Richard A. Joseph, “Africa, 1990-1997: From *Abertura* to Closure,” *Journal of Democracy*, vol. 9, no. 2, April 1998.

<sup>13</sup> Ibid. See also Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*.

Challenging dominant theoretical and empirical assumptions regarding the possibility of successful human and democratic rights reform in Kenya, the movement continued to positively impact political developments in these areas through December 2002, when the only political party that Kenyans had known in nearly forty years of independence was finally, and decisively, voted out of office.<sup>14</sup> Although the achievements of this movement were ultimately constrained by colonial authoritarian legacies and majoritarian political institutions, as the study documents, the movement's impact on human and democratic rights protections in Kenya was both unprecedented and unexpected. As the study argues, Kenya's transition from an authoritarian regime to an electoral democracy in the period of just over a decade (December 1991 – December 2002) is directly traceable to the movement's reform efforts.<sup>15</sup> The study provides a detailed analysis of the emergence, development and political impact of this remarkable social movement in an effort to gain theoretical and empirical insights that may prove valuable to other emerging democratic systems on the African continent, and elsewhere.

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<sup>14</sup> Not only did the presidential candidate of the opposition coalition, Mwai Kibaki of the National Rainbow Coalition (NARC), win a landslide victory in Kenya's presidential race, receiving more than 60 percent of the national vote, but NARC candidates also swept 60 percent of the seats in Kenya's parliament. See tables 7.1 and 7.2 at the conclusion of Chapter Seven for a summary of Kenya's presidential and parliamentary elections results in the December 2002 elections. These elections were heralded by domestic and international observers alike as Kenya's freest and fairest to date.

<sup>15</sup> These regime categories are discussed in the following section.

### **Conceptions of Democracy, Its Institutional Forms and Rights Protections:**

The study also uses the Kenyan case to examine three central hypotheses regarding conceptions of democracy and the relationship between democracy's institutional forms and citizens' human and democratic rights. The first hypothesis, building on the work of Larry Diamond and Richard Sklar, is that democracy is best understood from a developmental perspective.<sup>16</sup> Specifically, although all regimes that are classified as “democracies” must, at a minimum, be “civilian, constitutional system[s] in which the legislative and chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage,”<sup>17</sup> or “electoral democracies,” two further regime categories are valuable from both theoretical and policy perspectives: “pseudodemocracies” and “liberal democracies.” “Pseudodemocracies” are conceptually distinct from both authoritarian regimes and electoral democracies in that they are characterized by the presence of opposition political parties, but electoral processes are not yet free or fair enough to allow for the ruling party to be defeated.<sup>18</sup>

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<sup>16</sup> Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: The Johns Hopkins University Press, 1999. Diamond's work, in turn, builds on the work of Richard Sklar. See, in particular, Richard L. Sklar, “Developmental Democracy,” *Comparative Studies in Society and History*, vol. 29, no.4, October 1987, pp. 686-714 and Richard L. Sklar, “Towards a Theory of Developmental Democracy,” in *Democracy and Development: Theory and Practice*, Adrian Leftwich, ed., Cambridge and Oxford: Polity Press, 1996, pp. 25-44.

<sup>17</sup> Diamond, *Developing Democracy: Toward Consolidation*, p. 10.

<sup>18</sup> Ibid., p. 15. As Diamond explains, “pseudodemocracies” include a wide array of regimes, all of which are “illiberal,” but that vary widely “in their repressiveness and in their proximity to the threshold of electoral democracy.” Ibid., p. 16 “They include semidemocracies, which more nearly approach electoral democracies in their pluralism and competitiveness, as well as . . . ‘hegemonic party systems,’ in which a relatively institutionalized ruling party makes extensive use of coercion, patronage, media control and other features to deny formally legal opposition parties a fair and authentic chance to compete for power.” Ibid., p. 15. As Diamond notes, the concept of “hegemonic party systems” comes from Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis*, Cambridge: Cambridge University Press, 1976, pp. 230 – 238.

“Liberal democracies,” on the other hand, include all the characteristics of electoral democracies, but have four additional characteristics as well: (1) institutionalized protections for citizens’ political and civil rights;<sup>19</sup> (2) “horizontal accountability of office holders to one another;”<sup>20</sup> (3) “the absence of reserved domains of power for the military or other actors not accountable to the electorate, directly or indirectly;” and (4) “rule of law,” where the constitution reigns supreme.<sup>21</sup>

The value of a developmental conception of democracy, as Diamond argues and as the Kenyan case supports, is that it understands democracy as “a continuum and a

<sup>19</sup> It should be noted that Larry Diamond’s conception of “liberal democracy” is broader than most theorists in that he argues “it encompasses extensive provisions for political and civic pluralism as well as for individual *and group* freedoms . . .” Diamond, *Developing Democracy: Toward Consolidation*, pp. 10 – 11 [my emphasis]. In so doing, I believe he gives an implicit endorsement of consensus democracy in this respect. Most theorists of liberal democracy emphasize its protection of exclusively *individual*, and not *group* freedoms or rights.

<sup>20</sup> As Diamond explains, “horizontal accountability” “constrains executive power and so helps protect constitutionalism, legality, and the deliberative process.” Ibid., p. 287, footnote, 42. In addition to an independent legislature with the power to check executive power, this requires an independent judiciary as well as “institutionalized means (often in a separate, autonomous agency) to monitor, investigate, and punish government corruption at all levels.” Ibid. See also: Guillermo O’Donnell, “Delegative Democracy,” *Journal of Democracy*, vol. 5, no. 1, 1994, pp. 60 – 62 and Guillermo O’Donnell, “Horizontal Accountability and New Polyarchies,” in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder, CO: Lynne Rienner Publishers, 1999.

<sup>21</sup> Diamond, *Developing Democracy: Toward Consolidation*, pp. 11 - 12. As Diamond explains, “rule of law” means that “legal rules are applied fairly, consistently, and predictably across equivalent cases, irrespective of the class, status, or power of those subject to the rules.” Ibid. Moreover, not only do “all citizens have political and legal equality” under “true rule of law,” but “the state and its agents are themselves subject to the law.” Ibid. Finally, liberal democracies are also defined by constitutionalism; that is, political systems where the constitution is supreme. As Diamond argues, “if political authority is to be constrained and balanced, individual and minority rights protected, and a rule of law assured, [liberal] democracy requires a constitution that is supreme.” Ibid., p. 12. One could argue that this is actually also an implicit endorsement of consensus democracy in that one of the ten institutional features distinguishing consensus and majoritarian democracies is judicial review. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven: Yale University Press, 1999, p. 4.

process rather than a system that is simply either present or absent.”<sup>22</sup> Although the aforementioned four-fold regime typology (authoritarian regimes, pseudodemocracies, electoral democracies and liberal democracies) is valuable as a heuristic in assessing the progress or regress of democratization processes, the empirical reality, as Diamond explains, “is always messier.”<sup>23</sup> Viewed from a developmental perspective, democracy “emerges in fragments or parts, by no fixed sequence or timetable.”<sup>24</sup> That is, “democracies can either improve or decline in their levels of political accountability, accessibility, competitiveness, and responsiveness” and, thus, the “fate of democracy is open-ended.”<sup>25</sup> Significantly, from this perspective, “continued democratic development is a challenge for all countries . . . all democracies, new and established, can become more [or less] democratic.”<sup>26</sup>

A second hypothesis examined in the study is that, in addition to distinguishing between pseudodemocracies, electoral democracies, and liberal democracies, equally important to evaluating the *quality* of a democratic system is the distinction between majoritarian and consensus institutional forms of democracy.<sup>27</sup> In his path-breaking

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<sup>22</sup> Diamond, *Developing Democracy: Toward Consolidation*, p. xii.

<sup>23</sup> *Ibid.*, p. 17.

<sup>24</sup> *Ibid.*, p. 16.

<sup>25</sup> *Ibid.*, p. 19.

<sup>26</sup> *Ibid.*, p. 18. As Diamond argues, all “democratic institutions can be improved and deepened or may need to be consolidated; political competition can be made fairer and more open; participation can become more inclusive and vigorous; citizens’ knowledge, resources and competence can grow; elected (and appointed) officials can be made more responsive and accountable; civil liberties can be better protected; and the rule of law can become more efficient and secure.” *Ibid.*

<sup>27</sup> As Arend Lijphart has argued, whereas “[t]he majoritarian model concentrates political power in the hands of a bare minority,” the consensus model “accepts majority rule only as a *minimum* requirement”

work, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, Arend Lijphart uses seventeen different indicators to compare democratic quality in consensus and majoritarian democracies, and finds that, counter to conventional wisdom, “consensus democracies have a better record than majoritarian democracy on all of [these] measures” and that “all except two correlations are statistically significant” with “most of the correlations . . . significant at the 1 or 5 percent level.”<sup>28</sup> Qualitative indicators used by Lijphart include measures of political participation, women’s parliamentary and cabinet representation, “innovativeness and expansiveness of . . . family policies,” political equality,<sup>29</sup> economic equality,<sup>30</sup> citizen

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and “seeks to maximize the size of these majorities” by “shar[ing], dispers[ing] and limit[ing] power in a variety of ways.” Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 2. As is discussed in greater detail in Chapter Three, Lijphart outlines ten dominant institutional features that distinguish consensus and majoritarian forms of democracy. These are: “1. Concentration of executive power in single-party majority cabinets versus executive power-sharing in broad multiparty coalitions. 2. Executive-legislative relationships in which the executive is dominant versus executive-legislative balance of power. 3. Two party versus multiparty systems. 4. Majoritarian and disproportional electoral systems versus proportional representation. 5. Pluralist interest groups systems with free-for-all competition among groups versus coordinated and “corporatist” interest group systems aimed at compromise and concertation. 6. Unitary and centralized government versus federal and decentralized government. 7. Concentration of legislative power in a unicameral legislature versus division of legislative power between two equally strong but differently constituted houses. 8. Flexible constitutions that can be amended by simple majorities versus rigid constitutions that can be changed only by extraordinary majorities. 9. Systems in which legislatures have the final word on the constitutionality of their own legislation versus systems in which laws are subject to a judicial review of their constitutionality by supreme or constitutional courts. 10. Central banks are dependent on the executive versus independent central banks. Ibid., pp. 3 – 4.

<sup>28</sup> Ibid., 292 – 293. The study examines the performance of thirty-six democracies from their first national elections in or soon after 1945 through the middle of 1996. See Table 16.1 for Lijphart’s summary of “[b]ivariate regression analyses of the effect of consensus democracy (executive-parties dimension) on seventeen indicators of the quality of democracy” in table form. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 278 – 279. For a full discussion of these qualitative indicators, see *ibid.*, pp. 276 – 300.

<sup>29</sup> Since political equality is difficult to measure directly, Lijphart uses economic equality as a proxy, “since political equality is more likely to prevail in the absence of great economic inequalities.” Ibid., pp. 282 – 283. As Robert Dahl also argues, “[m]any resources that flow directly or indirectly from one’s position in the economic order can be converted into political resources.” Robert A. Dahl, “Equality



literacy,<sup>31</sup> voter turnout, citizen satisfaction with democracy, government accountability and corruption, the extent to which government policies approximate the preferences of a majority of voters, and the extent to which “the cabinet or president [are] supported by popular majorities.”<sup>32</sup>

These two central hypotheses lead to a third, which is implicitly stated in Lijphart’s work: citizens’ human and democratic rights are best protected by liberal democratic regimes that promote consensus democracy.<sup>33</sup> Although most theorists of democracy use “democratic rights” as synonymous with fundamental political and civil liberties, “human rights,” as defined by the Universal Declaration of Human Rights (UDHR), include economic, social and cultural rights, as well as political and civil

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versus Inequality,” *PS: Political Science and Politics*, vol. 29, no. 4, December 1996, pp. 639 – 648. Cited in *ibid.*

<sup>30</sup> To evaluate economic equality, Lijphart uses statistics collected by the United Nations Development Programme (1996) to assess what he refers to as the “rich-poor ratio.” This is “the ratio of the income share of the highest 20 percent to that of the lowest 20 percent of households.” *Ibid.*, p. 282. In addition, Lijphart also use a “decile ratio,” which is the income ration of the top to the bottom decile. *Ibid.*, p. 283. Finally, Lijphart also uses Vanhanen’s “Index of Power Resources [as] an indicator of equality based on several indirect measures such as degree of literacy (‘the higher the percentage of literate population, the more widely basic intellectual resources are distributed’) and the percentage of urban population (‘the higher [this] percentage . . . , the more diversified economic activities and economic interest groups there are and, consequently, the more economic power resources are distributed among various groups’).” *Ibid.*, pp. 283 - 284.

<sup>31</sup> See discussion of Vanhanen’s “Index of Power Resources” above.

<sup>32</sup> For a full discussion of these qualitative indicators and their meaning, see Lijphart, “Chapter 16: The Quality of Democracy and a ‘Kinder, Gentler’ Democracy: Consensus Democracy Makes a Difference,” *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 275 – 300.

<sup>33</sup> Although Lijphart’s work distinguishes only between consensus and majoritarian forms of democracy, because much of the democratization literature continues to use the categories of electoral and liberal democracy, and because liberal democracies, in theory, can be either consensus or majoritarian in form, I think it is useful to maintain the distinction between electoral and liberal democracy, while further refining the institutional form to which we refer by distinguishing between consensus and majoritarian models.

rights.<sup>34</sup> Despite the fact that Lijphart's work does not explicitly use the language or category of human rights in its comparative assessment of democracies, his findings clearly reveal that consensus rather than majoritarian democracies better protect these rights at individual and group levels. In addition to the qualitative indicators mentioned above, Lijphart also finds that consensus democracies are "more likely to be welfare states; they have a better record with regard to the protection of the environment; they put fewer people in prison and are less likely to use the death penalty," all of which are also important indicators of the extent to which citizens' human rights are protected.

Moreover, as Lijphart also contends, although measures of "women's political representation and the protection of women's interests . . . are important measures of the quality of democratic representation in their own right," "they can also serve as indirect proxies of how well minorities are represented generally."<sup>35</sup> As he explains, "[t]hat there are so many kinds of ethnic and religious minorities in different countries makes comparisons extremely difficult, and it therefore makes sense to focus on the "minority" of women—a political rather than a numerical minority—that is found everywhere and that can be compared systematically across countries."<sup>36</sup> Thus, given that "[t]he percentage of women's parliamentary representation is 6.7 percentage points

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<sup>34</sup> Universal Declaration of Human Rights (UDHR): <http://www.un.org/Overview/rights.html> As is discussed below, the UDHR was unanimously adopted by the United Nations General Assembly in 1948 and was reaffirmed in 1993 by 171 countries attending the World Conference on Human Rights in Vienna, Austria. <http://www.unhchr.ch/html/menu5/wchr.htm> Specifically, all 171 countries in attendance at this conference agreed that "human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments." [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

<sup>35</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 280.

<sup>36</sup> Ibid.

higher . . . in consensus democracies than in majoritarian systems,” one can infer that the human and democratic rights of individuals and groups are generally better protected in consensus democracies.

These three hypotheses are examined in the context of the Kenyan case during the period from December 1991, when Kenya’s incumbent authoritarian regime first conceded multiparty elections, to December 2002, when this regime was finally turned out of power by a broad-based, reformist opposition coalition, the National Rainbow Coalition, NARC.<sup>37</sup> Thus, this period covers regime transition in Kenya from an authoritarian regime to a “pseudodemocracy” to, finally, an electoral democracy. Despite the fact that it took three multiparty elections over the course of a decade for Kenya’s incumbent ruling party to be defeated, as the case study documents, Kenya’s human rights and democracy movement succeeded in significantly expanding rights protections for Kenyans during this period.

### **Introduction to the Kenyan Case:**

On May 1, 1972, the independent government of Kenya signed the Universal Declaration of Human Rights (UDHR) and ratified the two covenants that give legal effect to the principles laid out in the Declaration --the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and

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<sup>37</sup> In addition, however, chapters Three and Four also examine the role of majoritarian institutions in undermining human and democratic rights protections from Kenya’s independence elections in March 1963, through its (mostly) authoritarian period, December 1964 through December 1991. Although a second political party, the KPU, was allowed to mobilize in April 1966, as discussed in Chapter Three, it never constituted a significant electoral threat to the KANU regime, and it was ultimately banned in October 1969, just prior to Kenya’s December 1969 elections.

Cultural Rights (ICESCR).<sup>38</sup> Collectively these three documents are referred to as the “International Bill of Rights” and they constitute the most authoritative statement of human rights recognized by the international community since the founding of the United Nations in 1948.<sup>39</sup> Although the ICESCR requires only that states party to the Covenant utilize their resources “with a view to achieving progressively the full realization of the rights [it] recognize[s],”<sup>40</sup> the ICCPR legally obligates states to respect and protect all of the political and civil rights it identifies.<sup>41</sup> These rights include, among others:

- the right to life (Article 6)
- the right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Article 7)
- the right not to be subjected to arbitrary arrest or detention and, if detained, the right to a prompt, fair and public trial (Article 9)
- the right to free movement (Article 12)
- the right to equal treatment before the law and to a fair and public trial by a “competent, independent and impartial tribunal established by law” (Article 14)
- freedom of thought, conscience and religion (Article 18)
- the right to free expression, information and press (Article 19)

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<sup>38</sup> The ICCPR and the ICESCR were drafted to translate the principles of the UDHR (1948) into binding rules under international law. Although these covenants were largely complete by 1953, due to Cold War politics over the status and priority of political and civil rights versus economic, social and cultural rights, they were tabled for more than a decade. It was not until 1966, when newly independent African and Asian states for the first time formed the largest voting bloc within the United Nations that new life was breathed into the covenants and their drafting was completed. It took another decade (1976), however, before the requisite number of state ratifications was filed with the United Nations for the covenants to enter into force. See Jack Donnelly’s helpful discussion of this in Jack Donnelly, *International Human Rights*, 2<sup>nd</sup> edition, Boulder, CO: Westview Press, 1998, pp. 4 – 9.

<sup>39</sup> As of April 2006, 156 states were party to the ICCPR and 153 states were party to the ICESCR. <http://www.ohchr.org/english/countries/ratification/4.htm>, <http://www.ohchr.org/english/countries/ratification/3.htm>

<sup>40</sup> ICESCR, Article 2. <http://www.ohchr.org/english/law/cescr.htm>

<sup>41</sup> The International Covenant on Civil and Political Rights (ICCPR), Article 2, no. 2. <http://www.ohchr.org/english/law/ccpr.htm>.

- the right to peaceful assembly (Article 21)
- the right to free association (Article 22)
- the right to “take part in the conduct of public affairs, directly or through freely chosen representatives” (Article 25)
- the right “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors” (Article 25)
- the right to “have access, on general terms of equality, to public service in [one’s] country” (Article 25)<sup>42</sup>

These rights are also commonly identified by theorists of democracy as fundamental to the functioning of liberal democratic systems<sup>43</sup> and most were explicitly protected by Kenya’s constitutional Bill of Rights, dating to Kenya’s independence from Great Britain in 1963.<sup>44</sup>

Despite these formal protections under international and domestic law, Kenya’s first two post-independence regimes, the Kenyatta regime (1963 – 1978) and the Moi regime (1978 – 2002), routinely violated Kenyans’ fundamental human and democratic

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<sup>42</sup> ICCPR: <http://www.ohchr.org/english/law/ccpr.htm>.

<sup>43</sup> In addition, in his seminal work on democracy, *Polyarchy: Participation and Opposition*, Robert Dahl states that the following institutional guarantees are required for democracy: the freedom to form and join organizations, the freedom of expression, the right to vote, the right to be eligible for public office and to compete for support, the right to alternative sources of information, the right to free and fair elections, and “government policies depend on votes and other expressions of preference.” Robert A. Dahl, *Polyarchy: Participation and Opposition*, New Haven: Yale University Press, 1971, p. 3.

<sup>44</sup> The most notable exceptions were the failure of Kenya’s Constitution to protect Kenyans’ right to form and join opposition political parties, following a constitutional amendment enacted by the Moi-KANU regime in 1982, as well as the failure to protect secret ballot voting, which was also revoked by the Moi regime in 1986. As is discussed in Chapter Three, however, at independence Kenya had a constitutionally entrenched Bill of Rights, which was, in theory, protected by separation of powers and judicial review. See the *Constitution of Kenya*, Chapter II, “Protection of Fundamental Rights and Freedoms of the Individual,” Sections 14 – 28, Nairobi: Government of Kenya, 1963. As is discussed in Chapter Three of this study, Kenya’s 1963 Constitution underwent a series of fundamental changes that resulted in it being substantially reorganized and revised in 1969. It was at this time that Kenya’s Bill of Rights was moved from Chapter II to Chapter V of the Constitution, where it currently resides (as of April 2006).

rights as defined by these documents.<sup>45</sup> Among other abuses, as this study documents, both regimes violated citizens' rights to free speech, information, association, and assembly; they arbitrarily arrested, disappeared, and tortured regime critics; they consistently denied political detainees access to prompt and fair public trials; they severely restricted who could run for public office<sup>46</sup> and blatantly interfered with the fair functioning of Kenya's electoral processes.

In the face of these violations, there was no politically significant domestic or international condemnation of regime abuses until the mid-1980s --more than two decades after Kenya's Constitution was enacted, and more than a decade after Kenya ratified the ICCPR. Beginning in the early 1980s, members of Kenya's professional legal association, the Law Society of Kenya (LSK), for the first time in Kenyan history, began to condemn state abuses and frame violations as breaches of the Kenyan state's obligations under international and domestic law. By the mid-1980s, this group had grown and forged coalitions with dominant church organizations in Kenya, and human rights organizations abroad, to form a politically powerful transnational movement, which demanded that the Kenyan state fulfill its obligations under international and domestic law to promote and protect the fundamental human and democratic rights of its citizens.<sup>47</sup> Specific movement demands included:

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<sup>45</sup> That is, the International Covenant on Civil and Political Rights (ICCPR) and the Constitution of Kenya.

<sup>46</sup> As the study documents, although the constitutional amendment that made Kenya *de jure* a single party state was not enacted until 1982, Kenya had been a *de facto* single party state since 1969.

<sup>47</sup> The independent variable of this study, "transnational social movement," is defined as a group of nonstate organizations and/or individual actors, who share a sense of collective identity, and work together across national borders to promote a common set of social and political goals.

- rights to free speech and information;
- rights to free association and assembly –including the right to form and join opposition political parties;
- the right to vote in free and fair elections by secret ballot, and to compete for political office;
- the right to security of the person, including freedom from arbitrary arrest, search, seizure, detention and torture; and
- the right to a prompt, fair and public hearing by an independent and impartial tribunal, should any of these rights be violated.<sup>48</sup>

In less than five years' time, these demands grew to dominate not only the domestic political agenda, but also the international agenda, resulting in donor aid being withheld from Kenya in November 1991.

In response to the demands of this increasingly powerful transnational social movement, in December 1991, Kenya's resistant authoritarian regime agreed to allow multiparty elections by secret ballot for the first time in twenty-six years. Although the incumbent KANU regime<sup>49</sup> managed to win these elections in December 1992, this initial regime opening, combined with continued support from foreign-based international human rights organizations, independent foundations and donor states, transformed existing movement organizations in Kenya and led to the founding and

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<sup>48</sup> Although movement demands and priorities changed over the course of the movement's development, these rights were central demands during the period examined: 1982 – 2002. As noted above, all of these rights are explicitly recognized by the ICCPR: The right to vote in free and fair elections by secret ballot is found in Article 25; the right to free movement, association and assembly is found in Articles 12, 13, 21, 22; the right to free speech and information is found in Articles 18, 19; the right to security of the person, including the freedom from arbitrary arrest, search, seizure, detention and torture is found in Articles 6, 7, 9, 10, 11, 15, 17; and the right to a fair and public hearing by an independent and impartial tribunal, should any of these rights be violated, is found in Articles 14, 16, 26. See the International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/law/ccpr.htm>. Although most of these rights were also recognized in Kenya's Independence Constitution (1963), as Chapter Three documents, a series of constitutional amendments and statutory laws, introduced during the Kenyatta and Moi regimes, resulted in formal legal protections for these rights being undermined.

<sup>49</sup> The Kenya African National Unity Party (KANU) had been in power since Kenya's independence in 1963.

development of others. These social movement organizations, or SMOs,<sup>50</sup> then provided the leadership and organizational structure for Kenya's human rights and democracy movement over the course of the next decade (1992 – 2002). Contrary to assumptions of dominant theories in political science, this transnational social movement, comprised entirely of nonstate actors, significantly expanded the human and democratic rights of Kenyans, deepened processes of democratic development in Kenya, and for the first time since Kenya ratified the ICCPR, forced the state to comply with its reporting obligations as required by international law.<sup>51</sup>

Specific state level reforms that this study traces to Kenya's transnational human rights and democracy movement include:

- increased protections for free speech and press, as well as greater access to information from non-state sources in Kenya's rural areas;
- increased protections for freedoms of association and assembly, including the right to form and join opposition political parties;
- the right to stand for election to public office, including the presidency, and to compete freely for political support;

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<sup>50</sup> "Social movement organizations," or SMOs, are defined as "those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation." Jackie Smith, Ron Pagnucco, and Charles Chatfield, "Social Movements in World Politics: A Theoretical Framework," in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Jackie Smith, Charles Chatfield and Ron Pagnucco, eds., Syracuse: Syracuse University Press, 1997, pp. 60 – 61. In an early work, Mayer Zald and Roberta Garner argue that social movement organizations differ from other types of organizations in two ways: (1) "they have goals aimed at changing the society and its members; they wish to restructure society or individuals . . ." and (2) "they are characterized by an incentive structure in which purposive incentives predominate. While some short-run material incentive may be used, the dominant incentives offered are purposive . . ." Mayer N. Zald and Roberta Ash Garner, "Social Movement Organizations: Growth, Decay, and Change," p. 123.

<sup>51</sup> Specifically, Kenya's transnational human rights and democracy movement not only forced the Kenyan state to promote and protect the vast majority of rights identified in the ICCPR, but it also successfully pressured the state to begin filing status reports on human rights in Kenya, for the first time, as is required by international law.



- reinstatement of secret ballot voting in national and local elections
- enactment of electoral reforms, including the establishment of Kenya's first independent Electoral Commission, to provide for a more free and fair electoral process;<sup>52</sup>
- constitutional entrenchment and enforcement of presidential term limits;
- reinstatement of judicial tenure;
- greater protections from arbitrary arrest, searches, seizures and torture;<sup>53</sup>
- the release of all political detainees;
- establishment of Kenya's first independent national commission on human rights;<sup>54</sup>
- fulfillment of Kenya's reporting requirements under the International Covenant on Civil and Political Rights (ICCPR);
- ratification of two new international human rights treaties;<sup>55</sup>
- establishment of an independent constitutional review commission to comprehensively reform Kenya's Constitution with broad-based participation by Kenyan citizens; and, finally,
- regime change from an authoritarian regime to an electoral democracy.

Perhaps even more impressive than these reforms at the state level, however, was the impact of Kenya's human rights and democracy movement on Kenyan civil society. As a consequence of the movement's reform activities, to an historically unprecedented extent, Kenyans began to freely practice political speech; formed and joined independent organizations and opposition political parties; campaigned and voted in multiparty elections; engaged in civil disobedience, and demanded state accountability through the courts, the parliament and the streets. With the support of

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<sup>52</sup> The Electoral Commission of Kenya (ECK).

<sup>53</sup> Although there continue to be violations of these rights, the frequency of violations has been dramatically reduced.

<sup>54</sup> The Kenya National Commission on Human Rights.

<sup>55</sup> The Convention on the Rights of the Child (CRC) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) were ratified by the Kenyan state in July 1990 and February 1997, respectively.

international human rights organizations based abroad, and later donor states, dominant organizations comprising Kenya's human rights and democracy movement:

- monitored and publicized state abuses of human and democratic rights, which played a crucial role in delegitimizing Kenya's incumbent authoritarian regime;
- implemented nation-wide educational outreach programs focused on human and democratic rights, which resulted in increased awareness of these rights among citizens and demands that the state be held accountable for protecting them;
- established paralegal training programs and provided legal aid to victims of rights abuse, which also raised the level of rights awareness in Kenyan civil society, as well as placed pressure on the courts to provide redress;
- established Kenya's first independent, nongovernmental domestic election monitoring organization, which not only significantly contributed to more free and fair elections in Kenya, but also placed pressure on the government to develop an independent electoral commission;
- professionally trained and deployed a formidable presence of election monitors for Kenya's 1992, 1997 and 2002 multiparty elections, which also was invaluable in checking previously state-sanctioned electoral abuses;
- made human and democratic rights protections, including comprehensive constitutional reform, a priority on Kenya's national political agenda;
- produced draft legislation on constitutional reform and organized three citizen-based constitutional assemblies;
- produced a draft Constitution that was later largely adopted by Kenya's independent constitutional reform commission;
- increased Kenyans' awareness of internationally and constitutionally recognized human and democratic rights, and the role of state institutions in protecting them.

Finally, at the international level, Kenya's human rights and democracy movement:

- effectively mobilized the international human rights regime in support

- of its goals;<sup>56</sup>
- placed human and democratic rights violations in Kenya on the international political agenda;
- delegitimized Kenya's incumbent authoritarian regime;<sup>57</sup>
- successfully lobbied donor states to make aid delivery to Kenya contingent on human and democratic rights reform;
- successfully lobbied donor states to provide financial and technical support to movement organizations;
- strengthened the international rights regime by successfully pressuring a noncompliant party state to observe its human rights obligations under international law.

### **Central Questions and Puzzles Posed by the Kenyan Case:**

The role that Kenya's human rights and democracy movement played in promoting human rights protections and democracy in Kenya raises a series of questions and puzzles for political scientists. First, what explains the emergence of the movement in the 1980s, despite evidence of rights violations dating from Kenya's independence in 1963? Second, why and how was the movement, comprised entirely of nonstate actors, able to force a democratic opening in Kenya's resistant authoritarian regime? Third, what explains the continued development and political impact of the movement through three multiparty elections in Kenya, long after dominant theories in political science predict that it should have dissipated? Finally, why and how was the

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<sup>56</sup> Building on Stephen D. Krasner's work, this study defines "international human rights regime" as the "principles, norms, rules, and decision-making procedures around which actors' expectations converge" in the area of international human rights. Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in *International Regimes*, Stephen D. Krasner, ed., Ithaca: Cornell University Press, 1983, Fifth Edition, 1989, p.1.

<sup>57</sup> Prior to the emergence of Kenya's contemporary human rights and democracy movement, both the Kenyatta and Moi regimes were largely regarded by dominant states in the international system as supportive of the human and democratic rights of their citizens. Kenya was often referred to as a "single-party democracy" and praised for its convening of regular national elections—despite fundamental violations of Kenyans' political and civil rights in these elections, as was later documented and publicized by Kenya's human rights and democracy movement.

movement able not only to compel Kenya's incumbent regime to begin complying with its human and democratic rights obligations under international and domestic law, but also, ultimately, to catalyze a regime transition to electoral democracy in December 2002, after two failed attempts in December 1992 and December 1997, respectively?

In addressing these questions and puzzles, the study engages four dominant explanations of human and democratic rights expansion in the political science literature: (1) realist and neo-realist theories, (2) modernization theories, (3) democratic transitions theories, and (4) civil society theories. As is argued in Chapter Two, the study's theoretical chapter, although each of these theoretical approaches provides some insight into aspects of human and democratic rights reform in Kenya, none fully explains, or would predict, the types of reforms witnessed between December 1991 and December 2002.<sup>58</sup>

### **Summary of Findings:**

The central finding of this study is that, between December 1991 and December 2002, certain fundamental human and democratic rights became more widely recognized, practiced and protected in Kenya due to the emergence and political impact of a transnational social movement dedicated to the promotion of these goals. This

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<sup>58</sup> It was in December of 1991 that, due to sustained political pressure by Kenya's human rights and democracy movement, Kenya's incumbent authoritarian regime (KANU) announced that it would change Kenya's constitution to allow multiparty elections by secret ballot, and that these elections would be held by December 1992. The study then documents the role of Kenya's human rights and democracy movement in promoting human rights and democracy in Kenya through Kenya's third multiparty elections in December 2002, when KANU was resoundingly defeated by a coalition of opposition political parties that firmly embraced the movement's reform agenda.

movement, comprised entirely of nonstate actors, not only successfully pressured Kenya's resistant authoritarian regime to introduce unprecedented human and democratic rights reforms, but it also significantly impacted Kenyans' awareness of these rights and the role of state institutions in protecting them.

This thesis challenges conventional explanations of human rights expansion and democratization in the political science literature. First, by documenting the role of nonstate movement actors in enforcing international treaty obligations in the area of human rights, the study challenges dominant realist and neo-realist assumptions in international relations theory regarding the role of states as prime movers in the international system. Second, by documenting the movement's leading role in promoting Kenya's transition from an authoritarian regime to an electoral democracy, the study challenges dominant approaches in comparative politics that focus predominantly on regime elites and political parties, and tend to discount the role of societal and transnational influences. Third, by documenting movement emergence and impact under conditions of economic decline and state control of news media, the study challenges central assumptions of modernization theories. Finally, by examining the role of legal mobilization strategies in movement development and impact, the study challenges dominant civil society theories that tend not to examine the strategic dimensions of organizational formation and impact, or the role of international level variables in these processes.

By integrating state, societal and international levels of analysis, and building on insights from social movements and legal mobilization theories, the study puts forth

a new theoretical framework to explain the empirical and theoretical puzzles posed by the Kenyan case. Specifically, the study demonstrates the analytical value of three core concepts found in social movements theory --*political opportunity structures*, *mobilizing structures*, and *framing processes*, as well as legal mobilization strategies, to explain the emergence, development and political impact of Kenya's contemporary human rights and democracy movement. By framing movement demands in terms of human and democratic rights recognized under international and domestic law, and "mobilizing" these laws to legitimate their demands, emergent movement leaders succeeded in strategically exploited three fundamental shifts in national and international political opportunity structures to catalyze movement mobilization: (1) increased repressiveness of Kenya's authoritarian regime, (2) increased regime "vulnerability,"<sup>59</sup> and (3) the emergence of new movement allies in the form of international human rights organizations and later donor states.

Three central movement mobilizing structures were also important for movement successes: (1) Kenya's professional legal association, the Law Society of Kenya (LSK), (2) dominant church organizations, and (3) foreign-based international human rights organizations. Whereas members of the LSK and their international colleagues provided necessary technical skills to effectively deploy legal mobilization strategies at state, societal and international levels, it was the moral authority and

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<sup>59</sup> As the study explains, this concept builds on Keck and Sikkink's concept of "state vulnerability." Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca, NY: Cornell University Press, 1998, p. 208. See also *ibid.*, pp. 29, 117-118 and 207-209. In the Kenyan case, as the study documents, increased regime "vulnerability" resulted from: (1) the collapse and de-legitimization of single party states in Eastern and Central Europe, (2) the breakup of the former Soviet Union, and (3) new post-Cold War international political re-alignments

extensive domestic organizational networks of Kenya's dominant church organizations that provided the movement with its domestic legitimacy and mass base. Foreign-based human rights organizations also played critical roles in exposing and publicizing regime abuses internationally, and in successfully lobbying legislatures in donor states to withhold aid to Kenya and support movement activities. By framing movement demands in terms of internationally and constitutionally recognized human and democratic rights, emergent movement activists thus succeeded in building a transnational and mass-based social movement, comprised entirely of nonstate actors, that successfully forced a democratic opening in Kenya's resistant authoritarian regime and significantly advanced Kenyans' human and democratic rights protections over the next decade (1992 – 2002).

Despite these impressive, and unexpected, achievements of Kenya's transnational human rights and democracy movement, the study also finds that at each stage of its development, majoritarian features of Kenya's constitutional system constrained movement reform efforts. Particularly detrimental was Kenya's majoritarian electoral system. Not only did this system directly contribute to large-scale ethnic violence leading up to and following Kenya's 1992 and 1997 multiparty elections, but it also largely explains Kenya's protracted democratic transition. As electoral systems theorists predict, and as the Kenyan case clearly supports, single-member district plurality electoral systems create incentives for groups of similar

segments to cluster together in order to gain political influence.<sup>60</sup> This, in turn, tends to encourage parochial voting, group polarization and, in some cases, as in Kenya, political violence.

Moreover, because single-member district plurality systems tend to overrepresent large parties, create high representational thresholds for small parties, and provide opportunities for regime malapportionment and gerrymandering, this type of electoral system makes it especially challenging for emergent opposition parties to defeat incumbent regimes, especially in former single-party states. For example, in the Kenyan case, the incumbent Moi-KANU regime won parliamentary majorities in the 1992 and 1997 elections with only 26.6 and 38.6 percent of the vote respectively.<sup>61</sup> It was not until Kenya's third multiparty elections in December 2002, more than a decade after multipartyism was introduced, that the only political party that Kenyans had known in nearly forty years of independence was finally defeated. As chapters Seven and Eight discuss, this was accomplished by a broad-based coalition of opposition political parties, the National Rainbow Coalition (NARC). Given Kenya's majoritarian electoral system, however, parties comprising this coalition ultimately had to register and run candidates as a single party in order to defeat KANU. This, in turn, had

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<sup>60</sup> W. Arthur Lewis, "The Plural Society," in *Politics in West Africa*, Westport, CT: Greenwood Press, 1965, pp. 64 – 74; Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, pp. 156 – 168, Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 143 – 170.

<sup>61</sup> See tables 5.2 and 6.2 at the end of chapters Five and Six for summaries of the 1992 and 1997 elections.



detrimental political consequences for all constituent parties of NARC, except for the party that ultimately controlled Kenya's all-powerful and majoritarian executive.

The study ultimately finds that the likelihood Kenya's emerging democratic system will survive and thrive, in terms of promoting and protecting the human and democratic rights of its citizens, is directly linked to the *quality* of democratic representation produced by this system. The fundamental problem of majoritarian electoral systems, as the case study demonstrates, is that they tend to significantly distort the way in which citizens' vote shares are translated into seat shares in national legislative institutions. This, in turn, directly impacts the ability of these institutions to promote and protect the fundamental human and democratic rights of its citizens. Thus, as the study's concluding chapter argues, although Kenya's 2002 elections marked an important advance in the country's democratic development, the ultimate goal of Kenya's transnational movement—formal *institutionalization* of human and democratic rights protections in Kenya-- is directly linked to comprehensive reform of the country's dominant majoritarian institutions, and the introduction of institutions characteristic of consensus democracy.

### **Research Methods and Sources of Data:**

The study is based on nearly 100 interviews with representatives of Kenya's human rights and democracy movement between July 1997 and February 2006. Initial interviews were conducted with movement representatives of nongovernmental human rights organizations based in New York City and Washington, D.C. during the summer

of 1997. During the spring and summer of 1998 and 1999, further interviews were conducted in Nairobi, Kenya with domestically based movement leaders and participants, as well as with government and intergovernmental (United Nations) officials. Written and telephone correspondence was then maintained with a subset of movement representatives in Kenya, as well as with representatives of foreign-based human rights organizations, between September 1999 and February 2006.

In addition to interviews with movement representatives, the study also draws on archival materials. Specifically, longitudinal analysis of movement documents, as well as relevant policy documents and news media, was conducted for the twenty-one-year period between January 1982 and December 2002. This period documents the domestic and international institutional context within which Kenya's human rights and democracy movement emerged and developed, as well as the movement's political impact through three multiparty elections in Kenya: the 1992, 1997 and 2002 elections. In addition to materials collected while in Kenya, Stanford University generously granted me access to their newspaper archives at the Hoover Library during the 1999 - 2000 academic year. This newspaper research was then supplemented by further newspaper and journal searches via the World Wide Web and the Lexis Nexus database.

### **Chapter Overview:**

The following chapter, Chapter Two, "Human Rights and Democracy: Transnational Movements and Legal Mobilization Strategies," establishes the study's

theoretical framework. It examines four dominant theoretical approaches to explaining human and democratic rights development in the political science literature<sup>62</sup> and finds that although each provides some insight into aspects of political change in Kenya, none fully explains, or would predict, the changes witnessed at state and societal levels between December 1991 and December 2002. It was in December 1991 that Kenya's incumbent authoritarian regime announced founding elections,<sup>63</sup> and in December 2002 that this regime was finally, and decisively, defeated by a reformist opposition coalition. Thus, this period covers regime change in Kenya from an authoritarian regime to a pseudodemocracy to, finally, an electoral democracy. Building on concepts and insights from social movements and legal mobilization theories, and integrating state, societal and international levels of analysis, the chapter develops a new theoretical framework for understanding the extension of human and democratic rights protections in historically authoritarian and dependent states, such as Kenya.

Chapter Three, "Historical Background: Institutional Sources of Rights Violations and the Legal Construction of Authoritarianism in Kenya, 1963 – 1988," lays the historical groundwork for the study. This chapter documents how, despite a carefully crafted democratic constitution at independence, with formal checks on executive power and a constitutionally entrenched Bill of Rights, two majoritarian

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<sup>62</sup> As mentioned above these approaches are: (1) realist and neo-realist theories; (2) modernization theories; (3) democratic transitions theories; and (3) civil society theories.

<sup>63</sup> Following the work of Bratton and van de Walle, founding elections are defined as those elections where "the position of head of government is openly contested following a period in which such political competition had been denied." Bratton and Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, footnote 14, p. 15.

features of newly independent Kenya's constitutional structure --its single-member district plurality electoral system and weak bicameralism-- contributed to the erosion of formal rights protections not only for Kenya's political minorities, but, ultimately, for all Kenyans. Specifically, as a consequence of these majoritarian features, Kenya's minority party at independence, the Kenya African Democratic Union (KADU), was denied meaningful representation in Kenya's first parliament and the legislature ceased to function as an effective check on executive power.

With the support of Kenya's parliament, the executive then proceeded to introduce and enact a series of constitutional amendments (thirty in all) that concentrated executive power, undermined legislative power and judicial independence, and eliminated four additional institutional safeguards originally designed to promote and protect the human and democratic rights of Kenyans: parliamentary government, federal and decentralized national power, constitutional rigidity<sup>64</sup> and judicial review. As consensus theorists of democracy argue, each of these institutional features can importantly facilitate democratic functioning, especially in ethnically plural states, such as Kenya. As a consequence, in addition to colonial authoritarian legacies, the chapter argues that Kenya's independence Constitution itself ultimately contributed to the emergence of a repressive authoritarian regime with little regard for the fundamental human and democratic rights of its citizens.

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<sup>64</sup> That is, majorities greater than simple majorities are required to amend the constitution. Compare Lijphart's discussion of "constitutional flexibility," a characteristic of majoritarian democracies with "constitutional rigidity," a characteristic of consensus democracies. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 24, pp. 40 – 41.

Chapter Four, “Movement Emergence: The Politics of Repression, Resistance and Regime Liberalization, 1982 – 1991,” argues that Kenya’s initial democratic opening in December 1991 was a direct consequence of sustained challenges to the incumbent KANU regime by an emergent transnational social movement committed to promoting and protecting fundamental human and democratic rights in Kenya. This thesis challenges dominant explanations of democratization and human rights expansion in the political science literature. Building on theoretical insights from social movements and legal mobilization theories, the chapter demonstrates why and how this emergent movement, comprised entirely of nonstate actors, was able not only to force a democratic opening in Kenya’s resistant authoritarian regime, but also to change the foreign policy content of powerful states in the international system. As a consequence, these states, for the first time, not only withheld aid to Kenya until human and democratic rights reforms were enacted, but also became important supporters of Kenya’s human rights and democracy movement.

Chapter Five, “Movement Development and Countermovement Responses: Multipartyism, Majimboism and Political Violence, 1991 – 1992,” is comprised of three main sections. The first documents the continued centrality of Kenya’s reform movement in promoting human and democratic rights in Kenya from December 1991, when the KANU regime first conceded founding elections, to December 1992, when Kenya’s first multiparty elections in twenty-six years were convened. The chapter argues that two changes in the movement’s national and international political opportunity structures --lowered state barriers to independent organization and growing

support by foreign-based donors-- catalyzed the emergence of new movement mobilizing structures in the form of social movement organizations (SMOs). By engaging in legal mobilization strategies, these SMOs, in turn, created an enduring organizational structure for the movement, which allowed it to maintain its dominant role in promoting human rights and democratizing reforms beyond what dominant theories in the political science literature predict.

The second section of the chapter argues that whereas dominant theories of democratization tend not to examine or explain the political violence that is often associated with democratic transitions, social movements theories provide theoretical resources for better understanding potential sources of this violence. Specifically, social movements theories anticipate the emergence of “countermovements”<sup>65</sup> in response to the development of any social movement that becomes a significant socio-political force, as well as increasingly intense “framing contests” between movements, countermovements and regime elites, depending on the movement’s goals and the extent to which it threatens other socio-political actors. Building on these theoretical insights and empirical evidence from the Kenyan case, this section finds that the political violence leading up to and immediately following Kenya’s first multiparty elections in 1992 was largely the consequence of successful framing strategies by leaders of a regime-supported countermovement that emerged in response to Kenya’s reform movement in the last quarter of 1991. In addition, incorporating theoretical

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<sup>65</sup> “Countermovements” are defined by social movement theorists simply as those movements that “make contrary claims simultaneously to those of the original movement.” David S. Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *American Journal of Sociology*, v. 101, no. 6, May 1996, p. 1631.

insights from electoral systems theories, this section finds that Kenya's majoritarian electoral system provided institutional incentives for countermovement leaders to frame their demands in ways that contributed to ethnic group polarization, parochial voting and, ultimately, large-scale electoral violence in Kenya. Predictably, violence leading up to and immediately following Kenya's December 1992 elections was concentrated in electoral constituencies that were strategically important to the incumbent KANU regime's re-election.

The third and final section of Chapter Five argues that Kenya's majoritarian electoral system is also an important variable in explaining the incumbent KANU regime's victory in 1992. As electoral systems theorists predict, not only do majoritarian systems tend to overrepresent large parties, such as KANU, but especially where national electoral commissions are not independent, as was also the case in Kenya, majoritarian systems are especially vulnerable to regime gerrymandering and electoral malapportionment to bias regime support. In the case of Kenya's 1992 elections, this resulted in the incumbent KANU regime winning 53 percent of the parliamentary seats with less than one-third of the popular vote. Moreover, as a consequence of a new regime-supported electoral law that prohibited coalition government, the incumbent KANU president, Daniel arap Moi, was re-elected with only 36.6 percent of the national vote. Given that the next three presidential candidates polled 25.8, 19.6 and 17.1 percent of the vote, respectively,<sup>66</sup> it is likely that a coalition

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<sup>66</sup> Dieter Nohlen, Michael Krennerich and Bernhard Thibaut, eds., *Elections in Africa: A Data Handbook*, Oxford: Oxford University Press, 1999, p. 490. See also Table 5.1.

between any two of these three candidates' political parties would very likely have resulted in a defeat for the Moi-KANU regime.

Chapter Six, "The Politics of Constitutional Reform and Kenya's Second Multiparty Elections, 1993 – 1997," further develops the arguments laid out in Chapter Five, but focuses specifically on the movement's use of legal mobilization strategies to advance its human and democratic rights agenda through comprehensive reform of Kenya's Constitution. Although the movement ultimately failed in its goal of enacting a new democratic constitution prior to Kenya's second multiparty elections in December 1997, it succeeded in pressuring the KANU-dominated parliament into enacting a sweeping set of constitutional, statutory and administrative reforms known as the Inter-Party Parliamentary Group (IPPG) reform package. These reforms advanced the movement's constitutional reform agenda and repealed or significantly reformed almost all of Kenya's most repressive laws.<sup>67</sup> Despite the importance of these reforms for advancing human and democratic rights protections in Kenya, the fact that they were introduced only seven weeks prior to Kenya's December 27th elections meant that there was little time for them to significantly influence the fairness of these elections. As a consequence, and due to the fact that the reforms left Kenya's majoritarian electoral system intact, KANU was able to maintain its parliamentary majority and again secure the presidency in these elections.<sup>68</sup>

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<sup>67</sup> Most of these laws had colonial origins, as is discussed in Chapter Three. They were consistently used by both the Kenyatta and Moi regimes to silence regime critics.

<sup>68</sup> As a consequence of one of the IPPG reforms, which required that Kenya's twelve nominated parliamentary seats be allocated to parties based on their proportional representation in parliament, KANU's majority in parliament was reduced by two percentage points. Prior to this, all twelve seats



Chapter Seven, “Developing Democracy and the Defeat of KANU: Constitution-Making, Pact-Making and Institution-Building, 1998 – 2002,” examines the role of Kenya’s human rights and democracy movement in expanding rights protections through Kenya’s 1998 – 2002 electoral cycle and in finally defeating the incumbent KANU regime in Kenya’s third multiparty elections in December 2002. Specifically, this chapter examines movement successes in three main areas: (1) winning regime concessions regarding both the process and proposed substance of constitutional reform; (2) facilitating the emergence and electoral success of Kenya’s 2002 opposition unity pact, the National Rainbow Coalition (NARC); and (3) democratic institution-building at state and societal levels, which resulted not only in expanded human and democratic rights protections for Kenyans during the 1998 – 2002 electoral cycle, but also in promoting Kenya’s freest and fairest elections to date in December 2002.

The dissertation’s concluding chapter, Chapter Eight, “Transnational Movements, Human Rights and Democracy: Conclusions and Contributions of the Kenyan Case,” reviews the study’s central findings and the general theoretical contributions of the Kenyan case. Challenging dominant theories in political science, the chapter reviews why and how a transnational social movement, comprised entirely

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were appointed solely by Kenya’s president, with no formal institutional checks. Although another IPPG reform also finally repealed the prohibition on coalition government, as noted above, this reform came too late for opposition parties to field coalition candidates. As a result, KANU again secured the presidency, this time with 40 percent of the national vote, with the next four presidential candidates receiving 31.0, 10.8, 8.2 and 7.9 percent of the vote. Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, 1999, pp. 488 – 489. Thus, as was the case in Kenya’s first multiparty elections, a coalition between the top two candidates would have likely resulted in a defeat for KANU.

of nonstate actors, not only forced a democratic opening in a resistant authoritarian regime, but also importantly expanded human and democratic rights for Kenyans through three electoral cycles (December 1991 – December 2002). The chapter concludes that although Kenya's 2002 elections marked an important advance in Kenya's democratic development, until the consensus institutions advocated by leaders of Kenya's human rights and democracy movement, and endorsed by all parties comprising the NARC coalition prior to the 2002 elections, are formally enacted, the human and democratic rights of Kenyans will remain vulnerable.

## Chapter Two

### Human Rights and Democracy: Transnational Movements and Legal Mobilization Strategies

[O]nly by recognizing in the institution of human rights signs of the emergence of a new type of legitimacy . . . can [we] possibly hope to evaluate the development of democracy and the likely fate of freedom.

--Claude Lefort

[I]f we view democracy in developmental terms, emerging in fragments or parts . . . , then the presence of one fragment . . . can provide space or inspiration for the emergence of others. From this perspective, every increment of democratic progress is significant and should be encouraged.

--Larry Diamond

#### Introduction:

What explains the emergence of human and democratic rights protections in historically authoritarian and dependent states? There are four dominant schools of thought in the political science literature that speak to this question: (1) realist/neo-realistic theories; (2) modernization theories; (3) democratic transitions theories; and (4) civil society theories. The first section of this chapter reviews each of these theoretical perspectives and assesses its relevance to the Kenyan case. It finds that although each provides some insight into aspects of human and democratic rights reform in Kenya, none fully explains, or would predict, the kinds of changes witnessed between December 1991, when Kenya's incumbent authoritarian regime conceded founding elections,<sup>1</sup> and December 2002, when this regime was finally defeated in Kenya's third multiparty elections.

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<sup>1</sup> Founding elections are defined as those elections where "the position of head of government is openly contested following a period in which such political competition had been denied." Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, footnote 14, p. 15.

The second section of the chapter argues for a new theoretical approach to understanding the emergence of rights protections that builds on insights from the social movements and legal mobilization literatures. Specifically, this approach argues for the analytical value of three core concepts from contemporary social movements theory: *mobilizing structures*, *political opportunity structures* and *framing processes*. These concepts have been used primarily to explain the emergence and development of domestic social movements, but this study argues that they can be fruitfully extended to the international level to provide important insights into the emergence and development of *transnational* social movements.<sup>2</sup>

Because social movements theory tends to focus almost exclusively on questions of movement emergence and development, and not the political impact of movements, or specific reform strategies that may most effectively promote political institutional change, the study then turns to the political science and public law literatures on legal mobilization. Drawing on insights from legal mobilization theory, the study examines why and how international and domestic legal institutions and

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<sup>2</sup> The independent variable of this study, *transnational social movement*, is defined as a group of non-state organizations and/or individual actors, who share a sense of collective identity, and work together across national borders to promote a common set of social and political goals. In extending these core social movements concepts (mobilizing structures, political opportunity structures and framing processes) to the international level, the study seeks to build on and contribute to the emergent interdisciplinary literature on transnational social movements. This literature includes such works as: Jackie Smith, Charles Chatfield and Ron Pagnucco, eds., *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, New York: Syracuse University Press, 1997; Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 2<sup>nd</sup> edition, Cambridge: Cambridge University Press, 1999; Sidney Tarrow, *The New Transnational Activism*, New York: Cambridge University Press, 2005. Donatella della Porta, Hanspeter Kriesi, and Dieter Rucht, eds., *Social Movements in a Globalizing World*, New York: St. Martin's Press, 1999. John A. Gurdy, Michael Kennedy, and Mayer Zald, *Globalizations and Social Movements: Culture, Power, and the Transnational Public Sphere*, Ann Arbor: University of Michigan Press, 2000; Joe Brandy and Jackie Smith, eds., *Coalitions Across Borders: Transnational Protest and the Neoliberal Order*, Lanham, MD: Rowman and Littlefield, 2005.

norms can both empower and constrain transnational social movement efforts to promote human and democratic rights in historically authoritarian and dependent regimes. In so doing, it examines the impact of legal mobilization strategies at state, societal and international levels.

At the state level, the study examines the conditions under which these strategies enabled Kenya's transnational human rights and democracy movement to: (1) put human and democratic rights reform for the first time on the national political agenda, despite nearly three decades of violations; (2) force resistant state actors to enact formal human and democratic rights protections, such that domestic laws and institutions were more consistent with international human rights law and the country's international treaty obligations;<sup>3</sup> and (3) mobilize domestic and international political pressure to ensure that rights reforms, once enacted, were in fact enforced or that violations were highly publicized.

At the societal level, the study examines the way in which these strategies enabled the movement to: (1) sustain a common reform agenda and sense of shared identity among diverse societal actors; (2) increase general awareness among Kenyans of their constitutionally and internationally recognized rights, and the role of state institutions in protecting them; (3) change political practices in terms of the way citizens actually exercised newly established rights; (4) promote the establishment of "institutional support structures"<sup>4</sup> to make emergent human and democratic rights

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<sup>3</sup> Specifically, the International Covenant on Civil and Political Rights (ICCPR), which Kenya ratified in 1972.

more accessible. Finally, at the international level, the study examines the way these strategies worked to: (1) mobilize foreign-based nongovernmental human rights organizations to support Kenya's emergent movement and effectively publicize regime abuses internationally; (2) place pressure on donor states to make aid delivery contingent on human and democratic rights reform; (3) enforce international human rights treaty obligations; and, ultimately, (4) make international human rights institutions more effective and responsive through improving reporting mechanisms and channels of communication.

### **Explanations from the Literature and the Puzzle of the Kenyan Case:**

#### Realist and Neo-Realist Theories:

In international relations theory, realist and neo-realist approaches have historically dominated research into why and how change occurs in the international

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<sup>4</sup>This idea builds, in part, on a model put forth by Michael McCann in his 1994 book and 1998 article and, in part, on Charles Epp's conception of "support structures" for legal mobilization, both of which are discussed in greater detail below. Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago: University of Chicago Press, 1994; Michael W. McCann, "Social Movements and the Mobilization of Law," in Anne N. Costain and Andrew S. McFarland, eds., *Social Movements and American Political Institutions*, Lanham, MD: Rowman and Littlefield Publishers, Inc., 1998, pp. 201-215; Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998; Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," *American Political Science Review*, vol. 90, no. 4, December 1996, pp. 765-779. McCann, Epp, and other legal mobilization theorists demonstrate why and how "[t]he political significance of [formal rights protections] . . . depends on factors in civil society . . ." Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," p. 765. In the Kenyan case, I examine how different kinds of "institutional support structures" at the societal level functioned to make formal rights protections and policy changes more relevant and accessible to citizens whose rights have been violated. Specifically, I examine movement-supported educational outreach programs focused on human and democratic rights awareness, voting rights and election monitoring programs, general human rights monitoring programs, paralegal training and provision programs, and the establishment of legal defense funds to support public interest litigation, bail costs, as well as to generally assist families of political detainees.

system.<sup>5</sup> Although there is considerable variation among different approaches found within this general theoretical perspective, realist and neo-realists theories tend to share three common assumptions: (1) states are dominant actors in the international system, (2) states' interests are unitary, and (3) states act to maximize their economic and political power in the international system. Thus, these theories predict that, given a resistant authoritarian regime, like Kenya's, international human rights treaty obligations will not be enforced, unless economically and politically powerful states in the international system find it in their economic and political interest to do so.

In the Kenyan case, although economically and politically powerful donor states played an important role in pressuring the incumbent regime to introduce human and democratic rights reforms consistent with its treaty obligations, realist approaches cannot explain the timing of policy shifts in these powerful states, or continued domestic reforms, despite inconsistent support by these states.<sup>6</sup> Moreover, because

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<sup>5</sup> Within this general theoretical approach, I include the following work: Kenneth N. Waltz, *Theory of International Politics*, New York: Random House, 1979; Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, New York: Knopf, 5<sup>th</sup> ed., 1973; Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, NJ: Princeton University Press, 1984; Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory*, Boulder: Westview Press, 1989; Robert J. Art and Kenneth N. Waltz, eds., *The Use of Force: Military Power and International Politics*, Lanham: University Press of America, 4<sup>th</sup> ed., 1993; Robert Jervis, "Security Regimes," in Stephen D. Krasner, ed., *International Regimes*, Ithaca: Cornell University Press, 5<sup>th</sup> ed., 1989, pp. 173-194; and Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World," in Stephen D. Krasner, ed., *International Regimes*, Ithaca: Cornell University Press, 5<sup>th</sup> ed., 1989, pp. 115-140.

<sup>6</sup> Hans Peter Schmitz also makes this argument in his chapter contribution to *The Power of Human Rights: International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., Cambridge: Cambridge University Press, 1999. Hans Peter Schmitz, "Transnational Activism and Political Change in Kenya and Uganda," in *The Power of Human Rights: International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., Cambridge: Cambridge University Press, 1999, pp. 39 – 77. Interestingly, although Hans Peter Schmitz and I reach similar conclusions in the Kenyan case, our research was carried out completely independently, and we were not aware of each other's work and conclusions until after our respective research projects were complete.

realist and neo-realist theories assume that states are the prime movers in the international system, they also cannot explain why and how, in the Kenyan case, greater compliance with international treaty obligations and, ultimately, the strengthening of international human rights institutions, were directly traceable to the activism of nonstate movement actors. In fact, if nonstate actors are considered at all in these analyses, they are assumed to be the agents of states, and not independent actors in their own right. Thus, in the Kenyan case, realist approaches cannot explain why and how nongovernmental human rights organizations comprising Kenya's transnational movement not only acted independent of dominant state interests, but also, why and how, overtime, these actors were ultimately able to change the foreign policy content of these powerful states.<sup>7</sup>

#### Modernization Theories:

In the field of comparative politics, early debates on promoting human and democratic rights in historically authoritarian regimes were dominated by modernization theories.<sup>8</sup> A central assumption of modernization approaches is that

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<sup>7</sup> Ibid.

<sup>8</sup> Within this general theoretical approach, I include the following work: Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *American Political Science Review*, v. 53, March 1959, pp. 69-105; Karl W. Deutsch, "Social Mobilization and Political Development," *American Political Science Review*, n. 55, September 1961, pp. 493-514; Samuel P. Huntington and Jorge Dominguez, "Political Development," in Fred Greenstein and Nelson Polsby, eds., *Handbook of Political Science*, v. 3, 1975, pp. 1-98; Myron Weiner, *Modernization: The Dynamics of Growth*, New York, Basic Books, 1966; Daniel Lerner, "Modernization: Social Aspects," *International Encyclopedia of the Social Science*, 1968. Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Boston: Beacon Press, 1966. Dietrich Rueschemeyer, Evelyne Huber Stephens and John D. Stephens, *Capitalist Development and Democracy*, Chicago: University of Chicago Press, 1992.



processes of democratization and human rights reform are catalyzed by capitalist economic development, which, in turn, transforms class relations, and ultimately results in resistant state actors being forced to concede human and democratic rights reforms. Within this general approach, Marxist theorists insist that the working classes are the only true agents of human rights and democracy, while other theorists argue that middle classes play a determining role. These theorists focus on the social structural impact of capitalist development, such as urbanization, increased literacy and access to mass media, and argue that these effects create an increasingly “modern” and moderate middle class. This class, then, becomes a dominant force for promoting human and democratic rights reforms.

A relatively recent contribution to this approach, however, claims that, historically, middle classes have played an ambiguous role in promoting democratic rights protections.<sup>9</sup> In their comparative historical analysis of democratization in Western Europe, Latin America and the Caribbean, Rueschemeyer, Stephens and Stephens argue that while the middle classes “pushed for their own inclusion . . . their attitude towards inclusion of the lower classes depended on the need and possibilities for an alliance with the working class.”<sup>10</sup> Thus, they conclude that democratization will be promoted if, and only if, middle classes are forced to forge an alliance with working classes. What all these theories have in common, however, is the general assumption that capitalist economic development is the catalyzing force for the

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<sup>9</sup> Dietrich Rueschemeyer, Evelyne Huber Stephens and John D. Stephens, *Capitalist Development and Democracy*, Chicago: University of Chicago Press, 1992.

<sup>10</sup> *Ibid.*, p. 8.

promotion of human and democratic rights protections in historically authoritarian contexts.

In the Kenyan case, although segments of an urbanized and educated middle class played an important role in its human rights and democracy movement, the force driving their mobilization was not economic development. Like a majority of other sub-Saharan states, Kenya's economy was in a state of decline at the time of the movement's emergence and its democratic opening, and the mass media, especially radio media, remained tightly controlled by the regime. Moreover, largely as a consequence of ethnic and racial divisions in the country, as well as fear of political and economic repercussions, Kenya's business class and its central trade union organization, the Central Organization of Trade Unions (COTU),<sup>11</sup> maintained close ties to the regime. Thus, they were only very weakly mobilized, especially during the early stages of movement mobilization and development. Contrary to modernization theory assumptions, therefore, movement mobilization was not based on class relations. In addition, because modernization approaches, in general, tend to focus predominantly on domestic level variables, most cannot explain the emergence and political impact of a *transnational* movement in promoting human and democratic rights reforms, such as was the case in Kenya.<sup>12</sup>

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<sup>11</sup> COTU's leadership and activities were tightly controlled by both of Kenya's post-independent regimes.

<sup>12</sup> There are important exceptions to this, however, including Rueschemeyer, Stephens and Stephens work, which does account for the role of international variables. Rueschemeyer, Stephens and Stephens, *Capitalist Development and Democracy*.

Democratic Transitions Theories:

In response to the seeming economic determinism of many modernization perspectives, and in effort to explain the wave of democratization that swept Southern Europe and Latin America in the 1970s and 1980s, a new theoretical approach, “democratic transitions theory,” came to dominate the comparative politics literature in the mid 1980s through the 1990s. The classic theoretical work in this literature is Guillermo O’Donnell and Philippe Schmitter’s *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, published in 1986.<sup>13</sup> Unlike earlier modernization approaches, O’Donnell and Schmitter argue that democratic transitions in Southern Europe and Latin America were the consequence not of class conflicts, but of emergent divisions between regime “hard-liners” and “soft-liners,” where regime soft-liners proclaim the need for regime liberalization and/or democratization, while hard-liners insist on the continuance of authoritarian rule.<sup>14</sup> The only explanation given for *why* soft-liners might decide to break with regime hard-liners, however, is their “increasing awareness that the regime they helped to

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<sup>13</sup> Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore: The Johns Hopkins University Press, 1986, 3<sup>rd</sup> ed., 1991. This volume is the last in a four volume series. The first three volumes in this series, edited by Guillermo O’Donnell, Philippe C. Schmitter and Laurence Whitehead, provide rich empirically based analyses of transitions in Southern Europe and Latin America. Although this series is often referred to as the foundational work in the “transitions” literature, it builds on theoretical, methodological and epistemological insights found in Dankwart Rustow’s important article, “Transitions to Democracy: Toward a Dynamic Model,” *Comparative Politics*, vol. 2, April 1970, pp. 337-363.

<sup>14</sup> Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, pp. 15 –17.

implant . . . will have to make use, in the foreseeable future, of some degree or some form of electoral legitimation.”<sup>15</sup>

Although this theoretical approach acknowledges a role for societal actors in regime transitions, they argue that it is only *after* “soft-liners have prevailed over the hard-liners, [that] a generalized mobilization is likely to occur...”<sup>16</sup> Moreover, it contends that once founding elections<sup>17</sup> are announced, political parties will assume center stage, and civil society groups, which may have emerged after the regime opening, recede into the background. Thus, their model does not explain the role of societal or foreign-based actors in shifting elite preferences, causing regime splits, and/or forcing resistant elites to introduce democratizing reforms. In addition, it does not explain the continued role of these actors in promoting democratizing reforms long after founding elections have been held.<sup>18</sup>

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<sup>15</sup> Ibid., p. 16.

<sup>16</sup> Ibid., p. 48.

<sup>17</sup> O’Donnell and Schmitter define “founding elections” as “when, for the first time after an authoritarian regime, elected positions of national significance are disputed under reasonably competitive conditions.” Ibid., p. 57.

<sup>18</sup> Adam Przeworski directly adopts O’Donnell and Schmitter’s theoretical framework in his influential work, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge: Cambridge University Press, 1991. Other influential works in this literature include: Adam Przeworski, “The Games of Transition,” in Scott Mainwaring, Guillermo O’Donnell and J. Samuel Valenzuela, eds., *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, Notre Dame, IN: University of Notre Dame Press, 1992; Giuseppe Di Palma, *To Craft Democracies: An Essay on Democratic Transitions*, Berkeley: University of California Press, 1990; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, Oklahoma: University of Oklahoma Press, 1991; Scott Mainwaring, “Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues,” in Scott Mainwaring, Guillermo O’Donnell and J. Samuel Valenzuela, eds., *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, Notre Dame, IN: University of Notre Dame Press, 1992; Donald Share, “Transitions to Democracy and Transition through Transaction,” *Comparative Political Studies*, v. 19, January 1987, pp. 525-548.

In the Kenyan case, as in many other sub-Saharan states that experienced political openings and regime transitions during the 1990s, however, there is clear evidence that it was civil society actors that forced resistant political elites to initiate regime liberalization. In the most comprehensive comparative study of sub-Saharan political transitions to date, Bratton and van de Walle find that “[s]tarting in 1990, the number of political protests in sub-Saharan Africa rose dramatically from about 20 incidents annually during the 1980s to a peak of some 86 major protests events across 30 countries in 1991.”<sup>19</sup> It was then the following year, 1991, that “marked the pinnacle of a trend of increased political liberty in which African governments gradually introduced reforms to guarantee previously denied civil rights.”<sup>20</sup> By 1993, they document a dramatic increase in competitive national elections from “no more than two annually in the 1980s to a record 14 in 1993.”<sup>21</sup> Significantly, whereas twenty-nine out of forty-seven sub-Saharan states were governed by single-party constitutions in 1989, not a single *de jure* one-party state remained in sub-Saharan Africa by 1994. Moreover, by 1994, thirty-eight countries had held multiparty elections, of which twenty-nine were considered “founding elections” in that they “paved a route away from the monopoly politics of authoritarian regimes.”<sup>22</sup>

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<sup>19</sup> Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, p. 3.

<sup>20</sup> Ibid. Bratton and van de Walle operationalize political liberty as the average of civil liberties score for the (then) forty-seven sub-Saharan African states, as calculated by *The Comparative Survey of Freedom* (1989-1995). See *ibid.*, pp. 3-6, 15.

<sup>21</sup> *Ibid.*, p. 3.

<sup>22</sup> *Ibid.*, p. 7. Building on O’Donnell and Schmitter’s work, Bratton and van de Walle define founding elections as those elections where “the position of head of government is openly contested following a period in which such political competition has been denied.” *Ibid.*, p. 15.

Although Bratton and van de Walle's analysis ends in 1994, they conclude that "key political events occurred sequentially, peaking at roughly one-year intervals: Whereas the frequency of political protests crested in 1991, liberalization reforms reached their apex in 1992; whereas most electoral activity occurred in 1993, indicators of democracy were still rising in 1994."<sup>23</sup> They contend "[t]he succession of transition events strongly suggests that one trend precipitated the next. In other words, increases in mass protests . . . directly contributed to elite decisions to undertake political reform; subsequently, the extent of reforms measures . . . in turn influenced the convening of competitive elections, some of which led to democratic transitions."<sup>24</sup> Although they acknowledge that "these movements and institutional rearrangements" did not unfold "uniformly and to the same extent everywhere," they argue that they were to some extent evident in almost all sub-Saharan states, and "[t]ogether they amounted to the most far-reaching shifts in African political life since the time of independence 30 years earlier."<sup>25</sup> By the decade's end, only three of forty-eight sub-Saharan states had not held competitive multiparty elections<sup>26</sup> and, remarkably, these elections resulted in seventeen of forty-eight states being classified as "democracies" by the end of 1999.<sup>27</sup>

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<sup>23</sup> Ibid., pp. 3- 4.

<sup>24</sup> Ibid., pp. 4-5.

<sup>25</sup> Ibid., p. 3.

<sup>26</sup> The three states that had not held elections were Somalia, Swaziland, and Congo-Kinshasa.

<sup>27</sup> The seventeen democracies at the end of 1999 were: (1) Cape Verde; (2) Mauritius; (3) Sao Tome and Principe; (4) South Africa; (5) Benin; (6) Botswana; (7) Malawi; (8) Namibia; (9) Mali; (10) Ghana; (11) Madagascar; (12) Seychelles; (13) Central African Republic; (14) Mozambique; (15)

### Civil Society Theories:

Because of the limitations of realist, modernization and democratic transitions theories in explaining human and democratic rights reforms in sub-Saharan African states during the 1990s, analysts of African politics have embraced and developed what has become known as the “civil society approach” to explaining domestic political change.<sup>28</sup> Although there is considerable variation within this general theoretical perspective, most theorists build upon Tocquevillian conceptions of civil society. In

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Guinea-Bissau; (16) Lesotho; and (17) Liberia. Larry Diamond, “Introduction,” in Larry Diamond and Marc F. Plattner, eds., *Democratization in Africa*, Baltimore: The Johns Hopkins University Press, 1999, p. x. Of these seventeen democracies, Diamond categorizes the first nine as “liberal democracies” and the remaining eight as “electoral democracies.” As discussed in the study’s introduction, Diamond’s developmental conception of democracy advocates a four-fold regime typology. “Liberal democracies” are “those countries rated ‘free’ by Freedom House. Electoral democracies are also listed as democracies but not rated as ‘free.’ Pseudodemocracies have multiparty competitive elections that fall short of international standards of free and fair competition. All other regimes are classified simply as ‘authoritarian.’” Ibid. Diamond’s sources are Adrian Karatnycky, “The Freedom House Survey: The Decline of Illiberal Democracy,” *Journal of Democracy*, vol. 10, January 1999, pp. 112 – 125, and Freedom House, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties, 1997 – 1998*. New York: Freedom House, 1998. Ibid. See Chapter One for a more complete discussion (and critique) of these regime types.

<sup>28</sup> The “civil society” literature is a very large and growing literature in African politics, which I do not do justice to in this brief review. An excellent edited volume that brings together some of the most influential contributions is: John W. Harbeson, Donald Rothchild, and Naomi Chazan, eds., *Civil Society and the State in Africa*, Boulder, CO: Lynne Rienner Publishers, Inc., 1994. This work includes contributions by renowned theorists in the civil society literature, including: John Harbeson, Crawford Young, Michael Bratton, Victor Azarya, Nelson Kasfir, E. Gyimah-Boadi, Aili Mari Tripp, Janet MacGaffey, Jennifer Widner, Jane Guyer and Donald Rothchild. The volume also includes an important critical essay of this general approach by Thomas Callaghy. Other important works in this literature include: Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: The Johns Hopkins University Press, 1999; Stephen N. Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa*, West Hartford, CT: Kumarian Press, 1996; Robert Fatton, *Predatory Rule: State and Civil Society in Africa*, Boulder, CO: Lynne Rienner, 1992; Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument*, Bloomington, IN: Indiana University Press, 1999; Richard Joseph, ed., *State, Conflict, and Democracy in Africa*, Boulder: Lynne Rienner, 1999; Marina Ottaway and Thomas Carothers, eds. *Funding Virtue: Civil Society Aid and Democracy Promotion*, Washington, DC: Carnegie Endowment for International Peace, 2000; Stephen N. Ndegwa, eds., *A Decade of Democracy in Africa*, Leiden, The Netherlands, Koninklijke Brill NV., 2001; Célestin Monga, *The Anthropology of Anger: Civil Society and Democracy in Africa*, translated by Linda L. Fleck and Célestin Monga, Boulder, CO: Lynne Rienner, 1996.

his classic work, *Democracy in America*, Tocqueville noted that “Americans of all ages, all stations in life, and all types of disposition are forever forming associations.”<sup>29</sup> He believed that this characteristic of American life was critical to the development of democratic institutions and norms, because it was through these civic associations that Americans learned the “art” of democratic participation and came to understand and promote democratic rights and public interests, or in Tocqueville’s words, “self-interest properly understood.”<sup>30</sup> In addition, through participating in civic associations, Tocqueville argued that citizens create the best bulwark to the authoritarian tendencies of states. “Despotism, by its very nature suspicious,” he contends, “sees the isolation of men as the best guarantee of its own permanence.”<sup>31</sup> Thus, by forming and participating in civic associations, citizens not only learn democratic values and practices, but they also help institutionalize these norms by creating a counter-balance to check authoritarian inclinations of state actors.

Building on these Tocquevillian insights, as well as the wealth of empirical data that emerged in the wake of Africa’s political transitions, civil society theorists contend that it was “civil society” organizations that catalyzed the development of human and democratic rights movements across the continent. Their general argument is that as African states became increasingly dysfunctional through the 1980s, as a consequence of conditions of economic crisis and socio-economic

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<sup>29</sup> Alexis de Tocqueville, *Democracy in America*, translated by George Lawrence, J.P. Mayer, ed., NY: Harper and Row, Publishers, Perennial Library, 1992, p. 513.

<sup>30</sup> *Ibid.*, pp. 525-530.

<sup>31</sup> *Ibid.*, p. 509.



decline,<sup>32</sup> citizens increasingly formed their own societal-based “self-help” organizations to provide services that formerly had been provided by the state. These civil society organizations became increasingly well organized and powerful through the 1980s, such that by the 1990s, they were in a position to effectively challenge the authority and legitimacy of incumbent authoritarian regimes.

By shifting the focus from regime elites to societal actors and organizations, civil society approaches have made an important contribution to our understanding of human and democratic rights development in sub-Saharan states during the decade of the 1990s. However, these theoretical approaches do not provide a compelling theoretical explanation as to why and how civil society organizations were able to develop within repressive authoritarian contexts, nor why they choose to frame their demands in terms of international human rights in general, and political and civil rights in particular. That is, civil society theorists tend not to examine the *political* and *strategic* dimensions of organizational formation, or the political impact of specific reform strategies employed by civil society organizations. Moreover, like democratic transitions theories, civil society theories tend to discount the role of international level variables in explaining regime openings. Finally, civil society approaches generally assume a degree of homogeneity among societal interests that rarely existed

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<sup>32</sup> As is discussed in greater detail below, the majority of sub-Saharan states suffered conditions of severe economic decline beginning with the oil-shocks and global recession of the 1970s and 1980s. These conditions were then further exacerbated by the introduction of structural adjustment programs in the mid to late 1980s and 1990s. Other sources of economic decline included conditions of rampant corruption, and the effects of efforts to promote import substitution industrialization, which over-taxed agricultural products to promote development of industrial sectors. Not only did these tax proceeds get privatized through regime patronage networks, but an unintended consequence of this policy was that it created disincentives for farmers to produce export crops, thus further exacerbating an already serious foreign currency crisis.

in practice and, thus, they tend not to examine the political violence that often accompanied regime openings, nor its consequences for institutionalizing human and democratic rights on the continent. Thus, these approaches also leave many questions unanswered regarding the emergence and development of rights protections in sub-Saharan states through the 1990s.

**Transnational Movements and Legal Mobilization Strategies:  
A New Approach to Explaining Human and Democratic Rights Development:**

To address the questions and puzzles posed by the Kenyan case, this study argues that a new theoretical approach is needed that builds on insights from social movements and legal mobilization theories, and integrates state, societal and international levels of analysis. Specifically, the study draws on three core concepts from social movement theory—*mobilizing structures*, *political opportunity structures* and *framing processes*—and argues for their analytical usefulness in better understanding transnational movement emergence and development. Although these concepts have been used primarily to explain domestic movements, the study argues that they can be productively extended to the international level to provide important insights into the emergence and development of *transnational* movements.<sup>33</sup>

While social movements theory proves useful in understanding movement emergence and development, it is less so in understanding the political impact of

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<sup>33</sup> In so doing, this study seeks to build on and contribute to the emergent interdisciplinary literature on transnational social movements. See footnote 2 above. As also noted above, the independent variable of this study, *transnational social movement*, is defined as a group of nonstate organizations and/or individual actors, who share a sense of collective identity, and work together across national borders to promote a common set of social and political goals.

movements and specific reform strategies likely to lead to long-term political institutional change. In part, this is a consequence of disciplinary divisions of labor. As Anne Costain and Andrew McFarland point out, “[t]he sociologist rarely looks to see the impact movements have on lobbying, elections, and other political events. The political scientist infrequently generalizes about the relationship between political events and institutional change or how the development of social movements affects such events. The result is a truncated view of the world, a distortion in our understanding of . . . politics.”<sup>34</sup> In an effort to address this disciplinary gap, this study argues that insights from legal mobilization theory can be usefully combined with those from social movements theory to provide a more robust understanding of human and democratic rights reforms introduced in Kenya between December 1991 and December 2002.

Despite an overwhelming consensus among analysts of African politics regarding the importance of societal actors in sub-Saharan Africa’s recent political transitions, there have been surprisingly few studies that incorporate theoretical insights from the social movements literature into their analyses. To my knowledge, there are only seven book length studies that focus specifically on the role of social or political movements in Africa’s recent political transitions and, interestingly, none of these works address the theoretical literature on social movements.<sup>35</sup> Although each

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<sup>34</sup> Anne N. Costain and Andrew S. McFarland, “Introduction,” in Anne N. Costain and Andrew S. McFarland, eds., *Social Movements and American Political Institutions*, Lanham, MD: Rowman and Littlefield Publishers, Inc., 1998, p. 1.

<sup>35</sup> These works are: (1) Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, Cambridge: Cambridge University Press, 1997; (2) Gudrun Lachenmann, *Social Movements and Civil Society in West Africa*, Berlin: German Development

provides rich empirical case studies of reform movements, only one, Bratton and van de Walle's study, provides an over-arching theoretical framework for understanding movement emergence and political impact.<sup>36</sup> Bratton and van de Walle's work, however, largely neglects the strategic dynamics of movement development, as well as the transnational dimension of movement activity. Moreover, largely because their data dates only to 1994, in agreement with democratic transitions perspectives, it assumes that once founding elections are held, political protest movements recede into the background and political parties become the central actors in promoting further democratizing reforms. Thus, their work also does not explain why and how Kenya's transnational movement continued to play a leading role in promoting human and democratic rights reforms long after founding elections were held.

The following section critically examines three historically dominant theoretical approaches in the social movements literature and discusses how each contributed to the development of three concepts central to social movements theory -- *mobilizing structures*, *political opportunity structures* and *framing processes*. Through critical analysis of these concepts, the study then argues for their analytical usefulness

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Institute, 1992; (3) Mahmood Mamdani, T. Mkandawire, Wamba-dia-Wambe, eds. *Social Movements, Social Transformation and the Struggle for Democracy in Africa*, Dakar, Senegal: CODESRIA, 1988; (4) Mahmood Mamdani and Ernest Wamba-dia-Wamba, *African Studies in Social Movements and Democracy*, Dakar, Senegal: CODESRIA, 1995; (5) Lloyd Sachikonye, ed., *Democracy, Civil Society and the State: Social Movements in Southern Africa*, Haare: SAPES Books, 1995; (6) John A. Wiseman, *The New Struggle for Democracy in Africa*, VT: Ashgate Publishing Company, 1996; and (7) Glenn Adler and Jonny Steinberg, eds., *From Comrades to Citizens: The South African Civics Movement and the Transition to Democracy*, New York: St. Martin's Press, Inc., 2000.

<sup>36</sup> Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*.

in understanding the emergence and development of Kenya's contemporary human rights and democracy movement.

Social Movements Theories: Contributions and Limitations:  
Structural/Grievance Approaches:

The early literature on social movements was largely dominated by structural/grievance approaches.<sup>37</sup> Typically subsumed within this general theoretical approach are theories of collective behavior, mass society, shared grievance, relative deprivation, frustration-aggression and status inconsistency.<sup>38</sup> Although there is variation among these different theories, all share the common assumption that structural change triggers rising levels of individual and societal grievances, which, in turn, catalyze the emergence of social movements.<sup>39</sup> By "structural change," most theorists refer to such factors as significant shifts in economic conditions, class relations, status relations and/or demographics. Because these theories focus almost exclusively on participant grievances and psychological strain, however, they tend to

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<sup>37</sup> Some of the most influential works include: Ted Gurr, *Why Men Rebel*, Princeton: Princeton University Press, 1972; Neil Smelser, *Theory of Collective Behavior*, New York: Free Press, 1963; Ralph H. Turner and Lewis M Killian, *Collective Behavior*, Englewood Cliffs: Prentice-Hall, 1957; and James C. Davies, "The J – Curve of Rising and Declining Satisfaction as a Cause of Some of the Great Revolutions and a Contained Rebellion," in *Violence in America: Historical and Comparative Perspectives*, Washington, D.C.: U.S. Government Printing Office, 1969.

<sup>38</sup> Two insightful reviews of this literature are: John D. McCarthy and Mayer N. Zald, "Resource Mobilization and Social Movements: A Partial Approach, in Mayer N. Zald and John D. McCarthy, eds., *Social Movements in an Organizational Society: Collected Essays*, New Brunswick, NJ: Transaction Books, 1987, and Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, Chicago: University of Chicago Press, 2nd ed., 1999.

<sup>39</sup> Individual and societal "grievances" are also variably referred to in this literature as increased level of societal anxiety, psychological strain, alienation, cognitive dissonance and normative uncertainty. See Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*.

view social movement behavior as aberrant, irrational and indicative of high levels of societal stress and dysfunction. As a consequence, social movements are predominantly understood as psychological rather than political phenomena.

The criticisms of this approach have been numerous. Not only did early structural/grievance theories tend to posit an overly deterministic and mechanistic relationship between societal structures, grievance intensity and movement emergence, but in so doing, little attention, if any, was paid to the strategic dimension of social movement mobilization. As resource mobilization theorists later pointed out, structural/grievance approaches generally assumed that once grievances reached a certain threshold, social movements would rather “spontaneously” emerge. Thus, the process by which *individual* discontent is translated into organized *collective action* was largely neglected, and the role of resource endowments, leadership and coalition-building were left largely unexamined.

Although many of these theories became discredited with the emergence of progressive civil rights, feminist and student movements in the 1960s, variants of this approach have been used to explain the emergence of reform movements in sub-Saharan cases. Bratton and van de Walle, for example, implicitly employ a form of structural/grievance theory to explain movement emergence. They argue that it was African economic crises of the 1980s, which were further exacerbated by structural adjustment policies, that ultimately triggered the “sporadic outbreaks of popular protest . . .” in the 1990s.<sup>40</sup> They contend that these initial protests tended not to be

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<sup>40</sup> Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, p. 101.

“directed at explicit political goals,” but, overtime, the “outbursts” became progressively politicized as the initial “rage of antiincumbency. . . gradually took on a prodemocracy cast.”<sup>41</sup>

Unlike earlier structural/grievance approaches, however, Bratton and van de Walle incorporate political variables to explain variations in the timing and frequency of protests in different sub-Saharan states. By counting the total number of direct national elections held in African states from the time of independence through the end of 1989,<sup>42</sup> they find that the extent of citizens’ experience with elections and party competition during the post-colonial era was “positively, strongly and significantly related to the incidence of political protest in the present era.”<sup>43</sup> From this finding, they hypothesize that “where elections were a regular feature of African political regimes, elites and masses became socialized to accept participatory roles.”<sup>44</sup> Because of limited and declining opportunities for political competition over time, however, they contend that by the end of the 1980s “African voters were poised . . . to exercise the familiar urge to participate. Only this time, they did so through

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<sup>41</sup> Ibid., pp. 104–105.

<sup>42</sup> Bratton and van de Walle use the incidence of elections as a proxy for the extent of citizen participation in national politics. They score each party system according to the number of parties allowed (i.e., no-party system = 0; a one-party system = 1, and a multiparty system = 2). They then calculate the number of years that each country spent under each system between independence and the end of 1989, since, as noted above, it was in 1990 that political movements began to explode onto the national political scene in a majority of sub-Saharan states. See Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, footnote 61, p. 156.

<sup>43</sup> Ibid., pp. 140-141.

<sup>44</sup> Ibid., p. 141.

nonelectoral outlets such as strikes, riots and demonstrations.”<sup>45</sup> In other words, due to an increasing sense of deprivation in terms of both political *and* economic opportunities, Bratton and van de Wall argue that frustrated “African citizens were primed to rebel. . . [and] mass demonstration. . . was taken up with a vengeance by regime opponents.”<sup>46</sup>

In the only other broadly comparative study of political movements in Africa’s recent regime transitions, John Wiseman also employs a similar variant of structural/grievance theory to explain movement emergence. Like Bratton and van de Walle, he also argues that it was conditions of economic decline that set the stage for movement emergence. He contends that it was popular discontent “fuelled by popular perceptions that the ruling elites appeared immune to the economic hardships suffered by the rest of the population” that triggered movement emergence.<sup>47</sup> As he explains, “[t]he very unequal impact of economic crisis produced a crisis of legitimacy for rulers, who were increasingly seen as responsible for economic decline.”<sup>48</sup> In other words, movement emergence is largely explained by citizens’ feelings of relative deprivation, which, in turn, had been triggered by conditions of economic crisis.

Although structural approaches are useful in identifying the broad conditions that contribute to movement emergence, as well as in establishing the structural

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<sup>45</sup> Ibid., p. 143.

<sup>46</sup> Ibid.

<sup>47</sup> John A. Wiseman, *The New Struggle for Democracy in Africa*, VT: Ashgate Publishing Company, 1996, pp. 64-65.

<sup>48</sup> Ibid., p. 65.



parameters that can limit and constrain movement activity, like earlier grievance-based approaches, neither Bratton and van de Walle's nor Wiseman's theses tell us much about the *strategic* dimensions of movement emergence, nor the deliberate strategies employed by movement leaders to mobilize individuals and organizations, domestically *and* internationally, to support their goals. In fact, the international dimension of movement mobilization is largely left out of both analyses. Instead, they insist it was ultimately domestic economic crises, compounded by increasingly limited opportunities for political participation, that explains movement emergence and development, and that international variables played only a secondary role in this process.

Numerous other prominent analysts of sub-Saharan Africa's political openings take a similar view. For example, Jean-Francois Bayart, in his influential 1993 work, *The State in Africa: The Politics of the Belly*, insists "external dynamics played an essentially secondary role in the collapse of authoritarian regimes [in Africa], however much a tenacious myth suggests otherwise."<sup>49</sup> Naomi Chazan, also argues "domestic explanations lie at the root of the new political climate on the continent," and Christopher Clapham concurs that "the most important elements in this process are in my view domestic rather than international."<sup>50</sup> As this study argues, however, in the

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<sup>49</sup> Jean-Francois Bayart, *The State in Africa: The Politics of the Belly*, London: Longman Press, 1993.

<sup>50</sup> Naomi Chazan, "Africa's Democratic Challenge," *World Policy Journal*, vol. 9., no. 2, Spring 1992, p. 279; Christopher Clapham, "Democratisation in Africa: Obstacles and Prospects," *Third World Quarterly*, vol. 14, no. 3, 1993, p. 430. These works are cited by Wiseman to support of his case for the dominance of domestic variables in explaining democratization change in sub-Saharan states. See Wiseman, *The New Struggle for Democracy in Africa*, pp. 35- 37.

Kenyan case, domestic political reforms cannot be explained without reference to *international*, as well as domestic, variables.

Resource Mobilization Approaches and Mobilizing Structures:

Resource mobilization theories emerged largely in response to the perceived inadequacies of earlier structural/grievance approaches.<sup>51</sup> Whereas a defining feature of structural/grievance approaches was their focus on the level of grievances in a given society, resource mobilization theorists insist that “there is always enough discontent in any society to supply the grass-roots support for a movement . . .”<sup>52</sup> What matters, they argue, is not so much the *level* of discontent, but the amount and types of *resources* that aggrieved individuals and groups can access. Without access to resources, they insist that no matter how discontented a population, social movements will not emerge. Specifically, they argue that two types of resources are necessary for social movement emergence: (1) organizational resources –typically in the form of existing organizational structures; and (2) material resources –typically in the form of

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<sup>51</sup> Classic works within this general approach include: Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge, MA: Harvard University Press, 1965; Anthony Oberschall, *Social Conflict and Social Movements*, Englewood Cliffs, NJ: Prentice-Hall, 1973; John D. McCarthy and Mayer N. Zald, *The Trend of Social Movements in America: Professionalism and Resource Mobilization*, Morristown, NJ: General Learning Press, 1973; John D. McCarthy and Mayer N. Zald, “Resource Mobilization and Social Movements: A Partial Theory, *American Journal of Sociology*, v. 82, n. 6., May 1977, pp. 1212-1241; Mayer N. Zald, John D. McCarthy, eds., *The Dynamics of Social Movements: Resource Mobilization, Social Control, and Tactics*, Cambridge, MA: Winthrop Publishers, 1979; Mayer N. Zald and John D. McCarthy, eds., *Social Movements in an Organizational Society: Collected Essays*, New Brunswick, NJ: Transaction Books, 1987; William Gamson, *The Strategy of Social Protest*, Homewood, IL: Dorsey Press, 1975.

<sup>52</sup> Zald and McCarthy, *Social Movements in an Organizational Society: Collected Essays*, p. 18.

financial support for movement activities and individual rewards for organizational participation.<sup>53</sup>

Building on Mancur Olson's influential 1965 work, *The Logic of Collective Action*, a central contribution of resource mobilization approaches is that they take collective action, or movement mobilization, as a political problem to be explained, rather than merely assumed. Unlike earlier grievance-based theories, they argue that individuals who participate in collective action are rational actors who carefully weigh the costs and benefits of participation, and ultimately participate in order to secure desired individual and/or group preferences. Because collective benefits (in theory) accrue equally to all, and not disproportionately to those who contribute most toward their attainment, they contend that "rational" actors would prefer to "free ride" and let others do the work of participation for them.<sup>54</sup> Thus, they argue, the mere existence of common interests will not automatically give rise to collective action, as grievance-based theories contend, and this is especially the case in the pursuit of collective or public goods, such as rights protections. For this reason, Olson argues that collective action requires that individuals be provided with "separate and 'selective' incentives," or rewards, so that they are either "coerced" or "induced" to participate.<sup>55</sup>

This aspect of Olson's theory has been widely criticized by political process theorists for focusing too narrowly on the importance of select material incentives and

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<sup>53</sup> Ibid., pp. 18- 19. Both of these types of resources are discussed in greater detail below.

<sup>54</sup> This is the term that Olson uses. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, p. 51.

<sup>55</sup> Ibid., p. 51.

neglecting the role of “ideology, commitment, values, [and] the fight against injustice” as potential motivators to participate in collective action for public goods.<sup>56</sup> As Sidney Tarrow points out, there is some irony in the fact that Olson’s work was published during the decade of the 1960s when hundreds of thousands of U.S. citizens “struck, marched, rioted, and demonstrated on behalf of interests other than their own . . .”<sup>57</sup> As later social movement theorists would argue, to explain this requires close attention to the role of ideology and values, as well as environmental factors --all of which were largely neglected by early resource mobilization theorists.

Despite these shortcomings, early resource mobilization theorists’ emphasis on the importance of organizational and material resources provides important insights into the emergence and character of contemporary human rights and democracy movements on the African continent. Because the “bourgeoisie” in many sub-Saharan African countries remained closely tied to, or dependent upon, incumbent regimes and their policies,<sup>58</sup> as Robert Bates and others have pointed out, they had little incentive

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<sup>56</sup> Ibid., p. 16. This is also a general criticism of resource mobilization theory.

<sup>57</sup> Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, Second Edition, Cambridge: Cambridge University Press, 1998, p. 16. Also: Albert O. Hirschman, *Shifting Involvements: Private Interest and Public Action*, Princeton, NJ: Princeton University Press, 1982.

<sup>58</sup> In his insightful discussion of the weakness of the “bourgeoisie” in most African states at this time, Robert Bates focuses on two distinct groups: (1) those whose interests were tied to physical capital –i.e. “ports, utilities, mines, textile plants, food processing firms, manufacturing establishments and so on” and (2) those who engaged in commerce and trade. Robert, H. Bates, “The Impulse to Reform,” in Jennifer A. Widner, ed., *Economic Change and Political Liberalization in Sub-Saharan Africa*, Baltimore, MD: The Johns Hopkins University Press, 1994, pp. 19 – 20. As he explains, those in the first group were not owners of capital, but simply its “managers.” Capital remained owned by incumbent regimes or foreigners, and this “managerial” class only “receive[d] payment in the form of salaries rather than earnings from shares.” Ibid., p. 20. Thus, members of this group little incentive to oppose those who hired them, paid their salaries and could easily fire them. Those in the second group, on the other hand, the “marketeters,” found ways to profit from regime policies by engaging in black market activities and transnational smuggling of goods; thus, they also had little incentive to oppose incumbent regimes. Ibid., p. 19. Finally, Bates also draws attention to ethnic divisions within Africa’s

to oppose African governments and demand democratizing reforms. In addition, central trade unions in many African states were largely co-opted by state actors, so they were also not available as organizing structures for political reform. Instead, in many countries, professional legal associations and religious organizations were often among the few groups able to establish a significant degree of organizational and material autonomy from monolithic single-party state structures that dominated the continent, and it was members of these organizations that emerged as leaders of contemporary human rights and democracy movements in many sub-Saharan states.<sup>59</sup>

In the Kenyan case, resource mobilization theory thus helps us understand the emergence of its professional legal association, the Law Society of Kenya (LSK) and dominant church organizations, specifically Kenya's Catholic Church<sup>60</sup> and the National Council of Churches in Kenya (NCCK),<sup>61</sup> as dominant movement leaders, especially in the early stages of movement emergence. As the case study demonstrates, whereas the LSK provided necessary material and technical resources

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bourgeoisie, which also hindered their emergence as an organized force for reform on the continent. As he explains, in addition to deeply felt ethnic loyalties that divided the class, incumbent regimes also strategically "use[d] ethnic sentiments to stymie attacks on the old order." *Ibid.*, p. 21. This strategy is clearly observed in the Kenyan case, as is discussed in detail in Chapter Five below.

<sup>59</sup> Bates also notes that the "reformist impulse" in many sub-Saharan states was largely driven by members of professional associations, and he mentions law and church associations, in particular. *Ibid.*, pp. 21 - 24. As he observes, "[p]rofessional associations . . . "provide[d] the organizational infrastructure for dissent movements in Africa." *Ibid.*, p. 22. He explains this in terms of a "fixed and specific human capital model"; that is, "people who . . . invested in skills that are but imperfectly transferable elsewhere." *Ibid.* Because Bates' article speaks at a general theoretical level, however, he does not mention specific countries or case studies.

<sup>60</sup> Roman Catholics constitute approximately 33 percent of Kenya's population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>61</sup> The National Council of Churches of Kenya (NCCK) is an umbrella organization that conjoins most of Kenya's Protestant Churches. Protestants constitute approximately 45 percent of Kenya's population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

for movement emergence, Kenya's dominant religious organizations provided extensive organizational resources through their constituency networks that penetrated deep into Kenya's rural areas. It was these organizational networks that provided Kenya's emergent movement with its mass base. Because mass media, especially radio media, remained tightly controlled in Kenya, these organizational networks were critical to movement communications and mass mobilization. Finally, and significantly, these organizations also had international linkages that importantly facilitated transnational movement emergence, development and political impact.

One of the most consistent findings in the empirical literature on social movements is that social movement members tend to be recruited along established lines of social interaction.<sup>62</sup> As social movement scholars have documented, and as can be seen in African cases, social movements tend to be comprised of groups of people who have some connection to one another. This may include everything from friendship networks and neighborhood associations, to professional and/or religious organizations and ethnic associations. Anthony Oberschall refers to this process in his 1973 study as "bloc recruitment."<sup>63</sup> Evidence for this type of movement recruitment is clearly found in the Kenyan case, where early movement members were drawn primarily from profession legal and religious organizational networks.<sup>64</sup>

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<sup>62</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 44.

<sup>63</sup> Anthony Oberschall, *Social Conflict and Social Movements*, Englewood Cliffs, NJ: Prentice-Hall, 1973, p. 125. Cited in *ibid.*, p. 45.

<sup>64</sup> It should be noted, however, that once the movement gained momentum, it succeeded in recruiting individuals who had previously been largely unmobilized and isolated, in particular, squatters, small farmers and participants in Kenya's secondary economy, or *jua kali* workers.

In addition to membership, a second resource provided by extant organizations is what political process theorists refer to as “structures of solidarity.” By this, they mean “the myriad of interpersonal rewards that provide the motive force for participation . . .”<sup>65</sup> This concept was developed in part as a response to Mancur Olson’s positing of the “free rider problem.” As Doug McAdam contends, “[i]n the context of existent organizations. . . the provision of selective incentives would seem unnecessary. These organizations already rest on a solid structure of solidarity incentives, which insurgents have, in effect, appropriated by defining movement participation as synonymous with organizational membership.”<sup>66</sup> Although evidence from African cases supports this proposition in part, as is argued below, McAdam and other social movement theorists tend to underestimate the extent to which new structures of solidarity need to be constructed in order to sustain movement development.

A third resource provided by extant organizations, as mentioned above, is communication networks. In fact, as political process and other social movement theorists contend, it is the “strength and breadth” of these networks that “largely determine the pattern, speed, and extent of movement expansion.”<sup>67</sup> Despite the repressive political contexts of most single party regimes in sub-Saharan Africa, as Jennifer Widner has pointed out, “lawyers could still speak with their clients, at least up to a point, and clergy could still speak with members of their congregations or

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<sup>65</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 45.

<sup>66</sup> *Ibid.*, p. 46.

<sup>67</sup> *Ibid.*

parishes.”<sup>68</sup> Thus, lawyers and clergy, in many respects, were uniquely situated to facilitate communications among citizens and groups. As the Kenyan case clearly demonstrates, attorney-client communications, as well as the partially protected speech between clergy and their parishioners, were critical to movement emergence and development.

A final resource provided by existing organizational structures is leadership. As McAdam argues, the existence of established organizations “insures the presence of recognized leaders who can be called upon to lend their prestige and organizing skills to the incipient movement.”<sup>69</sup> In the Kenyan case, the degree of moral authority and legitimacy wielded by church leadership was essential for movement emergence, development and political impact. On the other hand, it was not until church leaders forged coalitions with members of Kenya’s professional legal association that “legal mobilization” strategies began to be effectively deployed at state, societal and international levels, and movement objectives began to dominate both domestic and international agendas.

This focus on extant organizational structures provides the theoretical foundations for the concept of “*mobilizing structures*” -- the first of three variables that this study argues is critical to understanding the emergence of human rights and democracy movements in sub-Saharan states.<sup>70</sup> In contemporary social movements

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<sup>68</sup> Jennifer A. Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, Berkeley: University of California Press, 1992, p. 188.

<sup>69</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 47.

<sup>70</sup> As will be discussed below, the other two concepts are: “political opportunity structures” and “framing processes.”



theory, “mobilizing structures” are defined as “those collective vehicles, informal, as well as formal, through which people mobilize and engage in collective action.”<sup>71</sup> As McAdam, McCarthy and Zald explain, these “meso-level groups, organizations, and informal networks [are the] collective building blocks” out of which social movements are made.<sup>72</sup> It is these organizational structures that often determine not only the form that emergent movements will take, but also the kinds of strategies they will employ. Thus, in the Kenyan case, the dominant role of lawyers as movement leaders largely explains why legal mobilization emerged as a central movement reform strategy.

Not only were *national* mobilizing structures critical to movement emergence in the Kenyan case, but also *transnational* mobilizing structures --specifically, nongovernmental international human rights organizations -- were central to this process. In fact, in the Kenyan case, domestic movement leaders insisted that without the material, organizational and political support of foreign-based international human rights organizations, the movement could not have emerged or survived, especially in its early stages of development. For this reason, the study argues for extending the concept of mobilizing structures to the international level.<sup>73</sup> Although a focus on national and transnational mobilizing structures, as well as the availability of financial,

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<sup>71</sup> See Doug McAdam, John D. McCarthy and Mayer N. Zald, “Introduction,” in Doug McAdam, John D. McCarthy and Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge: Cambridge University Press, 1996, p. 3.

<sup>72</sup> *Ibid.*, p. 3.

<sup>73</sup> In so doing, as mentioned above, this study seeks to build on and contribute to, the emergent interdisciplinary literature on transnational social movements. See footnote 2 above.

technical and organizational resources, is essential to understanding transnational movement emergence and development, this focus alone leaves many questions unanswered. For example, it tells us very little about the *timing* of movement emergence. Specifically, in the Kenyan case, a focus on mobilizing structures tells us little about why Kenya's professional legal association, the Law Society of Kenya (LSK), founded in 1949, emerged as a dominant leader of Kenya's contemporary human rights and democracy movement in the mid-1980s, while it remained silent to similar abuses dating to Kenya's first independence regime, the Kenyatta regime (1963 – 1978).

In addition, this focus alone cannot explain why and how Kenya's emergent movement became a mass movement with more than four million members by the mid-1990s, nor why and how emergent domestic leaders and organizations were able to forge successful coalitions with international human rights organizations based abroad. Finally, a focus solely on mobilizing structures cannot tell us why the movement's reform strategy of mobilizing domestic and international legal institutions and norms was ultimately as successful as it was in forcing Kenya's resistant authoritarian regime to introduce human and democratic rights reforms during the decade of the 1990s.

To answer these questions requires attention to domestic and international political institutional environments or, in social movement terms, "*political opportunity structures*," as well as the way in which these environments were exploited by movement leaders through "*framing processes*." These two concepts, "*political opportunity structures*" and "*framing processes*," both have theoretical roots

in political process approaches to social movement development, and it is to these approaches that we now turn.

#### Political Process Approaches:

The first comprehensive statement of political process theory in the social movement literature is found in Doug McAdam's insightful analysis of the U.S. civil rights movement, *Political Process and the Development of Black Insurgency, 1930-1970*.<sup>74</sup> Whereas resource mobilization theorists focus predominantly on the internal dynamics of social movement emergence, political process theorists emphasize the role of both internal and external political processes, as well as the interaction between the two. Specifically, political process theorists argue that three sets of variables are critical to explaining social movement emergence and development. First, as discussed above, is the existence of "mobilizing structures." Second are "political opportunity structures," which they define as the "political alignment of groups within the larger political environment."<sup>75</sup> Finally, third, is what McAdam refers to as "cognitive liberation," or the process by which seemingly powerless or marginalized groups come to perceive the injustice of their conditions, as well as the means for addressing it.<sup>76</sup> As McAdam explains, this aspect of political process theory builds directly on Marxist perspectives that "recognize that mass political impotence may as frequently stem from shared perceptions of powerlessness as from any objective inability to

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<sup>74</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

mobilize significant political leverage.”<sup>77</sup> Contemporary political process theorists refer to these processes as “framing processes.” The following two sections discuss each of these concepts in turn and highlight their relevance for understanding the emergence and development of Kenya’s contemporary human and democratic rights movement.

#### Political Opportunity Structures:

Peter Eisenger was the first theorist to use the concept of political opportunity structures in his 1973 comparative analysis of riot behavior in forty-three cities across the United States.<sup>78</sup> He defined these structures as the formal institutional structures of city government, which he categorized as either “open,” “closed,” or some combination of open and closed. Through rich empirical analysis, he determined that the relationship between political opportunities and extra-institutional activities (such as social movements, or, in his case, riots) is curvilinear. That is, where an institutional system is completely closed, political dissidents are typically effectively repressed, and no riots emerge. Where the system is open, dissidents have recourse to channels of representation and influence, and thus feel no need to riot. Where the system is some combination of open and closed, however, riots are most prevalent

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<sup>77</sup> Ibid., pp. 37 – 38.

<sup>78</sup> Peter K. Eisenger, “The Conditions of Protest Behavior in American Cities,” *The American Political Science Review*, vol. 67, 1973.

because dissidents understand that change is possible, but are frustrated in their efforts to affect this through established institutional channels.<sup>79</sup>

Social movement theorist Charles Tilly then incorporated this concept into his 1978 work, *From Mobilization to Revolution*, and applied it to national level politics in order to demonstrate the important role that state institutions play in shaping social movement emergence and development.<sup>80</sup> Four years later, political process theorist Doug McAdam then used the concept in a similar way to explain the way in which both state and local institutions impacted movement development in his analysis of the United States' civil rights movement. Over the next decade, the concept of political opportunity structures became widely used by social movement theorists from diverse theoretical traditions, but none of these works, including Tilly's and McAdam's, clearly specified the concept's constituent elements.

In his 1982 work, for example, McAdam contends “*any* event or broad social process that serves to undermine the calculations and assumptions on which the political establishment is structured occasions a shift in political opportunities.”<sup>81</sup> In his explanation, he includes such variables as “wars, industrialization, international political realignments, prolonged unemployment and widespread demographic

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<sup>79</sup> See also: David S. Meyer and Suzanne Staggenborg's discussion of Eisenger in David S. Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *American Journal of Sociology*, vol. 101, no. 6, May 1996, pp. 1628-1660.

<sup>80</sup> Charles Tilly, *From Mobilization to Revolution*, Reading, MA: Addison-Wesley Publishing Company, 1978.

<sup>81</sup> Doug McAdam, *Political Process and the Development of Black Insurgency*, p. 41.

changes.”<sup>82</sup> It was not until 1996, with the publication of McAdam, McCarthy and Zald’s influential work, *Comparative Perspectives on Social Movements*, that a concerted effort was made to bring greater analytical clarity to the concept. Building on the work of other prominent social movements theorists, they argue that movement political opportunity structures are defined by four key elements:<sup>83</sup>

1. The relative openness or closure of the institutionalized political system
2. The stability of . . . elite alignments. . .
3. The presence or absence of elite allies
4. The state’s capacity and propensity for repression<sup>84</sup>

Interestingly, this formulation, and its general application since, has focused almost entirely on domestic level politics, to the neglect of its potential application to political institutions, organizations and elites at the international level.<sup>85</sup> As is argued in the

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<sup>82</sup> Ibid.

<sup>83</sup> In particular, they build on the work of Charles D. Brockett, “The Structure of Political Opportunities and Peasant Mobilization in Central America, *Comparative Politics*, vol. 23, no. 3, April 1991, pp. 253-274; Hanspeter Kriesi, Ruud Koopmans, Jan Willem Duyvendak, and Marco G. Giugni, “New Social Movements and Political Opportunities in Western Europe,” *European Journal of Political Research*, vol. 22, 1992, pp. 219-244; Dieter Rucht, “The Impact of National Contexts on Social Movement Structures: A Cross-Movement and Cross-National Comparison,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge: Cambridge University Press, 1996, pp. 185-204; Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics*, Cambridge: Cambridge University Press, 1994. See Doug McAdam, “Conceptual Origins, Current Problems, Future Directions, in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, pp. 26 - 29.

<sup>84</sup> McAdam, McCarthy and Zald, “Introduction,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 10.

<sup>85</sup> Interestingly, although in his 1982 work, McAdam mentions that “international political alignments” are a potentially important constituent element of political opportunity structures, his analysis of the U.S. civil rights movement completely neglects this international dimension. It is not until McAdam published a second edition of this work in 1999 that he acknowledges this important gap in his analysis. As later theorists of the civil rights movements were to point out, the emergence of the Cold War had a significant impact on the dynamics of the movement’s emergence and development, as well as its

critique of these features below, however, movements' political opportunity structures can have both national *and* international dimensions.

The first constitutive element of political opportunity structures, the relative openness or closure of the political system, builds directly on Eisenger's early insights and, in many respects, Bratton and van de Walle's analysis also supports this general observation.<sup>86</sup> As discussed above, Bratton and van de Walle find a high degree of correlation between citizens' experience with elections during the immediate post-independence era, or the relative openness of the domestic political system, and the incidence of political protest in the contemporary era. They argue that, as African regimes became increasingly closed and repressive through the 1970s and 1980s, citizens felt increasingly frustrated by their ability to affect political change through electoral channels, so they rebelled, rioted and demonstrated.

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impact. In particular, see Mary L. Dudziak, "Desegregation as a Cold War Imperative," *Stanford Law Review*, vol. 41, 1988, pp. 61–120. As mentioned above, however, the emergent literature on transnational social movements *does* argue for extension of this concept to the international level, but, as was the case in the early literature focused on domestic social movements, there is a need for greater specification of the concept in this literature. For example, one of the more precise definitions in this literature still broadly defines "opportunity structures" as those "factors that facilitate or constrain social change efforts." Smith, Pagnucco and Chatfield, "Social Movements and World Politics: A Theoretical Framework," in Smith, Chatfield and Pagnucco, eds., *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, p. 66. Building on Tarrow's 1988 work, Smith, Pagnucco and Chatfield then argue that "several factors affect movement potential for influence, including the institutions that define formal and informal access to policy making, the stability of broad political alignments, the presence or absence of influential allies or support groups in the environment, splits in the governing elite, and changing norms." *Ibid.*, pp. 67–68. See also Sidney Tarrow, "National Politics and Collective Action," *Annual Review of Sociology*, vol. 14, pp. 421–440. In this study I build on McAdam, McCarthy and Zald's foundational 1996 definition of the concept, while extending its theoretical insights to the international level. In addition, I put forth a proposal for slight revision of their definition in an attempt to make it more parsimonious. In so doing, I build on Keck and Sikkink's important work, *Activists Beyond Borders: Advocacy Networks in International Politics*, as is discussed below.

<sup>86</sup> That is, that the emergence of protest movements is related to the degree of openness or closure of the domestic regime, and specifically that this relationship is curvilinear. See Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, pp. 140-141.

They also contend that the emergence of protest movements was more likely in “civilian one-party regimes where [regime opponents] judged that incumbent political elites would not or could not resort to repression” --that is, systems that were not *completely* closed, and not *too* repressive.<sup>87</sup> Although the Kenyan case demonstrates that Bratton and van de Walle’s analysis underestimates the extent to which movement leaders and participants often continue to engage in protest activities *despite* repressive state responses, like Eisenger, they find that protest movements are most likely to occur in systems whose domestic political institutional configurations were some combination of “opened” and “closed.”

In their pioneering 1998 work, *Activists Beyond Borders: Advocacy Networks in International Politics*, Margaret Keck and Kathryn Sikkink challenge this assumption by drawing on empirical evidence generated by transnational human rights, environmental and women’s advocacy networks, and by extending the concept of political opportunity structures to the international level.<sup>88</sup> In so doing, they argue that *even when* domestic political institutions remain virtually closed to emergent social movement actors, if *international* channels and institutions remain open, domestic movements with transnational links can emerge. In fact, they contend that it is especially in those cases where “channels between the state and its domestic actors

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<sup>87</sup> Ibid., p. 145.

<sup>88</sup> Keck and Sikkink define transnational advocacy networks as including “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse and dense exchanges of information and services.” Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 2. Although Keck and Sikkink do not focus on transnational social movements *per se*, as this study argues, their theoretical insights are quite relevant to the study of transnational social movements.



are blocked” that emergent transnational movements “bypass their states and directly search out international allies to bring pressure on their states from the outside.”<sup>89</sup>

This activates what they call the “Boomerang Pattern,” in which domestic actors mobilize external movement allies, who, in turn, lobby legislative representatives in their respective states, and/or relevant third party organizations,<sup>90</sup> to pressure recalcitrant regimes to enact reforms.<sup>91</sup> As the case study demonstrates, this pattern is clearly observable in the Kenyan case.

As was mentioned above, however, the success of domestic actors in this process largely depends on the availability of mobilizing structures at the international level. Moreover, as McAdam argues in the context of domestic mobilizing structures, the “breadth and depth” of these international structures directly impacts the likelihood of successful transnational movement emergence and development. Thus, especially when domestic institutions remain closed, the degree of “openness” of the international system to emergent movement demands constitutes a critical dimension of a movement’s political opportunity structure.

A second dimension of political opportunity structures impacting movement emergence and development, according to McAdam, McCarthy and Zald, is “the

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<sup>89</sup> Ibid., p. 12. Alison Brysk describes a similar phenomenon in her analysis of Argentina’s human rights movement. See Alison Brysk, “From Above and Below: Social Movements, the International System, and Human Rights in Argentina, *Comparative Political Studies*, vol. 26, no.3, October 1993, pp. 259-285.

<sup>90</sup> For example, International Financial Institutions (IFIs) such as the World Bank (WB) or International Monetary Fund (IMF).

<sup>91</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 13. This “Boomerang Pattern,” as documented in the study’s empirical chapters, is clearly observed in the Kenyan case.

stability of that broad set of elite alignments that typically undergird a polity.”<sup>92</sup> As the emergent literature on Africa’s political transitions makes clear, however, in the vast majority of sub-Saharan cases, domestic elite conflicts were much more often a *consequence*, and not a *cause*, of social movement emergence. If one extends this dimension of political opportunity structures to the international level, however, the shift in international elite alliances, as the result of the end of the Cold War, was of critical importance to emergent movements in African states. Although there were certainly pockets of resistance to authoritarian rule in most sub-Saharan states prior to 1989, it was the post Cold War international realignments that removed what had been a major impediment to movement emergence up until this time. As realists would predict, especially in those African states that were considered of economic and/or strategic importance to the United States and its allies, for example, not only did they not challenge authoritarian rule during the Cold War years, but in many cases, they actively supported it.

A third dimension of political opportunity structures that is argued to significantly impact movement emergence is “the presence or absence of elite allies.”<sup>93</sup> As indicated above, if extended to the international level, one could easily argue that with the end of the Cold War, repressive regime elites lost critical *international* allies, and reform movements gained them. However, almost without exception, “elite allies” in social movements theory refers exclusively to domestic

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<sup>92</sup> McAdam, McCarthy and Zald, *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 10.

<sup>93</sup> Ibid.

allies. In this respect, most African cases present somewhat of an anomaly to both contemporary social movements theories and modernization theories of democratization. The assumption of both of these schools of thought is that while the bourgeois and working classes remain closely tied to the regime, as was the case in a majority of African states, human and democratic rights movements will not emerge. On the other hand, the fact that dominant church organizations and professional legal associations began to take active oppositional positions against state policies constituted a real threat to many sub-Saharan regimes. As discussed above, dominant religious organizations, in particular, wielded considerable moral authority in most of these states, especially in rural areas.

A concept that perhaps more usefully captures important aspects of both these second and third dimensions of political opportunity structures is the international relations concept of “state vulnerability.” This concept is defined by Keck and Sikkink as the degree of state sensitivity to international pressure and it is operationalized both materially, in terms of aid, trade and other potential economic dependencies, and normatively, in terms of the state’s prior normative commitments and “desire to maintain good standing in valued international groupings.”<sup>94</sup>

Although Keck and Sikkink focus predominantly on international level variables, as the Kenyan case and other sub-Saharan cases demonstrate, there is also an important domestic dimension to this concept. Materially, as state coffers became increasingly depleted, incumbent regimes were less able to maintain domestic

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<sup>94</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 208. See also *ibid.*, pp. 29, 117-118 and 207-209.

patronage networks, their support bases eroded, and they became increasingly vulnerable to emergent opposition challenges. Normatively, as human rights and democracy movements became increasingly effective in exploiting contradictions in regime rhetoric and practice, regime legitimacy was also undermined. Finally, as is demonstrated below, domestic electoral cycles within newly liberalized regimes also significantly impacted the degree of perceived state vulnerability and, thus, the likelihood that reform movement demands would escalate.

Attention to the timing of domestic electoral cycles also provides some insight into what Sidney Tarrow calls “cycles of protest” or “cycles of contention.” He defines these cycles as

phase[s] of heightened conflict across the social system: with rapid diffusion of collective action from more mobilized to less mobilized sectors; a rapid pace of innovation in the forms of contention; the creation of new or transformed collective action frames; a combination of organized and unorganized participation; and sequences of intensified information flow and exchange between challengers and authorities.<sup>95</sup>

As the Kenyan case illustrates, as domestic elections approached, these “cycles of protest” tended to accelerate.

Finally, a fourth characteristic of political opportunity structures posited by McAdam, McCarthy and Zald is “the state’s capacity and propensity for repression.”<sup>96</sup> Although Bratton and van de Walle also insist that this is an important variable in explaining reform movement emergence, Wiseman and other observers of African

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<sup>95</sup> Tarrow, *Power in Movement: Social Movements and Contentious Politics*, p. 142.

<sup>96</sup> McAdam, McCarthy and Zald, *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 10.

politics disagree. Drawing on empirical evidence from numerous sub-Saharan cases, Wiseman contends that there was “considerable personal costs to those involved both at mass and elite levels.”<sup>97</sup> “[I]n almost all cases,” he continues, “some coercion was used, at least in the first instance, against the protestor. In some cases harsh coercion persisted as a continuing response to mass protest . . .”<sup>98</sup>

The Kenyan case clearly supports Wiseman’s findings and challenges the assumptions of McAdam, McCarthy and Zald, as well as those of Bratton and van de Walle. Despite violent repression by state military, paramilitary and police forces, the reform movement not only survived, but it continued to grow in size, as well as in the number of movement actions taken. What enabled this was the continued support of *international* level actors, organizations and institutions, as well as the increasingly effective legal mobilization tactics utilized by the movement’s leadership. Although the Kenyan state’s *propensity* for violence did decrease over time, this study finds that this was in fact a *consequence* of the movement’s impact, and not a *cause* of the movement’s emergence. Thus, consistent with Keck and Sikkink’s theory, this study also finds that a more important determinant of movement mobilization, especially in closed and repressive regimes, is the existence and continued support of politically powerful movement allies –at international, as well as domestic, levels. Based on this analysis, a revised version of the constituent elements of political opportunity

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<sup>97</sup> Wiseman, *The New Struggle for Democracy in Africa*, p. 6.

<sup>98</sup> *Ibid.*, p. 69.

structures reduces their number to three, but extends their application to the international level:

1. The relative openness or closure of institutionalized political systems, at domestic and/or international levels;
2. The presence or absence of politically powerful movement allies, at domestic and/or international levels;
3. The degree of state vulnerability at domestic and/or international levels.

Each of these elements was significant in explaining the emergence and development of Kenya's transnational movement. First, not only had Kenya's incumbent regime become increasingly repressive through the 1980s,<sup>99</sup> but also, at approximately the same time, the international human rights regime had become more open and responsive. This was primarily due to the emergence and increasing effectiveness of international nongovernmental human rights organizations.

Although some international human rights organizations date back to the late 1940s and early 1950s, just after the United Nations General Assembly unanimously approved the Universal Declaration of Human Rights (UDHR) in 1948,<sup>100</sup> most of these organizations remained relatively undeveloped until the early to mid-1980s. The numbers of these organizations began to grow in the 1970s, but it was not until the

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<sup>99</sup> Specific indicators of the Moi regime's increasing repressiveness were: (1) enactment of Section 2A of the Constitution, which constitutionally banned opposition party mobilization, (2) massive arrests following an abortive coup attempt shortly after enactment of Section 2A, and (3) the enactment of new electoral laws, which resulted in Kenya's secret ballot being abolished in the first round of general elections.

<sup>100</sup> For example, the International Commission of Jurists (ICJ), a prominent international human rights nongovernmental organization (NGO), was founded in 1952, and its Kenya chapter was founded in 1959. It did not become active as a human rights organization and advocacy group for judicial reform until the 1980s, however. See Chapter Five for a detailed discussion of the organizational development of ICJ-Kenya.

mid-1980s that effective transnational human rights networks emerged. As Keck and Sikkink report in their study of transnational human rights network development, “between 1983 and 1993 the total number of international human rights NGOs doubled, and their budgets and staff grew dramatically.”<sup>101</sup> As they explain, it was at this time that these groups became increasingly effective as enforcers of international human rights policies and norms at both international and domestic levels.<sup>102</sup>

Second, not only did these transitional networks make the international human rights regime more open and responsive, but their constituent organizations also became critical allies of, and participants in, Kenya’s emergent movement. Interviews with members of Kenya’s professional legal association, the Law Society of Kenya (LSK), who were the first domestic leaders of Kenya’s emergent movement, as well as longitudinal analysis of their professional journal, *The Advocate*, reveal growing transnational contact between members of the LSK and international human rights organizations beginning in the late 1970s and early 1980s. These contacts included educational exchanges, joint conferences and workshops, training seminars, and

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<sup>101</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 90. They state that “[t]wo separate coding efforts based on organizations listed in the Yearbook of International Organizations confirm this growth. . . Information on staff and budget changes [is] based on information from interviews with staff of U.S. human rights organizations.” Ibid., p. 90.

<sup>102</sup> Keck and Sikkink attribute the growth in breadth and depth of transnational human rights networks to both cultural and technological factors. Culturally, they argue that international human rights agreements of the post World War II period (specifically, the UDHR, the ICCPR and the ICESCR) provided a shared normative basis for human rights internationally, and these norms became increasingly “mobilized” by such international events as the U.S. civil rights movement in the 1960s, the wave of authoritarianism that swept Latin America in the 1970s, and anti-apartheid struggles in South Africa through the 1980s. As a consequence, a “[n]ew public receptivity” to human rights began to emerge internationally. Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 200. Technologically, they argue that such developments as faster, cheaper, and more decentralized modes of communication (e.g. the internet, fax machines, CNN, etc), as well as less expensive air travel, greatly impacted the effectiveness of these networks by both facilitating communications and undermining governments’ ability to control citizen access to information. Ibid.

increased access to information generated by foreign-based international human rights organizations. In part as a consequence of this, and in part as a consequence of growing Africanization of the LSK,<sup>103</sup> unlike earlier cycles of repression, in the early to mid-1980s, a growing number of Kenyan lawyers began bringing forth court cases defending Kenyan citizens' human and democratic rights, as defined by the International Covenant on Civil and Political Rights (ICCPR) and by Kenya's constitutional Bill of Rights.

Although these lawyers became new targets of state repression, and most ended up in prison for daring to challenge the regime, Amnesty International, one of the largest and most powerful international human rights NGOs at the time, promptly issued its first public condemnation of the Kenyan government for violating its obligations under the ICCPR and adopted numerous imprisoned lawyers as prisoners of conscience. As is documented in Chapter Four, in addition to Amnesty, a growing number of other foreign-based international human rights NGOs also forged coalitions with Kenya's emergent movement through the 1980s. By late 1991, Kenya's emergent *transnational* movement had effectively mobilized not only tens of thousands of Kenyan citizens, but also many of Kenya's most powerful donors to support movement demands. Although support of Kenya's donors was not consistent,

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<sup>103</sup> This is discussed in Chapter Four.



the movement continued to develop and effectively promote human and democratic rights protections through December 2002,<sup>104</sup> when the case study ends.

Finally, third, the “vulnerability” of the Kenyan state to international and domestic pressure also greatly increased beginning in the late 1980s. This was primarily due to the collapse of single party states in Eastern and Central Europe and the consequent perception among both international and domestic publics of the illegitimacy of single party rule. In his New Year’s Sermon on January 1, 1990, Reverend Timothy Njoya, one of Kenya’s most influential religious leaders, and a dominant movement leader, drew direct parallels between events transpiring in Eastern Europe and the political situation in sub-Saharan Africa.<sup>105</sup> He framed his criticisms in terms of the proven illegitimacy of single-party rule in both regions and called for the immediate introduction of multiparty politics in Kenya as a fundamental human and democratic right, and as a means for ensuring the protection of other fundamental rights. Soon afterwards, eighteen Kenyan Catholic bishops<sup>106</sup> also signed and publicized a pastoral letter urging political liberalization, and influential clergy within the National Council of Churches of Kenya (NCCCK)<sup>107</sup> also began publicly condemning regime abuses of human and democratic rights.

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<sup>104</sup> Specifically, despite continued violations by the Moi-KANU regime, these violations were increasingly resisted and condemned by a growing number of Kenyan citizens, who, overall, exercised a wider range of human and democratic rights than at any other time in Kenya’s history.

<sup>105</sup> Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, p. 192.

<sup>106</sup> As noted above, Roman Catholics constitute approximately 33 percent of Kenya’s population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>107</sup> As also noted above, National Council of Churches of Kenya (NCCCK) is an umbrella organization that conjoins most of Kenya’s Protestant Churches. Protestants constitute approximately 45 percent of Kenya’s population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

Further contributing to state vulnerability in Kenya, was a wave of political openings and constitutional conferences that swept the African continent beginning with the Benin Conference in February of 1990. As Pearl Robinson notes in her insightful analysis of the national conference phenomenon in African states:

[t]he lessons of Benin's National Conference were not lost [on other African states]. Between March 1990 and August 1991, the rulers of Gabon, Congo, Mali, Togo, Niger and Zaire faced the demands of pro-democracy forces and convened national [constitutional reform] conferences. During this same period, opposition groups in the Central African Republic (CAR), Cameroon, Madagascar, Burkina Faso, Mauritania and Chad began mobilizing campaigns to press their demands for national conferences.<sup>108</sup>

By June 1990, Kenya's movement also began framing its demands in terms of "comprehensive constitutional reforms" via a "consultative National Conference."<sup>109</sup> And, by July 7, 1990, a day that was to go down in Kenyan history as "*Saba Saba Day*,"<sup>110</sup> tens of thousands of Kenyans converged at Kamunjunki grounds just outside Nairobi, a site famous for anti-colonial demonstrations, and demanded that the regime

<sup>108</sup> Pearl T. Robinson, "Democratization: Understanding the Relationship between Regime Change and the Culture of Politics," *African Studies Review*, vol. 37, no.1, April 1994, p. 56. See also Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspectives*, pp. 165-197.

<sup>109</sup> On June 20, 1990, eighteen Catholic Bishops issued a pastoral letter urging the convening of a "consultative National Conference" to address emergent movement demands for reform. By July 16, 1990, the Anglican head of the NCKK, Bishop Henry Okullu, also insisted that the government convene a constitutional assembly in order that there might be a "more binding social contract between the people and their governors." See *The Daily Nation* select articles: June 20, 1990 and July 16, 1990. *The Daily Nation*: Nairobi: *The Daily Nation*. See also *Xinhua Press*, "Kenyan Bishop Calls for Resignation of Kenyan Government," July 16, 1990, The Xinhua General Overseas News Service. Accessed via LexisNexis, a division Reed Elsevier, Inc.

<sup>110</sup> *Saba* is the Kiswahili word for seven, thus "*Saba Saba Day*" drew attention to the day and month the demonstration was staged – July 7<sup>th</sup>. Every July 7<sup>th</sup> since the first 1990 demonstration in there have been commemorative demonstrations in Kenya to draw attention to the continued struggle for human rights and democracy, as well as to the lives lost in defense of these goals.

concede multiparty politics and constitutional reforms. This was the largest mass protest of its kind in the post-colonial period and, from this point forward, “mass action” as a peaceful form of protest<sup>111</sup> and legal mobilization strategy,<sup>112</sup> became a permanent and credible threat used by movement leaders to promote their reform demands. As a consequence, state actions, which were formerly regarded as legitimate by a vast majority of Kenyans, increasingly began to be perceived as fundamental breaches of the state’s obligations under national and international law.

Finally, and significantly, the international political realignments that followed as the Cold War came to an end further increased the vulnerability of the Kenyan state. For the first time since Kenyan independence in 1963, economically and politically powerful states in the international system, in particular the United States, were more open to conditioning their aid to Kenya on human and democratic rights reforms. In addition, the United States’ dominant aid organization, the U.S. Agency

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<sup>111</sup> As a leader of Kenya’s human rights and democracy movement, Willy Mutunga explains, “[m]ass action took various forms: rallies, demonstrations, processions, strikes, sit-ins, vigils, prayers, and parading coffins of the dead at police stations before burials.” Willy Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Nairobi: SAREAT, 1999, p. 157. As he further points out, “[a]ll of these activities were in defiance of [unconstitutional] laws” and undertaken as a form of civil disobedience. Ibid. “This mass action was premised on the legal theory . . . [that] states that laws of a repressive government should not be obeyed.” Ibid. By thus engaging in civil disobedience and legal mobilization, “[m]ass action challenged the legitimacy of the existing legal order.” Ibid. In response to the Moi-KANU regime’s claims that the movement’s aim in calling for “mass action” was simply to cause “chaos” and “violence,” another movement leader, Kivutha Kibwana, insisted that the movement “has categorically said it cannot support violence and indeed, we have stated over and over again that mass action is not violence. It is one way of expressing yourself as a citizen. It is a right that you have to really tell Government that it is not doing certain things, a way of convincing Government that it needs to do citizens’ bidding. . . . Within constitutional law, it’s known that mass action, as exemplified by men like Mahatma Gandhi and Martin Luther King; it is peaceful civil action. If you look at all our public statements, NCEC [National Convention Executive Council] has consistently emphasized non-violence and the rule of law. . . .” Kivutha Kibwana, “Kibwana: Beware of Government’s Intentions,” *The Daily Nation*, Nairobi: The Nation, April 5, 1998.

<sup>112</sup> Discussed below.

for International Development (U.S. AID), became a major supporter of Kenya's movement, providing necessary material, technical and political support to movement organizations. As the case study documents, however, the shift in U.S. foreign policy only followed persistent lobbying efforts and publicity campaigns by Kenya's emergent transnational human rights and democracy movement.

As contemporary theorists of social movements have argued, however, even *if* sufficient mobilizing and political opportunities exist for movement emergence, unless these opportunities are *perceived* as such by emergent activists, movements will not develop. As McAdam explains, together mobilizing structures and political opportunity structures offer only "a certain 'structural potential' for collective political action. Mediating between opportunity and action are people and the subjective meanings they attach to their situations."<sup>113</sup> Thus, one of the central political problems faced by emergent movements is whether *potentially* favorable shifts in political opportunities structures will be defined as such by a large enough group of people to launch a movement.<sup>114</sup> This brings us to the third, and final, variable upon which this study builds, successful "*framing processes*."

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<sup>113</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 48.

<sup>114</sup> McAdam, McCarthy and Zald, "Introduction: Opportunities, Mobilizing Structures, and Framing Processes –Toward a Synthetic, Comparative Perspective on Social Movements," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, McAdam, McCarthy and Zald, p. 8.

### Framing Processes:

Although the concept of framing has historical roots in the disciplines of cognitive psychology and psychiatry dating back to the 1950s, it was not introduced into the social science literature until 1974, and it was more than a decade later before it was first applied to the study of social movements.<sup>115</sup> In contemporary social movements theory, the activity of “framing” is generally understood as “the conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.”<sup>116</sup> As Snow and his colleagues explain, “[b]y rendering events or occurrences meaningful, frames function to organize experience and guide action, whether individual or collective.”<sup>117</sup> Frame analysis, thus, draws attention to the ways in which the cognitive processes involved

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<sup>115</sup> Early articulations of framing theory can be found in the cognitive psychology and psychiatry works of Jean Piaget, *The Construction of Reality in the Child*, Margaret Cook, trans., NY: Basic Books, 1954; Ulric Neisser, *Cognition and Reality: Principles and Implications of Cognitive Psychology*, San Francisco, CA: W. H. Freeman, 1976; and Gregory Bateson, *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology*, San Francisco, CA: Chandler Publishing Company, 1972. The first work in the social sciences to use the concept of framing was Erving Goffman’s *Frame Analysis: An Essay on the Organization of Experience*, Boston: Northeastern University Press, 1974. It was more than a decade later before Goffman’s concept of framing was first adapted and applied to the study of social movements by David A. Snow, E. Burke Rochford, Jr., Steven K. Worden, and Robert D. Benford, “Frame Alignment Processes, Micromobilization, and Movement Participation,” *American Sociological Review*, vol. 51, August 1986, pp. 464 – 481. See David A. Snow and Robert Benford’s very helpful discussion of the development of the concept of framing, upon which this review is based, in David A. Snow and Robert D. Benford, “Master Frames and Cycles of Protest,” in *Frontiers in Social Movement Theory*, Aldon D. Morris and Carol McClurg Mueller, eds., New Haven, CT: Yale University Press, 1992, pp. 133 – 155. See especially *ibid.*, pp. 136 – 138.

<sup>116</sup> McAdam, McCarthy and Zald, “Introduction,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements*, p. 6.

<sup>117</sup> Snow, Rochford, Worden and Benford, “Frame Alignment Processes, Micromobilization, and Movement Participation,” p. 464.

in coordinating collective action are linked to external political events and experiences.

As noted above, although Snow and his colleagues were the first to apply the concept of framing to social movement analysis, they were certainly not the first to assert the importance of cognitive and ideational dimensions of collective action. A long line of Marxist and neo-Marxists theorists has consistently emphasized this aspect of social movement activity. In the mid-1970s, for example, Frances Fox Piven and Richard A. Cloward argued that before a social movement can emerge “the social arrangements that are ordinarily perceived as just and immutable *must come to seem* both unjust and mutable.”<sup>118</sup> As mentioned above, political process theorist Doug McAdam also developed the concept of “cognitive liberation” to address this dimension of social movement activity, and other political process theorists, such as William Gamson, Sidney Tarrow and Charles Tilly, have also drawn attention to the catalyzing effect of ideas in triggering collective action.<sup>119</sup> Moreover, new social movement theorists also have focused explicitly on the role of ideas, ideology and values in explaining movement emergence.<sup>120</sup> Until Snow, Rochford, Worden and

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<sup>118</sup> Frances Fox Piven and Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail*, New York: Pantheon Books, 1977, p. 12.

<sup>119</sup> See William A. Gamson, *Talking Politics*, Cambridge: Cambridge University Press, 1992; Sidney Tarrow, *Democracy and Disorder: Protest and Politics in Italy, 1965- 1975*, Oxford: Oxford University Press, 1989; Sidney Tarrow, *Struggling to Reform: Social Movements and Policy Change During Cycles of Protest*, Ithica, NY: Cornell University, Center for International Studies, 1983; Tilly, *From Mobilization to Revolution*, 1978.

<sup>120</sup> For example, Alberto Melucci, in *Nomads of the Present: Social Movements and Individual Needs in Contemporary Society*, John Keane and Paul Mier, eds., Philadelphia, PA: Temple University Press, 1989; Alberto Melucci, *Challenging Codes: Collective Action in the Information Age*, Cambridge: Cambridge University Press, 1996; Alain Touraine, *The Voice and the Eye: An Analysis of Social Movements*, Alan Duff, trans., foreword by Richard Sennett, Cambridge: Cambridge University Press,

Benford's pioneering work in the mid-1980s, however, the processes by which emergent ideas became the basis for collective action remained highly underspecified.

In an influential article published in 1986, Snow and his colleagues developed the concept of "frame alignment" and argued that this was "a necessary condition for [movement] participation, whatever its nature or intensity, and ... it is typically an interactional and ongoing accomplishment."<sup>121</sup> They defined frame alignment as the "conceptual bridge linking [the] social psychological" aspects of movement participation to its "structural/organizational considerations."<sup>122</sup> In other words, it is the process by which individual and collective actors begin to *perceive* the structural and organizational possibilities available to translate individual and group grievances into successful collective action and, ultimately, social and political change. Building on Gramscian political insights, social movements theorists also argue that "successful" frame alignments must build upon existing cultural ideas and values, but then extend and/or transform these ideas to address emergent contemporary issues.<sup>123</sup>

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1981; Ronald Inglehart, *The Silent Revolution: Changing Values and Political Styles Among Western Publics*, Princeton, NJ: Princeton University Press, 1977; Ronald Inglehart, *Culture Shift in Advanced Industrial Society*, Princeton, NJ: Princeton University Press, 1990; and Paul R. Abramson and Ronald Inglehart, *Value Change in Global Perspective*, Ann Arbor, MI: University of Michigan Press, 1995.

<sup>121</sup> Snow, Rochford, Worden and Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation."

<sup>122</sup> *Ibid.*, p. 476.

<sup>123</sup> In his discussion of the development of counter-hegemonic ideas, discourses and practices, Antonio Gramsci insists that counter-hegemonic leaders must start from immediately existing local conditions, and then draw upon elements that are constitutive of the prevailing hegemony. As he explains: "[I]t is not a question of introducing from scratch a scientific form of thought into everyone's individual life, but of renovating and making 'critical' an already existing activity." Cited in: Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies," *Journal of Law and Society*, vol. 17, no. 3, Autumn 1990, p. 314. In his insightful critique of Gramsci's work, Hunt contends that there are two broad processes that Gramsci believed were necessary for successful counter-hegemonic struggles. The first is to "'supplement' that which is already in place; to add to or extend an existing discourse," and

Thus, the process of framing is strategic, self-conscious and political: movement leaders strategically create movement frames, which are then directed toward specific political targets in order to further the movement's social and political goals.

Snow, Rochford, Worden and Benford describe four types of frame alignment processes: (1) frame bridging, (2) frame amplification, (3) frame extension, and (4) frame transformation. *Frame bridging* refers to the process by which an emergent group of activists reaches out to other individuals and/or organizations to persuade them to join their efforts by framing their goals in terms of the stated interests and goals of these individuals or organizations.<sup>124</sup> In the Kenyan case, this is most clearly observed in the early stages of movement emergence where individual Kenyan lawyers reached out to other Kenyan lawyers within Kenya's professional legal association, the Law Society of Kenya (LSK), as well as lawyers affiliated with nongovernmental human rights organizations based abroad, by framing their objectives in terms of protecting fundamental political and civil rights, as defined by Kenya's Constitutional Bill of Rights, as well as *international* human rights, as defined by international law.<sup>125</sup> Moreover, by emphasizing their commitment to promoting and protecting human rights, and publicizing the extent to which Kenya's incumbent regime violated these rights, emergent activists were also able to mobilize

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the second is to put in place "discourses, which whilst still building on the elements of the hegemonic discourses, introduce elements that transcend that discourse." Ibid.

<sup>124</sup> Snow, Rochford, Worden and Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation," p. 467.

<sup>125</sup> Specifically the International Covenant on Civil and Political Rights (ICCPR), which Kenya became party to in 1972.



the leadership of dominant religious organizations in Kenya, who also professed to support this goal.

As the emergent movement sought to build its domestic and transnational bases, it also engaged in frame amplification, frame extension and frame transformation processes. As social movements theorists argue, “frame amplification” involves two separate, but related, processes: (1) “value amplification,” or the “focusing, elevation and/or reinvigoration. . . of one or more values presumed basic to prospective constituents, but which have not [yet] inspired collective action;” and (2) “belief amplification,” or underscoring beliefs about the seriousness of a particular problem, who is to blame for this problem, the potential efficacy of collective action, and the necessity of “standing up” to prevent its perpetuation.<sup>126</sup>

These processes were also clearly observed in Kenya as Kenyan lawyers and church leaders sought to mobilize members of their respective organizations to support movement activities. In particular, they used belief amplification processes to emphasize the seriousness of human and democratic rights abuse in Kenya and to place blame directly on the incumbent regime. They emphasized the efficacy of collective action by pointing to the successes of other rights movements, especially those in Eastern and Central Europe, and later those in other sub-Saharan states. Specifically, movement leaders began to frame demands in terms of the proven illegitimacy of Kenya’s single party state, and the necessity of allowing multiparty politics to make state actors and institutions accountable. In so doing, emergent

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<sup>126</sup> Ibid., p. 469.

leaders were able to persuade a growing number of Kenyans of the importance of standing up for rights protections, despite repressive regime responses.

Finally, frame extension and frame transformation processes were also important to building Kenya's mass-based and transnational movement. "Frame extension" refers to the process by which movement goals are recast as "attending to or being congruent with the values and interests of [other] potential adherents."<sup>127</sup> In the Kenyan case, this was observed as movement leaders sought to forge coalitions with a broader array of organizational interests in Kenya, including student organizations, environmental groups, women's rights groups, neighborhood organizations, labor unions, business groups and farming organizations. In so doing, movement leaders demonstrated, how, for example, the stated concerns of women, environmentalists, students, farmers, etc., were inextricably linked to the movement's goals of promoting human and democratic rights in Kenya.

Finally, "frame transformation" refers to the process of "redefining activities, events . . . that are already meaningful from the standpoint of some primary framework, in terms of another framework, such that they are now seen by the participants to be something quite else."<sup>128</sup> Specific examples of these included how,

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<sup>127</sup> Ibid., p. 472.

<sup>128</sup> Ibid., p. 474. Snow et al. contend that there are two analytically distinct dimensions of frame transformations: (1) "domain specific"; and (2) "global interpretative." "Domain specific frames" refer to the processes by which a "domain previously taken for granted is reframed as problematic and in need of repair, or a domain seen as normative or acceptable is reframed as an injustice that warrant change." In a "global interpretive frame," "the scope of change is broadened considerably as a new primary framework gains ascendance over others and comes to function as a kind of master frame that interprets events and experiences in a new [way]." Ibid., p. 475. Both of these concepts are examined in terms of the Kenyan case below.

as a consequence of strategic framing by movement leaders, a wide array of social and political problems in Kenya, including, but not limited to, violence and discrimination against women, unjust distribution of property rights, violent eviction of squatters, suppression of labor rights, and state predatory behavior in market processes, all came to be understood as fundamental violations of Kenyans' human and democratic rights. Moreover, overtime, as is seen in chapters Five through Seven, movement demands increasingly became understood in terms of the need to entirely rewrite Kenya's Constitution, in order to ensure formal institutional protection of Kenyans' human and democratic rights.

In addition to these four framing processes, social movement theorists also argue that the success of an emergent social movement in achieving its goals is ultimately determined by the extent to which framing processes accomplish four main tasks. These are: (1) "diagnostic framing," or identifying some aspect of social and political life as problematic and/or unjust; (2) "attributional framing," or attributing responsibility for this injustice to some identifiable individual, or set of individuals; (3) "prognostic framing," or proposing a solution and specifying what needs to be done; and (4) "motivational framing," or persuading others of the efficacy of collective action in rectifying this injustice.<sup>129</sup> Chapter Four discusses in detail how leaders of Kenya's transnational human and democratic rights movement were able to achieve these four key tasks.

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<sup>129</sup> This list draws from David A. Snow and Robert D. Benford, "Ideology, Frame Resonance, and Participant Mobilization," *International Social Movement Research*, vol.1, pp. 197-217; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

Significantly, as Sidney Tarrow and other prominent social movement theorists remind us, however, “[a]lthough movement organizers engage in framing work, not all framing takes place under their control.”<sup>130</sup> In addition to being limited by existing cultural resources, movement leaders compete with regime elites, emergent countermovements, as well as the media in “framing contests” over the meaning and interpretation of events. Moreover, because of the superior resources and capacities of state actors, movement leaders are often highly disadvantaged in these framing contests. Perhaps especially in former single party authoritarian regimes, where states continued to hold monopolies over mass media, as was the case in most sub-Saharan states through the late 1980s, movement leaders faced formidable obstacles in their framing efforts. This is why, in the Kenyan case, movement linkages with dominant church organizations were so critical to movement successes. Without the support of dominant church organizations, and their extensive linkages to rural areas, the movement likely would have remained predominantly urban and elite-based.

Finally, “framing processes” also have an important international dimension. As the Kenyan case demonstrates, the basic concepts that have been developed for analyzing the framing processes of domestic movements also provide critical insights into the framing of *transnational* movements. Specifically, the core strategic tasks of calling attention to or “naming” injustices, attributing blame for wrongs inflicted, specifying what needs to be done, and motivating potential supporters, are very similar

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<sup>130</sup> Tarrow, *Power in Movement: Social Movements and Contentious Politics*, p. 22.

at domestic and international levels. Thus, whether operating at domestic or international levels, the framing strategies of movement leaders remain fundamentally the same: to make issues understandable to target audiences, to attract attention and motivate action, and to make movement goals “fit” with responsive institutional structures.<sup>131</sup>

#### Legal Mobilization Strategies and the Promotion of Human and Democratic Rights:

Although social movements theories provide important insights into why and how Kenya’s contemporary transnational human rights and democracy movement emerged and developed, these theories tend not to examine the political impact of movements, nor why and how some movement strategies might be more successful than others in promoting human and democratic rights reform. As mentioned above, this is, in part, a consequence of disciplinary divisions of labor: whereas the study of social movements has been largely the domain of sociologists, the study of political institutional emergence and change has predominantly been the focus of political scientists. Although some social movement approaches, in particular political process and new social movements theories, examine the role of movements in impacting

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<sup>131</sup> See Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, pp. 2-3. In addition to Keck and Sikkink’s work, other important works that argue for extending the concept of framing to the international level include: Jackie Smith, Charles Chatfield, and Ron Pagnucco, eds., *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Syracuse, NY: Syracuse University Press, 1997. Sidney Tarrow, *The New Transnational Activism*, New York: Cambridge University Press, 2005. Donatella della Porta, Hanspeter Kriesi, and Dieter Rucht, eds., *Social Movements in a Globalizing World*, New York: St. Martin’s Press, 1999. John A. Gurdy, Michael Kennedy, and Mayer Zald, *Globalizations and Social Movements: Culture, Power, and the Transnational Public Sphere*, Ann Arbor: University of Michigan Press, 2000; Joe Brandy and Jackie Smith, eds., *Coalitions Across Borders: Transnational Protest and the Neoliberal Order*, Lanham, MD: Rowman and Littlefield, 2005.

social value change, these analyses rarely link instances of social change to political institutional change. Dominant approaches in the political science literature, on the other hand, provide important insights into the role of elite conflicts and strategic bargaining in explaining institutional emergence, but tend not to explain how and why elite preferences might change over time, nor the role of organized social interests in these processes.<sup>132</sup>

This study seeks to address this disciplinary gap by proposing a new theoretical approach that draws on social movements and legal mobilization theories, as well as empirical insights from the Kenyan case. Although legal mobilization theories focus predominantly on domestic level analyses, the study argues that fundamental insights from this literature can be fruitfully extended to the international level to explain why and how *transnational* movements can mobilize *international*, as well as domestic, legal norms and institutions to promote human and democratic rights protections in historically authoritarian and dependent regimes. In so doing, the study argues that we arrive at a more robust explanation for the emergence of rights protections in the Kenyan case, as well as one that better explains the puzzles that the Kenyan case poses to dominant theories of democratization in the political science literature.<sup>133</sup>

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<sup>132</sup> As mentioned above, the democratic transitions literature tends to focus almost exclusively on intra-regime bargaining between “soft-liner” and “hard-liner” regime elites, and it argues that democratic institutions emerge largely as a compromise outcome resulting from these elite bargaining processes.

<sup>133</sup> That is, the four dominant schools of thought discussed above: (1) realist/neo-realist theories; (2) modernization theories; (3) democratic transitions theories; and (4) civil society theories.

### Defining Legal Mobilization:

First, what is meant by “legal mobilization”? Frances Zemans defines legal mobilization as “a form of political activity by which the citizenry uses [existing laws, institutions and norms] on its own behalf.”<sup>134</sup> Much of the legal mobilization literature builds upon E.P. Thompson’s categorization of law as “(1) *institutions* (courts, etc.); (2) *personnel* (lawyers, judges, etc.), and (3) *ideology*.”<sup>135</sup> From this conceptual distinction follow three general assumptions: (1) legal systems contain multifaceted and even contradictory dimensions; (2) legal practices and rights discourses are not limited to formal state institutions; and (3) citizens’ interpretations of existing legal orders vary according to their status and class position in a particular society.<sup>136</sup> These assumptions distinguish legal mobilization theorists from legal scholars who tend to focus more narrowly on legal policy making and case outcomes,

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<sup>134</sup> Frances Kahn Zemans, “Legal Mobilization: The Neglected Role of the Law in the Political System,” *The American Political Science Review*, vol. 77, 1983, p. 690.

<sup>135</sup> E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, New York: Pantheon Books, 1975, p. 260. Cited in McCann, “Social Movements and the Mobilization of Law,” in Costain and McFarland, eds., *Social Movements and American Political Institutions*, p. 202.

<sup>136</sup> Central works in the legal mobilization literature that I draw from in this section include: Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago: University of Chicago Press, 1994; Michael W. McCann, “Social Movements and the Mobilization of Law,” in Anne N. Costain and Andrew S. McFarland, eds., *Social Movements and American Political Institutions*, Lanham, MD: Rowman and Littlefield Publishers, Inc., 1998, pp. 201-215; Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, New Haven, CT: Yale University Press, 1974; Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998; Charles R. Epp, “Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms,” *American Political Science Review*, vol. 90, no. 4, December 1996, pp. 765-779; Hendrick Hartog, “The Constitution of Aspiration and ‘The Rights That Belong to Us All,’” *The Journal of American History*, December 1987, pp. 1013 – 1034; Frances Kahn Zemans, “Legal Mobilization: The Neglected Role of the Law in the Political System,” *The American Political Science Review*, vol. 77, 1983, pp. 691-703; Alan Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies,” *Journal of Law and Society*, vol. 17, no. 3, Autumn 1990, pp. 309-328; Kevin J. O’Brien, “Rightful Resistance,” *World Politics*, vol. 49, no. 1, 1996, pp. 31-55; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, New York: Pantheon Books, 1975.

and tend not to examine how legal institutions and norms can be mobilized by subordinate groups to promote broad processes of social and political change.

Although legal mobilization theorists generally agree with critical legal scholars that legal institutions and norms typically function to sustain existing power hierarchies in a given society, they find that, under certain conditions, these institutions and norms can be used by subordinate groups to successfully challenge and change these hierarchies. Thus, legal mobilization theorists are centrally concerned with specifying these conditions.

In an important work published in 1998, legal mobilization theorist Charles Epp finds that a necessary condition for effective legal mobilization is the existence of what he calls legal mobilization “support structures.”<sup>137</sup> Although he does not reference social movements theory, Epp’s conception of support structures for rights advocacy is similar to the social movements concept of mobilizing structures, but his operationalization of the concept is more specific. Whereas social movement theories operationalize mobilizing structures as “those collective vehicles, informal, as well as formal, through which people mobilize and engage in collective action,”<sup>138</sup> Epp argues that at a minimum, effective support structures for legal mobilization must include: (1) rights advocacy lawyers; (2) rights advocacy organizations, and (3) sources of

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<sup>137</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998.

<sup>138</sup> See McAdam, McCarthy and Zald, “Introduction,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 3.



financing.<sup>139</sup> Folded into this conception are additional insights from resource mobilization theories in the social movements literature. That is, for effective legal mobilization to emerge, not only are *organizational resources* (i.e. able and committed lawyers and rights advocacy organizations) necessary, but *material resources* (i.e. sources financing) are also required.

As the study's empirical chapters demonstrate, Epp's insights are quite relevant to the Kenyan case. It was not until rights advocacy lawyers and rights advocacy organizations emerged, *and* they received financial assistance –from domestic and international sources, that legal mobilization strategies to promote human and democratic rights protections in Kenya began to be effective. Specifically, in terms of organizational resources, this required the Africanization and decolonization of Kenya's professional legal association, the Law Society of Kenya (LSK), and the development of foreign-based, as well as domestic, rights advocacy organizations –primarily in the form of international human rights NGOs. In terms of material resources, this required the assistance of domestic legal and religious organizations, international human rights organizations, independent foundations, as well as Kenya's major donors.

Charles Epp's work has been significant in at least two respects. First, through his detailed case studies of rights expansion in the United States, Canada, Great Britain and India, his work has made an important contribution to our understanding of why and how legal mobilization strategies can impact domestic institutional

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<sup>139</sup> Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, pp. 2-3.

change. Second, in so doing, his work has effectively challenged two dominant explanations in the public law literature that point to either activist judges or constitutionally entrenched bills of rights as primary catalysts in explaining rights expansion.

Despite these important contributions, as Ann Southworth points out, Epp's work focuses almost exclusively on legal mobilization within *institutionalized* court systems in general, and individual rights litigation at high court levels in particular. In so doing, she argues it largely neglects the numerous other arenas where law is "negotiated, made and enforced."<sup>140</sup> As she explains, "[c]ourts . . . are not the only arenas in which activists invoke rights claims and attempt to give them legal force, and they are not the only institutions to have contributed to the expansion of individual rights."<sup>141</sup> Although litigation in the courts can be *one* important strategy of rights advocacy, "activists also pursue . . . rights claims before agency officials and legislatures, in the press and the workplace, and on the streets,"<sup>142</sup> as the Kenyan case clearly demonstrates.

In her work, Southworth finds that legislative and administrative advocacy, in particular, "often contribute . . . directly to social change by inducing people to voluntarily comply, influencing attitudes and norms, and bolstering grassroots

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<sup>140</sup> Ann Southworth, "The Rights Revolution and Support Structures for Rights Advocacy," *Law and Society Review*, vol. 34, no. 4, 2000, p. 1204.

<sup>141</sup> *Ibid.*, p. 1208.

<sup>142</sup> *Ibid.* See also Piven and Cloward 1979, as cited in Southworth, "The Rights Revolution and Support Structures for Rights Advocacy," p. 1208.

organizing activities.”<sup>143</sup> Other legal mobilization theorists have also found that “rights litigation has accomplished little where it has not been accompanied by legislative and executive branch support.”<sup>144</sup> Thus, an approach to legal mobilization is needed that “recognizes how rights are claimed and negotiated in a wide variety of settings, including the courts, but also legislatures, agencies, the workplace, the media, public squares and private interactions.”<sup>145</sup> As the Kenyan case also demonstrates, this broader conception of legal mobilization more accurately accounts for the ways in which Kenya’s mass-based and transnational movement used domestic and international legal institutions and norms to promote greater rights protections in Kenya.

### Why and How Do Legal Mobilization Strategies Work?

First, legal mobilization theorists, like social movements theorists, contend that “[o]ne of the primary obstacles to social change is the acquiescence of the oppressed.”<sup>146</sup> Thus, “whether discontents become political issues depends . . . on

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<sup>143</sup> Examples that Southworth provides from the United States include: (1) the Civil Rights Act of 1964, which gave African Americans “almost immediate access to hotels, restaurants, theaters, hospitals, and swimming pools. . . .”; (2) the Elementary and Secondary Education Act of 1965, which made \$1 billion available to school districts that did not discriminate; and (3) Title VII of the Civil Rights Act of 1964 “profoundly changed how employers make hiring, promotion, and firing decisions.” As she points out, these legislative acts “contributed substantially to desegregating schools, as least as much as the Supreme Court’s decision in *Brown v. Board of Education*,” and their impact cannot be explained simply by litigation to enforce these Acts. *Ibid.*, p. 1210.

<sup>144</sup> *Ibid.*, p. 1208.

<sup>145</sup> *Ibid.*, p. 1209.

<sup>146</sup> Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, pp. 132, 134. Among others in a long tradition reaching back to Marx, see John Gaventa, who has also drawn

whether they are *perceived* as a social problem” and, they argue, this is “more a matter of cognition and values than of objective measures of deprivation, oppression, and injustice.”<sup>147</sup> As social movement theorist Doug McAdams also argues, there is a “tendency [for] people to explain their situation as a function of individual rather than situational [or political] factors,” or what is referred to as the “fundamental attribution error.”<sup>148</sup> In this respect, legal mobilization theorists have found that simply by framing demands in terms of rights creates an awareness that the problem is no longer a personal matter, but that it holds greater public and political significance.<sup>149</sup>

Moreover, legal mobilization theorists argue that rights framing can be particularly effective in empowering previously quiescent populations because once citizens “begin to believe that they have rights. . . they cease sublimating their grievances and begin to seek redress.”<sup>150</sup> As Stuart Scheingold explains, “[s]ince rights carry with them connotations of entitlement, a declaration of rights tends to politicize needs by changing the way people think about their discontents.”<sup>151</sup>

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attention to this problem in his insightful study: John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*, Chicago: University of Illinois Press, 1980.

<sup>147</sup> Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, pp. 132, 134.

<sup>148</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 50. The term “fundamental attribution error” is credited to Ross, 1977, cited in McAdam, p. 50.

<sup>149</sup> McCann, “Social Movements and the Mobilization of Law,” in Costain and McFarland, eds., *Social Movements and American Political Institutions*, p. 208.

<sup>150</sup> Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, p. 131. Thus, the rights frame operates in a similar way to the “injustice frame” in that it takes a situation that was previously seen as “unfortunate but perhaps tolerable,” and reframes and it in such a way as to “underscore and embellish [its] seriousness and injustice” and recast it as a violation of one’s entitlements, or rights.

<sup>151</sup> *Ibid.*, p. 136.

Interestingly, Alexis de Tocqueville expressed a similar understanding of rights more than a century earlier when he wrote: “There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights. There is something great and virile in the idea of rights which removes from any request its suppliant character, and places the one who claims it on the same level as the one who grants it.”<sup>152</sup>

Although numerous examples of this can be pointed to in the Kenyan case, as well as other sub-Saharan cases, perhaps particularly illustrative is the example of mothers of political prisoners in Kenya, who in early 1992, for the first time in Kenyan history, mobilized rights that were protected, in theory, under domestic constitutional and international human rights law, to demand the release of their children.<sup>153</sup> By framing their demands in terms of these domestically and internationally recognized rights, problems that had previously been perceived as the “personal” problems of individual families in Kenya came to dominate not only the domestic political agenda, but also the international political agenda. As local and international media publicized the mothers’ demands, and domestic and international support for the mothers grew, Kenya’s incumbent authoritarian regime was finally forced to recognize the problem of illegal detention of political prisoners in Kenya, and eventually released nearly all its political detainees, as the mothers had demanded.

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<sup>152</sup> Alexis de Tocqueville, “The Idea of Rights in the United States,” *Democracy in America*, pp. 237-240.

<sup>153</sup> See Chapter Five for a full discussion of this case.

Second, by “provid[ing] credible goals, cue[ing] expectations and enhanc[ing] self images,” legal mobilization theorists argue that legal mobilization strategies and rights framing can also provide an important basis for political organization.<sup>154</sup>

Although they concede that there are no assurances that successful political organizations or movements will in fact emerge from a growing awareness of rights, they contend that by mobilizing legal institutions and norms, subordinate groups can “aggregate political energies and bring them to bear on the vital aspect of successful action, that is, building an organization.”<sup>155</sup>

This aspect of legal mobilization is also clearly seen in the Kenyan case as a growing number of movement leaders and activists began framing their demands in terms of specific human and democratic rights,<sup>156</sup> this strategy began to lay the foundation for emergent social movement organizations (SMOs)<sup>157</sup> focused on these

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<sup>154</sup> Stuart Scheingold, for example, argues that through legal mobilization strategies “[r]ights are employed as mobilizing catalysts. They provide credible goals, cue expectations, and enhance self-images. By thus instilling a sense of purpose, feelings of legal competence, and perceptions of political efficacy, an emphasis on rights lays the foundation for effective political organization.” Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, p. 214.

<sup>155</sup> Ibid.

<sup>156</sup> In particular, as the case study demonstrates, movement actors focused on the rights to free speech, information, association and assembly, as well as the rights to participate in free and fair elections.

<sup>157</sup> Social movement theorists Jackie Smith, Ron Pagnucco and Charles Chatfield define social movement organizations (SMOs) as “those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation.” They further explain that SMOs “vary in their degree of *formalization*, or formally defined roles, rules and criterion of membership, and *centralization*, or the degree of concentration of decision-making power.” Smith, Pagnucco and Chatfield, “Social Movements in World Politics: A Theoretical Framework,” in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Smith, Chatfield and Pagnucco, eds., pp. 60 – 61. In an early work, Mayer Zald and Roberta Garner argue that social movement organizations differ from other types of organizations in two ways: (1) “they have goals aimed at changing the society and its members; they wish to restructure society or

rights. Although, as discussed above, other conditions were also necessary for the successful emergence and development of these organizations,<sup>158</sup> framing demands in terms of these rights importantly focused emergent organizational goals and expectations, and facilitated coalition building between domestic and foreign-based actors and organizations. As emergent domestic organizations gained greater levels of domestic and international support, interviews with individuals within these organizations also reveals that their sense of political efficacy grew, as well as their confidence that significant human and democratic rights concessions could be won from Kenya's resistant authoritarian regime.

Third, by employing legal mobilization strategies, legal mobilization theorists have found that “legal norms can become important elements in the process of forging a sense of collective aspiration and identity among differently situated citizens.”<sup>159</sup> In the Kenyan case, as the study demonstrates, the “human rights” frame proved particularly important in forging a sense of collective identity among such diverse groups as Kenyan Protestants, Catholics and Muslims; rural farmers and urban lawyers and squatters; as well as across ethnic lines –albeit to a more limited extent, especially in the early stages of movement mobilization.<sup>160</sup> Moreover, although this

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individuals . . .” and (2) “they are characterized by an incentive structure in which purposive incentives predominate. While some short-run material incentive may be used, the dominant incentives offered are purposive . . .” Mayer N. Zald and Roberta Ash Garner, “Social Movement Organizations: Growth, Decay, and Change,” p. 123.

<sup>158</sup> This process is discussed in detail in Chapter Five.

<sup>159</sup> McCann, “Social Movements and the Mobilization of Law,” in Costain and McFarland, eds., *Social Movements and American Political Institutions*, p. 204.

<sup>160</sup> As a consequence of colonial and post-colonial legacies, which provided certain ethnic groups in Kenya with disproportionate access to state resources, ethnic divisions were particularly difficult for

theoretical insight has been applied predominately to domestic level politics, as the Kenyan case demonstrates, the development of human rights norms and institutions at the *international* level also provided a valuable resource to its emergent domestic movement. By framing demands in terms of *international* human rights, emergent domestically-based activists and organizations were able to reach out to and successfully mobilize foreign-based actors and organizations in support of their goals.

Fourth, as Michael McCann argues, legal mobilization strategies can also provide important tools for articulating a “causal story” about existing structures of power and sources of injustice, which, in turn, can facilitate movement mobilization and success in achieving movement goals.<sup>161</sup> For example, by framing demands in terms of rights protected, in theory, under existing international and domestic laws, and publicizing regime violations of these laws, legal mobilization strategies can work to accomplish the four key “tasks” that social movement theorists argue are necessary for movement success: (1) diagnosing, or “naming” the problem; (2) attributing responsibility to specific individuals, groups, and/or institutions; (3) proposing

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movement leaders to overcome in the process of building Kenya’s transnational movement. This situation provides a clear example of the way in which legal institutional legacies can *constrain*, as well as enable, emergent movements. On the other hand, as the case study demonstrates, overtime, important successes were also achieved in this respect. Especially important in this respect, as is argued in Chapter Seven, was the fact that movement leaders advocated central institutions of consensus democracy as part of their constitutional reform agenda.

<sup>161</sup> McCann, “Social Movements and the Mobilization of Law,” in Costain and McFarland, eds., *Social Movements and American Political Institutions*, p. 204. This observation recalls the emphasis that social movements theorists have placed on the role of “injustice frames” in catalyzing movement emergence.



solutions for redress; and (4) motivating collective action by reference to extant legal institutions and norms.<sup>162</sup>

In the Kenyan case, as movement activists documented and publicized the role of the resistant Moi-KANU regime and specific state institutions in violating fundamental human and democratic rights, the illegitimacy of the regime and these institutions became increasingly apparent to a growing number of Kenyans. By then proposing reform strategies targeted specifically at these institutions, and reaching out to and mobilizing other domestic and foreign-based actors and organizations, movement leaders succeeded not only in building a mass-based and transnational movement focused on human and democratic rights reform in Kenya, but also in forcing Kenya's resistant incumbent regime to enact formal rights reforms at the state level.<sup>163</sup> Perhaps even more significantly, however, by using international and domestic legal norms to build a mass-based movement focused on human and democratic rights, for the first time in Kenyan history, Kenyans began practicing political speech, forming and joining opposition political parties and organizations,

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<sup>162</sup> As discussed above, contemporary social movements theories have argued that four key tasks of framing that largely determine the success of social movements are: (1) diagnostic framing; (2) attribution framing; (3) prognostic framing; and (4) motivational framing. This list draws from David A. Snow and Robert D. Benford, "Ideology, Frame Resonance, and Participant Mobilization," *International Social Movement Research*, vol.1, pp. 197-217; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. As noted above, although Keck and Sikkink focus on "advocacy networks" rather than social movements, many of their theoretical insights draw from, and importantly contribute to, social movements theory.

<sup>163</sup> As the study documents, although Kenya's constitutional Bill of Rights contained explicit formal protections for Kenyans' fundamental human and democratic rights, these rights protections were undermined by a series of statutory and administrative laws, as well as majoritarian political institutions.

campaigning and voting in multiparty elections, engaging in civil disobedience, and demanding state accountability through the courts, the parliament and the streets.<sup>164</sup>

Fifth, in order to compel formal institutional change at the state level, legal mobilization theorists argue for the importance of what they call “legal leveraging.”<sup>165</sup> Although Michael McCann contends that this dimension of legal mobilization “usually entails some measure of litigation or other formal legal action,”<sup>166</sup> theoretical insights from Keck and Sikkink’s model,<sup>167</sup> and empirical insights from the Kenyan case, indicate that this is not necessarily the case. Specifically, Keck and Sikkink’s 1998 work draws attention to four types of leveraging used by transnational advocacy networks that have been successful in pressuring resistant authoritarian regimes to introduce formal institutional reforms at the state level:

(1) *information politics*, or the ability to quickly and credibly generate politically usable information and move it to where it will have the most impact; (2) *symbolic politics*, or the ability to call upon symbols, actions, or stories that make sense of a situation for an audience that is frequently far away; (3) *leverage politics*, or the ability to call upon powerful actors to affect a situation where weaker member of a network are unlikely to have influence; and (4) *accountability politics*, or the effort to hold powerful actors to their previously stated policies or principles.<sup>168</sup>

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<sup>164</sup> This process is documented in Chapters Five and Six.

<sup>165</sup> McCann, “Social Movements and the Mobilization of Law,” p. 207.

<sup>166</sup> Ibid.

<sup>167</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

<sup>168</sup> Ibid., p. 16. Keck and Sikkink’s analysis also builds upon Alison Brysk’s work on human rights networks and movements in Latin America, where she also develops and uses the categories of “information politics” and “symbolic politics.” See Alison Brysk, “Hearts and Minds: Bringing Symbolic Politics Back In,” *Polity* 27, Summer 1995, pp. 559 – 585; Alison Brysk, “Acting Globally: Indian Rights and International Politics in Latin America,” in *Indigenous Peoples and Democracy in Latin America*, ed. Donna Lee Van Cott, New York, St Martin’s Press/Inter-American Dialogue, 1994,

As we shall see in the Kenyan case, movement participants used each of these strategies, while drawing on international human rights agreements to which the Kenya was party, as well of Kenya's constitutional Bill of Rights, to force Kenya's incumbent authoritarian regime to respect its international and domestic legal obligations. For example, by drawing on the rights recognized by the International Covenant on Civil and Political Rights (ICCPR) and Kenya's Constitution, and carefully documenting and publicizing regime abuses, movement representatives used *information politics* to expose contradictions between regime obligations and practices, and undermine regime legitimacy both domestically and internationally. This information was then also used by movement actors and organizations to engage in *leverage politics* and pressure Kenya's donor states, as well as relevant third party organizations --such as the World Bank and the IMF-- to withhold aid to the regime until human and democratic rights reforms were enacted.

Examples of symbolic politics used by Kenya's movement include the mobilization of the mothers of political prisoners in Kenya, whose identity as mothers resonated with other mothers both domestically and abroad. Because these mothers also framed their demands in terms of their children's political and civil rights, as recognized by the ICCPR and Kenya's Constitution, they also succeeded in effectively legitimizing and politicizing their demands, mobilizing domestic and international

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pp. 29 – 51; and Alison Brysk, "From Above and Below: Social Movements, the International System, and Human Rights in Argentina, *Comparative Political Studies*, vol. 26, no. 3, October 1993, pp. 259-285.

support, and ultimately forcing the Moi-KANU regime to observe its human and democratic rights obligations. In so doing, domestic and foreign-based organizations comprising Kenya's human rights and democracy movement also used *accountability politics* to "shame" both the Moi-KANU regime, as well as Kenya's donor states, into promoting policies more consistent with their professed support of human and democratic rights.<sup>169</sup>

Although forcing a resistant authoritarian regime to introduce formal rights reforms at the state level is, in and of itself, a significant achievement, as the Kenyan case clearly demonstrates, this does not necessarily mean that these changes will be consistently implemented or enforced by state actors. In this respect, by promoting greater levels of awareness of the substance of rights reforms at the societal level, legal mobilization strategies in the Kenyan case helped empower citizens to actively resist and publicize continued state violations, and, in so doing, often forced greater state compliance. In addition, by continuing to lobby parliament and executive agencies, as well as bring legal actions against the state for continued violations, legal mobilization strategies worked in a similar way to pressure resistant state actors and institutions to be more consistent in enforcing newly enacted reforms. Finally, as Michael McCann explains, whether judicial decisions are favorable or not, formal legal actions against states can often further the goals of rights movements. This is because "[f]ormal legal actions by movements [can] transform disputes by mobilizing

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<sup>169</sup> This is a strategy documented by Keck and Sikkink in their analysis. Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. See also: Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*.

not just judges. . . but also a variety of social advocacy groups, nonjudicial state officials, and broader public sentiment.”<sup>170</sup> In so doing, litigation, whether successful or not, “provides a powerful means for . . . ‘expanding the scope of conflict’ in ways that enhance the bargaining power of disadvantaged groups, and raise the perceived risks of hard line opposition from their foes.”<sup>171</sup> The Kenyan case provides numerous examples of this, as is documented in the following chapters. In addition, and as is also seen in the Kenyan case, “initiatives in the courts can be used to bring important matters to legislative attention, [and to] force them upon the agendas of reluctant. . . representatives.”<sup>172</sup> As anthropologist Sally Engle Merry insightfully points out, “[e]xperienced plaintiffs [over time] come to see rights as an opportunity [and] a basis for action, rather than a guarantee of protection.”<sup>173</sup>

A final legal mobilization tactic used by movement activists in the Kenyan case was to take formal constitutional and international human rights protections and argue for extension of these to excluded groups in Kenya – in particular to women, ethnic minorities, Kenya’s youth and the physically handicapped.<sup>174</sup> Movement

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid. McAdam also notes a similar phenomenon in his study of the U.S. civil rights movement. McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*.

<sup>172</sup> Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, p. 144.

<sup>173</sup> Sally Engle Merry, “Concepts of Law and Justice among Working-Class Americans: Ideology as Culture,” *Legal Studies Forum* 9, 1985, p. 67. Cited in John Brigham, *The Constitution of Interests: Beyond the Politics of Rights*, New York: New York University Press, 1996, p. 11.

<sup>174</sup> Michael McCann also finds evidence for these strategies in his work. As he argues, “movement building around particular rights claims can emerge in a variety of ways, including: “by exploiting the conflict between already settled rights claims and practices violating those rights, by identifying implicit contradictions within settled discursive logics of rights, or by developing logical extensions or

leaders insisted not only that these groups be equally protected under Kenyan law, but also that special affirmative action provisions be made for them in Kenya's revised constitution. In addition, as is discussed in Chapters Six and Seven, movement leaders demanded that a form of proportional representation be introduced to guarantee these groups greater voice in national level decision-making in Kenya. As a consequence, not only were movement leaders able to forge politically valuable coalitions with these groups and organizations representing them, but they were also able to mobilize considerable political support to win important institutional and legal protections for them.

**Conclusion:**

This chapter examined four dominant theoretical approaches to explaining human and democratic rights development in the political science literature and found that although each provides some insight into aspects of political change in Kenya, none fully explains, or would predict, the changes witnessed at state and societal levels between December 1991 and December 2002. It was in December 1991 that Kenya's incumbent authoritarian regime announced founding elections, and in December 2002 that this regime was finally, and decisively, defeated by a reformist opposition coalition. Thus, this period covers regime change in Kenya from an authoritarian regime to a pseudodemocracy to, finally, an electoral democracy. Building on concepts and insights from social movements and legal mobilization theories, and

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new practical applications of settled rights claims." McCann, "Social Movements and the Mobilization of Law," in Costain and McFarland, eds., *Social Movements and American Political Institutions*, p. 204.

integrating state, societal and international levels of analysis, the chapter develops a new theoretical framework for understanding the extension of human and democratic rights protections in historically authoritarian and dependent states, such as Kenya.

## Chapter Three

### Historical Background: Institutional Sources of Rights Violations and the Legal Construction of Authoritarianism in Kenya, 1963 – 1988

Little exists to document the widespread repression of opposition in Africa since independence. Current studies of the rise of capitalism and the post colonial state largely ignore institutionalized authoritarianism, which is the political side of this process . . . Its salience continues with Kenya having become a *de jure* one party state under President Daniel arap Moi . . . It now appears that authoritarianism must be regarded as part of the ongoing political process and not simply as episodic.

-- Susanne D. Mueller, 1983

#### Introduction:

In perhaps the most authoritative work on constitutional development in Kenya, Yash Pal Ghai and J.P.W.B. McAuslan argue that Kenya's independence constitution "showed a remarkable distrust of power" and carefully designed institutional safeguards to check and balance the powers of executive, legislative and judicial branches of government.<sup>1</sup> According to these constitutional scholars, "Kenya was to be a country where the Rule of Law was to be supreme, individual rights in a context of a non-discriminating society were to be fundamentally safeguarded, legislative and executive powers were to be accordingly circumscribed and . . . judges were to be established as watchdogs over the new scheme."<sup>2</sup> Moreover, Kenya's constitutionally entrenched Bill of Rights, which provided extensive formal protections for individual political and civil liberties, "was to be supreme over the

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<sup>1</sup> Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, New York: Oxford University Press, 1970, p. 190.

<sup>2</sup> *Ibid.*, p. 411.



ordinary laws and executive action, and amendment was through a complex and difficult process.”<sup>3</sup>

Despite these apparently careful constitutional efforts, the fundamental human and democratic rights of Kenya citizens were consistently violated throughout the country’s first two independence regimes, the Kenyatta regime (1963 – 1978) and the Moi regime (1978 – 1997). This chapter examines why and how this came about. Specifically, the chapter focuses on the political development of Kenya’s independence Constitution, later amendments to this Constitution, and the impact of these on democratic and human rights protections for Kenyan citizens between the years 1963 and 1988. This period covers the entire Kenyatta regime and the first decade of the Moi regime. Although Kenyans’ human and democratic rights continued to be violated throughout the remainder of the Moi regime (1989 – 2002), the 1988 general elections marked an important turning point in Kenyan politics.

After these elections, and for the first time in Kenya’s post-independence history, a transnational human rights and democracy movement, the central focus of this dissertation, became increasingly assertive and successful in challenging regime abuses. Although the movement began to emerge in the early 1980s, it was not until the mid-1980s, as is discussed in the following chapter, that it gained sufficient political support to constitute a credible threat to the regime. Over the next fifteen years (1988 – 2002), as the case study documents, the movement played an

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<sup>3</sup> Ibid.

unexpected, and historically unprecedented, role in promoting and protecting the human and democratic rights of Kenyans.

This chapter lays the historical groundwork for the case study and provides the historical background necessary to understand the institutional and political environment within which Kenya's contemporary human rights and democracy movement emerged. In addition, it addresses the puzzle of why and how Kenyans' political and civil rights came to be so blatantly violated during its first twenty-five years of independent rule, despite such an apparently carefully crafted independence Constitution. Building on the work of Arend Lijphart, the chapter finds that two majoritarian features of newly independent Kenya's political institutional structure in particular, its single-member district (SMD) plurality electoral system and weak bicameralism, in addition to colonial authoritarian legacies, contributed to the erosion of formal rights protections not only for Kenya's political minorities, but ultimately all Kenyans, during Kenya's first two post-independence regimes.

Specifically, as electoral systems theorists would predict, as a consequence of Kenya's single-member district plurality electoral system, Kenya's independence elections resulted in a predominantly two-party race<sup>4</sup> in which the larger of these two

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<sup>4</sup> As is discussed below, one other small party, the African Peoples' Party (APP) won 8 seats (7.1 percent of the vote share) in Kenya's House of Representatives, and 2 seats (5.3 percent of the vote share) in the Senate. See Table 3.1 at the end of this chapter for a summary of Kenya's 1963 Senate and House of Representative election results. This predominance of two parties, given Kenya's SMD plurality electoral system, is as Duverger's Law would predict. Duverger's Law is a political principle that states that plurality electoral systems tend "to create and maintain two-party systems." Maurice Duverger, "Duverger's Law: Forty Years Later," in Bernard Grofman and Arend Lijphart, eds., *Electoral Laws and Their Political Consequences*, New York: Agathon Press, Inc., 1986, p. 69. Duverger, a French sociologist who originally published his findings in 1951, explains that this is the consequence of both "mechanical" and "psychological" effects. The "mechanical effect" refers to the fact that a party can win up to 49.99 percent of the vote in a constituency, yet still fail to win a seat. The

parties, the Kenya Africa National Union Party (KANU), representing Kenya's larger ethnic groups, was over-represented in Kenya's lower house, the House of Representatives.<sup>5</sup> Despite the fact that Kenya's upper legislative chamber, the Senate, was designed, in theory, to compensate for the predicted over-representation of KANU in the lower house, because Kenya's independence Constitution failed to provide for a strong form of bicameralism, almost all power was concentrated in the lower house. As a result, Kenya's main opposition party, Kenya Africa Democratic Union (KADU), comprised primarily of Kenya's smaller ethnic groups, was effectively excluded from national power in these elections. As Lijphart has argued: "Two conditions have to be fulfilled [in bicameral systems] if... minority representation is to be meaningful: the upper house has to be elected on a different basis than the lower house, and it must have real power – ideally as much power as the lower house."<sup>6</sup>

The chapter argues that these two majoritarian institutional features contributed not only to the elimination of institutions originally designed to safeguard minority

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"psychological" effect follows from mechanical effect in that voters, candidates and political party organizers understand that single-member district plurality systems discriminate against smaller parties, and thus they gravitate towards supporting major parties.

<sup>5</sup> This is because plurality systems create a situation where majorities are "manufactured" out of mere pluralities. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 15. Douglas W. Rae, as Lijphart explains, was the first to use the term "manufactured majorities" to describe the artificial majorities created by plurality electoral systems. Ibid. Thus, depending on the number of candidates standing for election in a particular district, the percentage of total votes needed to win a plurality, or "majority," can be quite low. Moreover, opposition candidates can potentially receive up to 49.99 percent of the vote in a constituency, and still not win a seat; and, if constituencies are of very unequal population size, as is also possible under SMD plurality systems, then an opposition party could potentially receive a greater number of votes than the majority party nationally, yet still win fewer legislative seats. In the Kenyan case, as the chapter demonstrates, KANU was able to use its manufactured majority in parliament to gradually undermine opposition and minority rights protections in Kenya.

<sup>6</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 39.

interests in Kenya, but also to the legislature's failure to effectively check executive power. As a consequence, with the full support of Kenya's legislature, Kenya's executive introduced a series of constitutional amendments (thirty in all) that not only undermined the independence of Kenya's judiciary and its national electoral commission, but also replaced parliamentarianism with presidentialism; replaced institutions promoting decentralized and federal rule with centralized and unitary structures; replaced bicameralism, albeit in weak form, with unicameralism; and eliminated constitutional rigidity and judicial review. As consensus theorists of democracy have argued, each of these institutional features can importantly facilitate democratic functioning, especially in ethnically plural societies such as Kenya's.<sup>7</sup>

Thus, the chapter concludes that, in addition to colonial authoritarian legacies, Kenya's independence Constitution itself ultimately contributed to the emergence of two post-independence authoritarian regimes in Kenya that had little regard for the fundamental human and democratic rights of its citizens.

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<sup>7</sup> Although there has been considerable debate regarding a precise definition of "plural" societies, this study uses the four criteria outlined by Lijphart: (1) "segments" are clearly identifiable; (2) the number of people comprising each segment is easily determinable; (3) segmental boundaries and political, social and economic organizational boundaries closely correspond; and (4) political parties follow segmental lines. See: Arend Lijphart, "Consociational Theory: Problems and Prospects," *Comparative Politics*, vol. 13, no. 3, April 1981, p. 356. Lijphart explains that demographic "segments" may be either "religious, ideological, linguistic, regional, cultural, racial, or ethnic [in] nature." See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977, pp. 3 - 4. Although societal pluralism is clearly a matter of degree, as Lijphart suggests, these four criteria "may be used to determine whether a society is completely plural or deviates from perfect pluralism to a greater or lesser extent on one or more of the four dimensions." Lijphart, "Consociational Theory: Problems and Prospects," p. 356.

### **Models of Democracy and Their Impact on Rights Protections:**

As Arend Lijphart explains, one of the fundamental dilemmas of democracies, conceived of as “government by and for the people,” is deciding “who will do the governing and to whose interests . . . the government [should] be responsive when the people are in disagreement and have divergent preferences.”<sup>8</sup> The most common answer to this problem has been “the majority of the people,” the principle that informs majoritarian forms of democracy. A second answer, which informs Lijphart’s consensus model of democracy, is: “as many people as possible.”<sup>9</sup> As Lijphart explains, the crux of the consensus model of democracy is:

it accepts majority rule only as a *minimum* requirement: instead of being satisfied with narrow decision-making majorities, it seeks to maximize the size of these majorities. Its rules and institutions aim at broad participation in government and broad agreement on the policies that the government should pursue.<sup>10</sup>

The majoritarian model of democracy, on the other hand, “concentrates political power in the hands of a bare majority –and often even merely a plurality instead of a majority.”<sup>11</sup>

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<sup>8</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 1.

<sup>9</sup> *Ibid.*, p. 2.

<sup>10</sup> *Ibid.*, p. 3.

<sup>11</sup> *Ibid.* In an insightful article, Jack Nagel argues that “majoritarian” democracies that are founded on plurality electoral systems “should be described as *pluralitarian*, rather than majoritarian,” due to the fact that it is merely a plurality and not a *majority* that rules under these conditions. See Jack H. Nagel, “Expanding the Spectrum of Democracies: Reflections on Proportional Representation in New Zealand,” in *Democracy and Institutions: The Life Work of Arend Lijphart*, Markus M.L. Crepaz, Thomas A. Koelble, and David Wilsford, eds., Ann Arbor: The University of Michigan Press, 2000, p. 118.

In his study of government forms and performance in thirty-six democracies,<sup>12</sup> Lijphart finds that, with respect to what are considered perhaps the most important political institutional structures in democracies, ten characteristics fundamentally differentiate majoritarian and consensus models. These are:

1. Concentration of executive power in single-party majority cabinets versus executive power-sharing in broad multiparty coalitions.
2. Executive-legislative relationships in which the executive is dominant versus executive-legislative balance of power.
3. Two-party versus multiparty systems
4. Majoritarian and disproportional electoral systems versus proportional representation.
5. Pluralist interest groups systems with free-for-all competition among groups versus coordinated and “corporatist” interest group systems aimed at compromise and concertation.
6. Unitary and centralized government versus federal and decentralized government.
7. Concentration of legislative power in a unicameral legislature versus division of legislative power between two equally strong but differently constituted houses.
8. Flexible constitutions that can be amended by simple majorities versus rigid constitutions that can be changed only by extraordinary majorities.
9. Systems in which legislatures have the final word on the constitutionality of their own legislation versus systems in which laws are subject to a judicial review of their constitutionality by supreme or constitutional courts.
10. Central banks that are dependent on the executive versus independent central banks.<sup>13</sup>

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<sup>12</sup> The study examines the performance of thirty-six democracies from their first national elections in or soon after 1945 through the middle of 1996. It builds on Lijphart’s earlier work, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, but as Lijphart notes, the fifteen new countries added in his most recent work include four from southern Europe (Spain, Portugal, Greece, and Malta) and the remainder from the developing world: Latin America, the Caribbean, Africa, Asia and the Pacific. See Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. x.

<sup>13</sup> Lijphart finds that, empirically, these ten institutional characteristics cluster in two separate dimensions. The first dimension groups institutional characteristics of executives, parties, electoral systems and interests groups, and is referred to as the “*executive-parties dimension*.” The second dimension groups institutional characteristics typical of federal versus unitary forms of government, and

Although Lijphart's empirical study finds that consensus democracies outperform majoritarian democracies on such significant indicators as macroeconomic management, control of violence, the quality of democracy, and democratic representation in *all* democratic societies, regardless of degree of societal heterogeneity, consensus institutions have been found to be particularly important in ethnically divided, or plural, societies.<sup>14</sup> In particular, electoral systems that promote proportional representation,<sup>15</sup> as opposed to majoritarian/plurality systems, which tend to over-represent larger parties, are considered of critical importance. In fact, as West African economist and Nobel Prize laureate, Arthur Lewis, argued in the mid-1960s: “[T]he surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American electoral system of first-past-the-post.”<sup>16</sup>

The central problem with majoritarian institutions in general in plural societies, and majoritarian electoral systems in particular, as consensus theorists of democracy argue, is that they tend to *permanently* exclude minorities from government, thus violating democracy's primary meaning, that “all who are affected by a decision

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is referred to as the “*federal-unitary dimension*.” Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 2 – 4.

<sup>14</sup> Defined above.

<sup>15</sup> As Lijphart explains, “the basic aim of proportional representation (PR) is to divide the parliamentary seats among the parties in proportion to the votes they receive.” Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 37. Thus, proportional representation systems aim to translate votes into seats as accurately as possible.

<sup>16</sup> W. Arthur Lewis, “The Plural Society,” in *Politics in West Africa*, Westport, CT: Greenwood Press, 1965, p. 71. Single-member district plurality electoral systems are referred to as “first-past-the-post” systems in Great Britain and in some of its former colonies.

should have the chance to participate in making that decision either directly or through chosen representatives.”<sup>17</sup> As Lijphart explains, “the exclusion of the minority is mitigated if majorities and minorities alternate in government,” or the policy spectrum of political parties is narrow enough that minorities’ “interests and preferences are reasonable well served by the [majority’s] policies in government.”<sup>18</sup> In plural societies, however, neither of these conditions tend to be present. As Lijphart contends, “[u]nder these conditions, majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime.”<sup>19</sup> Moreover, “[i]n the most deeply divided societies . . . majority rule spells majority dictatorship and civil strife rather than democracy. What such societies need is a democratic regime that emphasizes consensus instead of opposition, that includes rather than excludes, and that tries to maximize the size of the ruling majority instead of being satisfied with a bare majority: consensus democracy.”<sup>20</sup> This chapter examines these hypotheses in the context of the Kenyan case in order to assess the impact of Kenya’s majoritarian institutions on the emergence of authoritarianism and citizens’ rights violations between 1963 and 1988.

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<sup>17</sup> Ibid., pp. 64 – 65.

<sup>18</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 31 – 32.

<sup>19</sup> Ibid., pp. 32 –33.

<sup>20</sup> Ibid., p. 33.



### **Ethnic and Political Cleavages in Pre-Independence Kenya:**

In order to understand both the emergence of Kenya's political institutional structure at independence and its political impact, one must first consider the country's rather complex demographic structure. Independent Kenya's first official population census listed forty-two different ethnic groups, although only twelve groups of these groups were identified as the main ethnic segments.<sup>21</sup> Listed in descending order of numerical strength, they were: the Kikuyu (20.1 percent), the Luo (13.9 percent), the Luhya (13.2 percent), the Kamba (10.9 percent), the Kalenjin (10.8 percent), the Meru/Embu (7 percent), the Mijikenda (and related coastal groups) (5.4 percent), the Somali (2.2 percent), the Maasai (1.4 percent), the Taita (1 percent), and the Samburu and Turkana (less than 1 percent).<sup>22</sup> According to Rae and Taylor's index of ethnic fragmentation, Kenya had an overall value of  $F = 0.88$ , which is considered "extremely high."<sup>23</sup> Because these groups were easily identifiable, their sizes were clearly established, most social organizations "tend[ed] to be organized along lines of

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<sup>21</sup> 1969 Kenya Population Census, cited in John Nellis, *The Ethnic Composition of Leading Kenyan Government Positions*, Uppsala: Nordiska Afrikainstitutet, 1974.

<sup>22</sup> Ibid. The Meru and Embu are closely related Bantu groups, and thus are often grouped together. Also, although the Luhya are listed as Kenya's third largest ethnic group, this group is comprised of at least sixteen different sub-tribes, most of which have very different cultural histories. As a consequence, the Luhya have never mobilized as a cohesive group, unlike most other major ethnic groups in Kenya.

<sup>23</sup> These populations estimates are based on Kenya's 1969 Census, cited in Dirk Berg-Schlosser, "Elements of Consociational Democracy in Kenya," *European Journal of Political Research*, vol. 13, 1985, p. 98.

segmental cleavages,” and political parties followed segmental lines, newly independent Kenya clearly fit the criteria of a “plural” society.<sup>24</sup>

Historically, linguistic ties help explain many of the underlying relationships between ethnic groups in Kenya, although this was not exclusively the case. The four major language families found in Kenya are the Bantu, the Nilotic, the Nilo-Hamitic and the Hamitic families. The largest group, the Bantu, includes the Kikuyu, the Luhya, the Kamba, the Meru/Embu, as well as the Mijikenda, the Taita, and other related coastal groups. Most of these groups migrated to Kenya from the south. The largest Bantu group in Kenya, the Kikuyu, and its close relatives, the Meru and Embu, settled in central Kenya, now Central Province. The Luhya, a sizable 13.2 percent of the population,<sup>25</sup> settled primarily in western Kenya; the Kamba, only half the size of the Kikuyu, but still constituting approximately 11 percent of the population settled in what is now Eastern Province; and finally the Mijikenda and Taita settled on and near Kenya’s coast, now Coast Province.

The Nilotic and Nilo-Hamitic groups migrated to Kenya primarily from the north and west, and the main Nilotic group, the Luo, settled primarily in Nyanza Province around Lake Victoria in western Kenya. The related Nilo-Hamitics, which include the Kalenjin, the Masaai, the Samburu and the Turkana, settled primarily in a broad stretch of western Kenya that extends from the Kenya’s north to south borders. The Hamitic peoples, by far the smallest group in Kenya, include only a few Somali

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<sup>24</sup> Lijphart, “Consociational Theory: Problems and Prospects,” p. 356.

<sup>25</sup> As noted above, although Kenya’s 1969 census lists the Luhya as a dominant ethnic group in Kenya, it has never mobilized as a cohesive political group.

and related groups in the northeastern part of the county.<sup>26</sup> The major urban areas in Kenya, including its capital, Nairobi; the major port city on the Indian Ocean, Mombasa; the major port city on Lake Victoria, Kisumu; and Nakuru in central Kenya, were somewhat ethnically heterogeneous, but the Kikuyu and Luo groups tended to predominate in all of these cities.<sup>27</sup>

Because of the Kikuyus' proximity to colonial centers and resources, as well as their concentration in one of Kenya's most agriculturally fertile regions, central Kenya, they had greater access to wage-labor, markets, formal education, and bureaucratic appointments during the British colonial period (1895 – 1963). This, in addition to their larger numbers, contributed to their emergence as national political leaders in pre-independence Kenya. In 1944, Kikuyu leaders formed the core of Kenya's first political party, the Kenya African Union (KAU), and many of these individuals ultimately became national leaders in Kenya's rebellion against colonial rule, the Mau Mau rebellion (1952 – 1956). In response to this violent uprising, the British banned the KAU and prohibited the formation of political parties on a national basis in Kenya until 1960. As a consequence, parties mobilized strictly at Kenya's district level during this period, impacting the later development of national parties in

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<sup>26</sup> George Bennett and Carl G. Rosberg, *The Kenyatta Election: Kenya 1960 – 1961*, New York: Oxford University Press, 1961, p. 28. See also: Henry Bienen, *Kenya: The Politics of Participation and Control*, Princeton: Princeton University Press, 1974; Dirk Berg-Schlosser, *Tradition and Change in Kenya: A Comparative Analysis of Seven Major Ethnic Groups*, Paderborn: F. Schöningh, 1984; and David K. Leonard, *African Successes: Four Public Managers of Kenyan Rural Development*, Berkeley: University of California Press, 1991.

<sup>27</sup> As is discussed below, this is because the Kikuyu and Luo were “favored” ethnic groups by the British during the colonial period, with greater access to wage-labor, formal education and bureaucratic appointments in the colonial administration.

Kenya. The British also arrested all KAU leaders, including Jomo Kenyatta, a Kikuyu who eventually became Kenya's first prime minister and later its imperial/autocratic president.

Once the colonial ban on the development of national parties was lifted in February of 1960, as Duverger's law predicts, two dominant national parties emerged in Kenya: the Kenyan African National Union (KANU) and Kenyan African Democratic Union, KADU. KANU, which claimed to be the heir of KAU, was founded in March of 1960, and conjoined the Kikuyu and closely related Bantu groups, including the Meru/Embu and the Kamba, with the Luo, a Nilotic group. Given that the Nilotics are both linguistically and culturally distinct from the Bantu, the Kikuyu/Luo alliance is best explained by shared their economic interests,<sup>28</sup> as well as what Bennett and Rosberg have described as their more "more militant and uncompromising" nationalism.<sup>29</sup> As they explain, they wanted "*uhuru sasa*" (freedom now), rather than a more gradual approach to independent rule, which was advocated many of Kenya's smaller ethnic groups. This was not only because the Kikuyu and Luo emerged from the colonial period with greater political and economic advantages than other groups, and thus were well situated to assume positions of leadership in Kenya's first independence government, but also because of their greater numbers. If the Kikuyu, and the closely related Meru/Embu, Kamba and Luo groups voted as a

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<sup>28</sup> As mentioned above, the Kikuyu and Luo had disproportionate access to wage-labor, markets, formal education and bureaucratic appointments and experience during the British colonial period, thus they were the ethnic groups best situated to assume positions of leadership in newly independent Kenya.

<sup>29</sup> Bennett and Rosberg, *The Kenyatta Election: Kenya 1960–1961*, p. 36.

cohesive block, they comprised approximately 54 percent of Kenya's population. Thus, Kenya smaller ethnic groups "fear[ed] . . . domination by an exclusive Kikuyu-Luo post-independence government."<sup>30</sup>

For this reason, the second dominant national party to emerge in 1960, the Kenyan African Democratic Union, KADU, was formed largely in response to KANU and was comprised primarily of Kenya's smaller ethnic groups. Specifically, it conjoined the Kalenjin, Mijikenda, Somali, Maasai, Samburu and Turkana groups, but also dominant subtribes within the politically diverse Luhya group. Due to the colonial ban on national parties between 1952 and 1960, KADU first emerged as an alliance of diverse district level parties and political alliances. Most significant in the early stages of KADU's formation was the emergence of the Kalenjin Political Alliance (KPA), led by Daniel arap Moi and Taita Towett, two prominent Kalenjin politicians. The alliance conjoined four independent political parties from four districts in Kenya --Baringo, Kericho, Nandi and Elgeyo-Marakwet, each dominated by different Kalenjin sub-tribes, and claimed to represent all Kalenjin-speaking peoples.<sup>31</sup> Soon after the emergence of this alliance, coalitions were then forged with other district level parties including the Luhyas' Kenya African People's Party,<sup>32</sup> the

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<sup>30</sup> Stephen Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," *American Political Science Review*, vol. 91, no. 3, September 1997, p. 605.

<sup>31</sup> Approximately seven different sub-tribes comprise the Kalenjin: the Nandi, Kipsigis, Tugen, Keiuo, Marakwet, Pokot and Sabao. See David W. Throup and Charles Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, Oxford: James Currey Ltd, 1998, Figure 1.1, p. xii.

<sup>32</sup> As mentioned above, however, the Luhyas are an extremely diverse group and were ultimately split in their political loyalties between the Kenya African People's Party, which ultimately formed KADU, and KANU.

Maasais' Maasai United Front Party, the Somalis' Somali National Association, and the Coast African People's Union, which mobilized several smaller ethnic groups along Kenya's coast. A month later, on June 25, 1960, these groups declared their allegiance to the Kenya African Democratic Union (KADU) as a new national party.<sup>33</sup> Ronald Ngala, former leader of the Coast African People's Union Party, was elected leader of KADU, and Masinde Muliro, former leader of the Luhya's Kenya African People's Party, was elected his deputy.

Once KANU and KADU were established, as Duverger's Law predicts, almost all remaining district level parties and political associations declared their allegiance to one or the other of these two parties. Representatives of these two parties were then selected to meet, together with representatives of colonial Britain, to draft Kenya's independence Constitution at Lancaster House in London. This was accomplished through a series of three constitutional conferences held in 1960, 1962 and 1963, known as the "Lancaster House Conventions," the first of which had already been convened in January 1960. It was through this process of constitution-making that fundamental political differences between KANU and KADU, which had already become apparent, became even more pronounced.

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<sup>33</sup> Ibid.

### **Constitution-Making and Kenya's Independence Constitution:**

The first Lancaster Convention was convened in London in January 1960, just prior to the emergence of KANU and KADU,<sup>34</sup> and was attended by elected and appointed representatives of indigenous Kenyans, British settlers and the British government, as well as a select group of constitutional advisors from various parts of the world.<sup>35</sup> At this first constitutional conference, indigenous Kenyans, many of whom were later to become leaders of either KANU or KADU, presented a united front to demand both “independence . . . and [in the interim] . . . a new constitutional framework allowing greater African representation in colonial legislative institutions” from Britain.<sup>36</sup> In response, the British government promised “eventual African self-

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<sup>34</sup> As noted above, Britain's ban on national level parties in Kenya was not lifted until February 1960.

<sup>35</sup> Among the constitutional advisors who attended the Lancaster Conferences was Justice Thurgood Marshall of the United States.

<sup>36</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 604. A “Legislative Council” was established by the British colonial government in Kenya in 1905, however, direct election of indigenous African Kenyans on this Council was not allowed until 1957. At this time, eight of thirty-four seats were allocated to Africans, although the franchise among Africans was considerably restricted by various qualitative criteria. Prior to this, “African representation” on the Council was an appointee of the British colonial government. In 1958, the number of seats allocated to Africans was increased to fourteen, which it remained until the first Lancaster Conference in January of 1960. As a consequence of this conference, the total number of Council seats was raised to fifty-three, twenty of which were reserved for Europeans, Asians and Arabs. The remaining thirty-three seats were elected on a common roll, with significantly lowered franchise requirements, thus allowing more indigenous African Kenyans the right to vote. This was the first time that Africans held a majority of seats on the Legislative Council, despite the fact that they comprised more than ninety percent of Kenya's population. They held this majority until the Legislative Council was officially dissolved with the May 1963 elections to elect Kenya's first independent parliament. See Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, pp. 62 – 78; and Cherry Gertzel, *The Politics of Independent Kenya, 1963-8*, Evanston: Northwestern University Press, 1970, pp. 8 – 20.

government ‘based on parliamentary institutions of the [majoritarian] Westminster model.’<sup>37</sup>

With the lifting of the ban on national parties shortly after this conference, and the emergence of KANU and KADU, the remainder of Kenya’s constitutional negotiations were conducted primarily through representatives of these parties. Given the very different ethnic composition of KANU and KADU, it is not surprising that they held very different political positions in the constitution-making process. Whereas KANU advocated development of highly centralized majoritarian government and institutions in Kenya, KADU wanted decentralized rule, effective representation of rural districts, and in general, national level institutions that would guarantee representation and protection of minority rights and interests. In particular, KADU leaders advocated a highly decentralized and federal system in Kenya, referred to as *majimboism*, or “regionalism,” which would grant considerable decision-making autonomy to each region. In addition, they wanted strong bicameralism, where the upper house would privilege minority representation and have equal power to the lower house.

Finally, they also insisted on a constitutionally entrenched Bill of Rights and a rigid constitutional structure, such that for specially entrenched provisions, such as individual rights and *majimbo* structures, a seventy-five percent majority in the lower house and a ninety percent majority in the upper house would be required for amendment. It should be noted, also, that almost all British ex-patriots/former

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<sup>37</sup> Her Majesty’s Stationery Office [HMSO] 1960, p. 6. Cited in Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 604.



colonialists who chose to remain in Kenya after independence allied with KADU during the constitutional negotiations. Being a “minority group,” they not only supported, but also helped develop, many of KADU’s constitutional recommendations at Lancaster. As is discussed below, it largely was for this reason that KADU’s constitutional proposals were given the weight they were in the final drafting of Kenya’s independence constitution.<sup>38</sup>

KANU, on the other hand, believed that these institutional demands, and *majimboism* in particular, would be both too expensive to implement and would result in unnecessarily slow and cumbersome national decision-making. Instead, they argued that Kenya needed highly centralized political structures in order to promote rapid economic growth and development. Thus, they aggressively lobbied for a centralized and unitary form of government, based closely on the majoritarian Westminster model. Not coincidentally, this constitutional structure would also privilege their political and economic interests, as Kenya’s majority party, in independent Kenya.

By the time the second Lancaster Constitutional Conference met in February of 1962, KANU and KADU’s political positions had polarized. KADU insisted that either their demands be accepted, or they would completely withdraw from the constitutional negotiations, indefinitely postponing Kenya’s independence. Moreover,

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<sup>38</sup> The best source on this period, Ghai and McAuslan, note that although the British team that moderated the negotiations between KANU and KADU at Lancaster were, in theory, a neutral party, in practice they favored the inclusion of KADU proposals. It is for this reason, they argue, that they were given greater weight in the final drafting of Kenya’s independence Constitution than they otherwise would have. Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*.

the most radical wing of KADU threatened civil unrest in Kenya if their demands were not met.<sup>39</sup> After two months of intransigence, KANU finally conceded most of KADU's demands, primarily for two reasons. First, they managed to lock in important compromises on KADU's position, which are discussed below. Second, they reasoned that, since they were the clear majority party, they could implement further changes to the Constitution once they formed the independence government. Thus, the 1962 Constitution, which for all intents and purposes remained unchanged through the final Lancaster negotiations in September of 1963,<sup>40</sup> made provisions for nearly all of KADU's demands. These demands, however, as is discussed below, were provided for within a constitutional structure that remained predominantly majoritarian/Westminster in form.

Specifically, these demands translated into constitutional provisions for a bicameral parliament, called the National Assembly, comprised of a lower house, the House of Representatives, and an upper house, the Senate, as well as a prime minister elected by a majority in the lower house.<sup>41</sup> The House of Representatives was to be

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<sup>39</sup> Oginga Odinga, *Not Yet Uhuru*, London: Heinemann Educational Books Ltd., 1967, pp. 227-28.

<sup>40</sup> Although the 1962 Constitution was not significantly changed in the final round of constitutional negotiations in September of 1963, two important revisions should be noted: (1) regional police forces and civil services were combined into single, national organizations; and (2) constitutional amendment proposals that failed to receive required majorities in the two houses of parliament could then be submitted to a national referendum. If two-thirds of the electorate voted in favor of the proposal, then the proposal could be re-introduced into parliament and passed as ordinary legislation, that is, a simple majority vote. Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," p. 606.

<sup>41</sup> In Kenya's first elections in May of 1963, however, the prime minister, Jomo Kenyatta, was ultimately appointed by the Colonial Governor on advice from the parliament, as stipulated by the 1962 Constitution. "Internal" self-governance was then granted on June 1, 1963, thereafter known as *Madaraka Day*, and official independence was granted on December 12, 1963.

comprised of 129 members, with one member elected on a plurality basis from each of 117 electoral districts, as well as 12 specially elected members, elected also by a majority of members of the House.<sup>42</sup> The Senate, on the other hand, was to be comprised of 41 members, with one member elected from each of Kenya's 41 administrative districts, also on a plurality basis. Administrative district boundaries were to be based almost entirely on former British colonial administrative boundaries, with some slight revision, since no district could be in more than one of the seven designated *majimbos*, or regions, which formed Kenya's federal structure.<sup>43</sup> These boundaries were drawn by the British during the early colonial period specifically with an eye towards creating ethnically homogeneous administrative units, and with little concern for highly variable population densities. As one source reports, "in thirty-five of the forty-one constituencies, one tribe constituted an absolute majority of the population, and in seventeen constituencies over 90 per cent were of the same tribe."<sup>44</sup>

Thus, highly populated districts in central Kenya –where Kenya's largest ethnic community, the Kikuyu, is concentrated received the same number of Senate seats (one) as very sparsely populated districts in other parts of the country, where

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<sup>42</sup> The Electoral Commission for the 1963 elections was comprised of six members: the chair was the speaker of the Senate; the vice-chair was the speaker of the House; one member appointed on advice of the prime minister; and three members were appointed by the parliament on advice of the regional assemblies. See: Institute for Education in Democracy, *The National Elections Data Book: Kenya 1963 – 1997*, Nairobi, Kenya: Institute for Education in Democracy (IED), July 1997. As discussed below, however, the executive gained increased control over the Commission, such that by December of 1966, the executive appointed a majority of members.

<sup>43</sup> As is discussed below, the independence Constitution provided for the creation of seven *majimbos*, or regions, as the basis of its federal structure.

<sup>44</sup> J.H. Proctor, *Parliamentary Affairs*, p. 389.

Kenya's smaller ethnic communities were predominate. Moreover, Kenya's larger tribes—the Kikuyu and Luo, in particular—tended to predominate in Kenya's major urban centers (Nairobi, Mombasa and Kisumu), and these areas were also counted as single districts, despite very high population concentrations. Thus, district boundaries worked well to promote the interests of Kenya's smaller ethnic groups in Kenya's proposed Senate.<sup>45</sup> Indicative of the degree of malapportionment among rural districts, one source reports that two districts in Maasailand, Narok and Kajiado, which voted for KADU in the independence elections, had a total of 23,068 votes, whereas the nearby district of Fort Hall, which was predominantly Kikuyu and voted for KANU, had a total of 115,932 votes.<sup>46</sup> In another KANU district, the winning candidate needed 165,155 votes to win a seat.<sup>47</sup>

Given the extent to which KANU would be clearly disadvantaged by this representational formula, the question arises as to why they, as the majority party at the Lancaster Conventions, consented to this proposal. In addition to the factors mentioned above,<sup>48</sup> KANU was able to lock in important compromises on KADU's

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<sup>45</sup> Although Kenya's major urban centers at the time (Nairobi, Mombasa and Kisumu) were multi-ethnic, Kenya's largest (cohesive) ethnic groups, the Kikuyu (20.1 percent), the Luo (13.9 percent), were predominant. These population estimates are based on Kenya's 1969 Census, cited in Dirk Berg-Schlosser, "Elements of Consociational Democracy in Kenya," *European Journal of Political Research*, vol. 13, 1985, p. 98.

<sup>46</sup> Clyde Sanger and John Nottingham, "The Kenya General Election of 1963," *The Journal of Modern African Studies*, vol. 2, no. 1, 1964, p. 35. I have been unable to obtain complete data regarding malapportionment of Senate constituencies at this time.

<sup>47</sup> Ibid.

<sup>48</sup> As mentioned above, first, almost all former British colonialists/ex-patriots who chose to remain in Kenya after independence not only allied themselves with KADU, but they also helped develop KADU's political platform as a Kenyan "minority." Consequently, although the British team that moderated the Lancaster Conventions was, in theory, a neutral party in the negotiating process, in

position. Specifically, whereas KADU lobbied for a strong form of bicameralism, where the Senate would be equal in power to the House of Representatives, KANU flatly rejected this proposal. As Ghai and McAuslan report, not only did KADU want the Senate's legislative power to be "equal to that of the lower house," but it also lobbied for Kenya's cabinet to "be responsible to the entire National Assembly; [and] its members . . . elected by both houses sitting together . . ." <sup>49</sup> All of these proposals were rejected by KANU, however. Thus, although KANU granted the establishment of the Senate to provide greater representation for minority ethnic interests at the national level in Kenya, they ensured that this chamber was effectively denied meaningful political power.

With regard to KADU demands for decentralized and federal government, KANU agreed that the country would be divided into seven regions, or *majimbo*s -- Coast, Eastern, Central, Rift Valley, Nyanza, Western and North-Eastern, and provisions were made for each region to have its own legislative and executive institutions. <sup>50</sup> It was agreed that candidates for election to regional assemblies had to be registered voters in that region, and qualifications for voter registration were

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practice, it ultimately favored KADU proposals and they were given greater weight than the otherwise would have. Second, KADU succeeded in basically blackmailing KANU by threatening to withdraw completely from constitutional negotiations unless their demands were met. Because KANU was anxious to quickly move forward with independence, they ultimately agreed to many of KADU demands, but only after two months of intransigence. Third, with executive and legislative power determined predominantly by majoritarian formula, KANU leaders figured that they could easily make further changes to the independence Constitution once they formed Kenya's new government. Finally, fourth, as discussed here, KANU was able to lock in important compromised on KADU's positions.

<sup>49</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 204

<sup>50</sup> Kenya's federal system was based largely on the Swiss system, and a special constitutional advisor from Switzerland was invited to the 1962 and 1963 Lancaster Conventions to assist in its design.

established such that only those with a genuine connection to the region were eligible to vote. The president of each region was to be elected by a simple majority of regional assembly members, and could be removed only by a three-fourths vote of all members. Regional assemblies were to be responsible for a broad range of activities including local government, police, social services, utilization of land, agriculture, economic and social development, housing and education.<sup>51</sup> Regional elections, like national elections, were scheduled to take place at a minimum of five-year intervals.

Finally, as mentioned above, Kenya's independence Constitution also included an extensive Bill of Rights, which was closely modeled after the first twenty-one articles of the Universal Declaration of Human Rights (UDHR).<sup>52</sup> These rights were to be protected, first, by an independent judiciary. Most important in this respect, the Constitution established a Supreme Court with "unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law . . ." and these could be heard either in "a direct application to it or on a reference from a subordinate court . . ."<sup>53</sup> Specifically, if an individual alleged that any of her or his fundamental rights had been violated, or even were *likely* to be violated, then that individual could apply directly to the Supreme Court for redress. In the case of detainees, if any Kenyan citizen alleged a violation in relation to a detained person, then that individual could

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<sup>51</sup> Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 9.

<sup>52</sup> The UDHR had been unanimously approved by the United Nations General Assembly a little more than a decade earlier, on December 12, 1948.

<sup>53</sup> *The Constitution of Kenya*, 1963, Chapter X, Section 172 (1).

apply directly to the Court. Finally, if questions of constitutional interpretation arose in any of Kenya's subordinate courts, the Constitution stated that "the [subordinate] court may, and shall if any party to the proceeding so requests, refer the question to the Supreme Court."<sup>54</sup>

The Supreme Court was to be comprised of not less than eleven justices, and be led by a Chief Justice. The Chief Justice was to be appointed by the prime minister, but approved by a minimum of four (of the seven) regional presidents.<sup>55</sup> Other justices on the court were to be appointed by the prime minister, with the majority approval from the House of Representatives only. No approval from the Senate was necessary. All Supreme Court justices, including the Chief Justice, were guaranteed security of tenure and could be removed from office only for "inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour . . ."<sup>56</sup> In addition, the Constitution gave the Supreme Court power of judicial review on constitutional questions, and when the

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<sup>54</sup> Ibid., Section 175 (1). At independence, appeals on constitutional questions and questions relating to fundamental rights went directly from a final decision by the Supreme Court to the Privy Council in London. This was abolished in 1965, however, with the establishment of the East African Court of Appeals. With the dissolution of the East African Community in the mid 1970s, a Court of Appeal was established in Kenya. It is a seven-member court with the power of review over original jurisdiction cases of the High Court, as well as review of appellate decisions of the High Court on matters of law. The Court of Appeal does not have the authority to review constitutional decisions made by the High Court, however. See: Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, New York: Robert F. Kennedy Memorial Center for Human Rights, 1992, p. 16.

<sup>55</sup> *The Constitution of Kenya*, 1963, Chapter X, Section 172 (1).

<sup>56</sup> Ibid., Chapter X, Section 173 (3).

Court sat as a constitutional court, it was to be comprised of “an uneven number of judges, not being less than three.”<sup>57</sup>

Second, Kenya’s Bill of Rights was also protected by stringent constitutional amendment procedures. The general requirement for amendments to the Constitution was a three-fourths vote in both the House of Representatives and the Senate. If this failed, however, the amendment could then be taken to the electorate in a national referendum.<sup>58</sup> If the amendment received two-thirds of the national vote, it could then be reintroduced into parliament and passed by a simple majority in both houses --the requirement for ordinary legislation. However, certain chapters of the Constitution were considered of fundamental importance, and thus could be changed only by seventy-five percent approval in the House of Representatives, and *ninety* percent approval in the Senate. These “specially entrenched provisions” included constitutional chapters on fundamental rights and freedoms of the individual (the Bill of Rights), citizenship, provisions regarding the composition of, election to, and power of the Senate, the boundaries of regions or *majimbo*s, the structure of regional institutions, and finally, the amendment procedure itself.

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<sup>57</sup> Ibid., Chapter X, Section 174 (3).

<sup>58</sup> This was a concession won by KANU in the final round of the Lancaster negotiations in September of 1963. See above.



**Majoritarian Institutions and the Erosion of Rights Protections:  
The Kenyatta Years, 1963 – 1978:**

Given this apparently carefully designed constitutional structure, with specially entrenched provisions for Kenyans' fundamental political and civil rights, as well as the protection of minority interests through federal institutions, bicameralism, a rigid constitutional structure, and judicial review, the question arises: How did the fundamental human and democratic not only of Kenya's minority groups, but ultimately all Kenyans, come to be so blatantly and consistently violated during Kenya's first twenty-five years of independent rule? This section argues that, given Kenya's ethnic composition, two key features of its independence Constitution --its single-member district plurality electoral system and its weak bicameralism --together with colonial authoritarian legacies, contributed to the emergence of authoritarianism in Kenya and the violation of rights protections not only for Kenya's political minorities, but ultimately all Kenyans.

Specifically, as a consequence of these two majoritarian institutional features, not only were institutions originally designed to safeguard minority interests in Kenya's independence Constitution gradually eliminated, but also Kenya's legislature itself ceased to function as an effective check on executive power. Thus, with the full support of Kenya's legislature, Kenya's executive proceeded to introduce a series of constitutional amendments (thirty in all) that not only undermined the independence of Kenya's judiciary and its national electoral commission, but also replaced parliamentarianism with presidentialism; replaced institutions promoting decentralized and federal rule with centralized and unitary structures; replaced bicameralism, albeit

in weak form, with unicameralism; and eliminated constitutional rigidity and judicial review. The sections below examine why and how this came about.

Kenya's Independence Elections, May 1963:

Kenya's independence elections were finally held in May of 1963 under Kenya's 1962 Lancaster Constitution. Although prior to Kenya's "official" independence on December 12, 1963, these elections were of critical importance, as individuals elected to Kenya's newly established parliament at this time were to lead the country to independence and through its first government. New elections were not scheduled again, unless a parliamentary vote of no confidence required it, until June 1968. Three separate elections were held over the course of a week, although no counting commenced until the final elections were complete.<sup>59</sup> The first election was for Kenya's Regional Assemblies, the second was for the Senate, and finally, the third was for the House of Representatives.<sup>60</sup> Voter turnout in these elections was quite high—over 70 percent.<sup>61</sup>

As electoral systems theorists would predict, Kenya's single-member district plurality formula resulted in a predominantly two-party race in the House of

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<sup>59</sup> Sanger and Nottingham, "The Kenya General Election of 1963," p. 28.

<sup>60</sup> Sanger and Nottingham report that "[t]he reason given [for the three separate elections] was that there were not enough staff, especially in the rural areas, to deal with the voters at once." Ibid.

<sup>61</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook Elections* reports that voter turnout in these elections was 71.3 percent. See *ibid.*, p. 485.

Representative's election, with over-representation of the majority party --KANU.<sup>62</sup> Specifically, KANU's 53.6 percent of the vote share translated into 64.3 percent of the elected seats (72 of 112 seats); and KADU, the minority party, won 25.8 percent of the votes, which translated into 28.6 percent of the seats (32 of 112 seats).<sup>63</sup> Thus, although another very small third party, the African Peoples' Party (APP), won 8 seats with 7.4 percent of the vote share, 94 percent of the elected seats were held by KANU and KADU, and nearly two-thirds of these were held by the majority party, KANU. Moreover, because Kenya's twelve specially elected members were also chosen on the basis of a majoritarian formula, in that House members, sitting as an electoral college, elected them on the basis of majority vote, conceivably all twelve of these seats also could have gone to KANU, bringing its seat share up to 67.7 percent. It was only by an error that one of these seats went to KADU.<sup>64</sup> This increase of eleven seats still brought KANU's seat share up to 67 percent (83 of 124 seats), and reduced KADU and the APP's seat shares to 26.6 and 6.5 percent, respectively. Most disadvantaged were Kenya's two smallest parties, the Baluhya Political Union (BPU) and the Coast Peoples' Party (CPP), as well as independent candidates.

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<sup>62</sup> As Duverger's Law predicts, single-member district plurality systems tend to "create and maintain two party systems." Maurice Duverger, "Duverger's Law: Forty Years Later," in Bernard Grofman and Arend Lijphart, eds., *Electoral Laws and Their Political Consequences*, New York: Agathon Press, Inc., 1986, p. 69.

<sup>63</sup> See Table 3.1 at the end of this chapter for a summary of Kenya's 1963 parliamentary election results.

<sup>64</sup> As Sanger and Nottingham report, although "[i]t was mathematically possible for KANU to control the selection of the full dozen . . . through someone in KANU reading wrongly across the ballot-slip, KADU secured one. Ibid.

In Kenya's 1963 Senate race, due to malapportioned districts, another institutional feature of single-member district plurality systems, KADU ended up with 42 percent of the seat share with only 27 percent of the vote, and KANU's seat share, 52 percent, was actually *smaller* than its vote share, 59 percent.<sup>65</sup> As discussed above, this was by deliberate constitutional design in order to ensure representation of Kenya's smaller ethnic communities at the national level. Despite the fact that, in theory, KADU had 42 percent of seats in the Senate, this ended up meaning very little in terms of its ability to influence national policy for two reasons. First, as Duverger's law would predict, the two APP Senators ended up leaving their party shortly after elections and joining with KANU, *and* a member of KADU simply crossed party lines to increase his influence as a member of the majority party.<sup>66</sup> This political maneuvering ended up increasing KANU's seat share by nearly 8 percent points – from 52.6 percent of the seats to 60.5 percent, and reducing KADU's by almost three points, from 42.1 percent to 39.6 percent.<sup>67</sup> Second, and even more importantly, as mentioned above, is the fact that almost all power was concentrated in Kenya's lower house as a consequence of its weak form of bicameralism.

Thus, despite the fact that KANU received only 53.6 percent of the vote share in these elections --that is, *more than 46 percent of Kenyans voted against KANU*-- as

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<sup>65</sup> See Table 3.1 at the end of this chapter.

<sup>66</sup> Sanger and Nottingham, "The Kenya General Election of 1963," pp. 35 – 36.

<sup>67</sup> *Ibid.* As is also predicted by Duverger's Law, Kenya's 1963 Senate race, like the House of Representatives' race, was also a predominately two party race with KANU and KADU holding 95 percent of the seats.

a consequence of Kenya's single-member district plurality system and weak bicameralism, the party controlled over two-thirds of the seats in Kenya's all powerful House of Representatives, and Kenya's smaller political parties were all effectively excluded from national power. Given this overwhelming parliamentary majority, the Kenyatta-KANU regime<sup>68</sup> then proceeded to further concentrate its power through undermining the independence of Kenya's judiciary and electoral commission, and gradually eliminating the consensus institutions included in Kenya's independence Constitution to promote and protect minority interests.

Specifically, as mentioned above, Kenya's parliamentary government was replaced by presidentialism; institutions promoting decentralized rule and federalism were replaced by centralized and unitary structures; bicameralism, albeit in weak form, was replaced by unicameralism; and institutional protections for constitutional rigidity and judicial review were also subverted. Ironically, these "constitutional coups" were achieved through the formal legal process of introducing and implementing a series of statutory laws and constitutional amendments,<sup>69</sup> most of which had colonial origins, through Kenya's parliament. In so doing, the KANU regime succeeded in eliminating formal democratic rights protections not only for Kenya's political minorities, but ultimately all Kenyans. The sections below examine why and how this came about.

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<sup>68</sup> Although the leader of KANU, Jomo Kenyatta, would have been easily elected prime minister at this time, the British colonial government reserved the right to formally appoint Kenya's first prime minister "on advice from parliament" in these first elections in Kenya's 1962 Constitution. As was widely expected, however, they appointed Kenyatta.

<sup>69</sup> I thank Arend Lijphart for this phrasing and insight.

The “Legal” Construction of Authoritarianism in Kenya:

In August of 1964, less than a year after Kenya’s official independence, the Kenyatta-KANU regime drafted its first constitutional amendment, the Constitution of Kenya Amendment Act No. 28 of 1964, which had three major objectives: (1) to change Kenya’s status to a sovereign Republic; (2) to replace Kenya’s parliamentary system with presidentialism, and (3) to centralize national power by reducing the powers of Kenya’s regional governments. The purpose of changing Kenya’s status to a sovereign Republic was to eliminate remaining privileges reserved for Kenya’s former Governor-General and the Queen of England, despite Kenya’s “independent” status. For example, the independence Constitution granted Kenya’s Governor-General power to make amendments to existing Kenyan laws through December 1964 to ensure that they were consistent with Kenya’s independence Constitution. The 1964 constitutional amendment not only gave these powers to Kenya’s new president, Kenyatta, but also importantly extended them. As Ghai and McAuslan point out, whereas these powers were initially “restricted to bring the law into conformity with the Constitution, in 1964 they extended to changes considered necessary or *expedient* in consequence of the *amendment* of the Constitution.”<sup>70</sup> As is examined below, Kenyatta began to make extensive use of these powers.

The amendment’s second object was to replace Kenya’s parliamentary system with a presidential system, where the president was both head of state and head of government. Although the electoral rules established for presidential elections at this

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<sup>70</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 339.

time<sup>71</sup> ensured that Kenya's president's had majority support in Kenya's lower house,<sup>72</sup> Kenyatta ultimately was not subject to these rules, since the amendment declared that "the person holding the office of the Prime Minister immediately before the declaration of the Republic will automatically become the first President."<sup>73</sup> Thus, by constitutional fiat, Kenyatta became Kenya's first president, with the first presidential elections not scheduled until June 1968.<sup>74</sup> Significantly, this amendment increased the powers of Kenya's executive in numerous respects.

First, Kenya's president was given sole authority to appoint and dismiss the vice president, cabinet ministers and assistant ministers, as well as decide allocation of government portfolios to ministers. Second, whereas Kenya's former prime minister was institutionally required to act on advice of his cabinet, this was no longer the case. Third, although, in theory, Kenya's lower house could still call a vote of no confidence in Kenya's executive, in practice, as Ghai and McAuslan explain, this was highly

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<sup>71</sup> These electoral laws were later changed, as is discussed below.

<sup>72</sup> As Ghai and McAuslan explain, presidential candidates had first to win the parliamentary seat in her or his constituency and then win a majority of votes in parliament. Those standing for parliamentary elections had to officially state their support for a single presidential candidate, and whoever received a majority of votes from elected parliamentarians, and also was elected in his or her constituency, was then elected president. If no candidate received a majority vote, and/or the individual with a majority of votes failed to carry her or his constituency, the parliament then acted as an electoral college. Any member of parliament was eligible to stand as a presidential candidate, and a vote was taken by secret ballot. If no candidate received a simple majority, up to two more votes could be taken, after which time, if still no majority candidate emerged, parliament was dissolved and new general elections held. Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, 221 – 226. As is seen below, however, because Kenya ultimately became a single party state, all that was ultimately required of either Kenyatta and later his successor, Moi, was that they be nominated by KANU, in addition to winning the parliamentary seat in their home constituency.

<sup>73</sup> Ibid, p. 212.

<sup>74</sup> Ibid. Since Kenya's Constitution mandated that parliamentary elections be held every five years, presidential elections were scheduled to coincide with these elections.

unlikely.<sup>75</sup> This was because the president was given general powers to dissolve Kenya's parliament, including at the time of a no confidence vote. This thus acted as a major disincentive for parliament to call a vote of no confidence, since, in so doing, it would be immediately dissolved. Moreover, because the president was given powers to dissolve parliament at any time, "[b]esides acting as a threat to restive MPs, it enable[d] the President to choose the most propitious time to seek a fresh term of office." Because there were also no term limits on presidential tenure, this, indeed, significantly increased executive power. Finally, as Ghai and McAuslan document, general executive powers in relation to Kenya's armed forces and police, declaration of state emergencies and emergency powers, Kenya's civil service and, eventually, Kenya's judiciary, as is examined below, were also significantly increased.<sup>76</sup>

The most controversial aspect of the amendment, however, was its third objective: to centralize national power by reducing the powers of Kenya's regional governments. Given the contentious nature of the *majimbo* negotiations at the Lancaster conferences, this is not surprising. Ultimately, the Kenyatta-KANU's strategy in reducing region powers was to exploit a loophole in the independence Constitution regarding the *substance* rather than *structure* of regional powers. As noted above, although the "structure" of regional institutions was carefully protected by the specially entrenched provisions of the Constitution, as Ghai and McAuslan

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<sup>75</sup> Ibid., pp. 346 – 357.

<sup>76</sup> See Ghai and McAuslan's insightful analysis of executive power in *ibid.*, pp. 220 – 258.



point out, “few of the substantive powers of the Regions were so entrenched.”<sup>77</sup> Thus, the Kenyatta regime’s constitutional amendment stated that in certain policy areas, namely in “education, agriculture, health, economic and social development and utilization of land. . .”, “Regional Assemblies should have no exclusive executive authority.”<sup>78</sup> The Amendment was also carefully drafted so that none of its provisions fell under the specially entrenched constitutional provisions. It was introduced into the National Assembly a month later, and by the following month, November 1964, it achieved the requisite 75 percent support it needed in both houses for ratification.

Despite KANU’s overwhelming majority in Kenya’s House of Representatives, and sizeable majority in the Senate, because Kenya’s independence Constitution required super-majorities (75 percent in both houses) for constitutional amendment, had KADU voted as a cohesive block, it easily could have prevented the 1964 constitutional amendment. Thus, the political puzzle that passage of this amendment presents is why members of KADU ultimately voted with the KANU government to enact a constitutional amendment that was so clearly against their political interests. Two explanations appear dominant: First, since Kenya’s May 1963 elections, KANU used its nearly two-thirds majority in the House of Representatives, where, as mentioned above, almost all national power was concentrated, to take control of national policymaking and direct state resources to party supporters in

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<sup>77</sup> Ibid., p. 212.

<sup>78</sup> Ibid., p. 211.

exclusively “KANU regions.” Second, the Kenyatta regime appealed to the personal and career interests of individual members of KADU to entice them to cross party lines and support KANU. Specifically, to ordinary KADU MPs, the regime offered generous development funds for their constituencies, and for KADU leaders, enticement packages included promises of cabinet positions and/or sizable interests in emergent business and land deals, as well as parastatal organizations.

This strategy proved quite effective. In a major political coup for the Kenyatta regime, it ultimately persuaded KADU leader Daniel arap Moi to cross party lines and support KANU by offering him the powerful cabinet post of Minister of Home Affairs.<sup>79</sup> Although the details are not known, Moi apparently also was offered lucrative business opportunities and land deals, as well as sizable development funds for his home area in western Kenya. As a consequence, Moi made the decision not only to support KANU’s constitutional amendment, but also to change his party affiliation to KANU. Although, as will be seen in Chapter Five, some prominent Kalenjin politicians never forgave Moi for what they perceived as a clear betrayal of KADU interests and principles in order to promote his own personal and career interests, he was only one of numerous KADU MPs to ultimately join KANU. Because of Moi’s important leadership role in KADU, however, his support of KANU had a particularly detrimental effect on the continued cohesiveness of KADU.

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<sup>79</sup> This office included supervision of Kenya’s police forces, some security forces, the prisons and probation services, citizenship and immigration, among other responsibilities. See history of Ministry of Home Affairs, Government of Kenya web site: <http://www.vice-president.go.ke/>. Given that Kenya’s police force at the time outnumbered its defense forces, and in fact performed many of the same functions as the military, this was, indeed, a powerful post. Jennifer Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, Berkeley: University of California Press, 1992.

As a consequence, KANU was ultimately able to gain the ten additional votes it needed in both the House and the Senate to pass Kenya's first constitutional amendment. Moreover, by November of 1964, enough KADU MPs had crossed the floor and joined KANU that the party completely dissolved itself and Kenya became a *de facto* single party state. As Stephen Ndegwa concludes in his insightful analysis of this period: "Outnumbered, outmaneuvered, and with no prospects for enforcing the compromise constitution or, given the reality of census-type voting, for overtaking KANU at the subsequent polls, KADU willingly dissolved and joined KANU to form a single-party state . . ." <sup>80</sup>

Kenya's *De Facto* Single-Party State and Its Institutional Consequences:

With the dissolution of KADU, not only did Kenya's legislature cease to exist as an effective check on executive power, but the stringent requirements for constitutional amendment outlined in the Kenya's independence Constitution also became meaningless. Thus, the Kenyatta regime proceeded virtually unimpeded in pursuing its political strategy of concentrating and centralizing executive power, and undermining Kenyans' rights protections, ironically via the purportedly "legal" method of introducing and enacting a series of constitutional amendments through Kenya's compliant legislature. A month after the enactment of its first constitutional amendment and the dissolution of KADU, the Kenyatta regime moved quickly to

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<sup>80</sup> Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," p. 606.

introduce a second amendment, the Constitution of Kenya Amendment Act No. 38, in December 1964.

This amendment was designed to further undermine Kenya's federal system, as well as subvert judicial independence in Kenya. Specifically, the amendment had three key goals: (1) eliminate entirely the power of regions to raise revenues independently; (2) grant the president sole authority to appoint High Court judges;<sup>81</sup> and (3) eliminate the requirement for the president to get the approval of four of seven regional presidents in the appointment of Chief Justice of the Court.<sup>82</sup> With KADU successfully merged into KANU, this constitutional amendment also easily received the requisite votes needed for its enactment in Kenya's parliament, and the Kenyatta regime's strategy of using the Constitution as a tool to consolidate state power in the executive, and subvert individual and group rights protections, was successfully launched.<sup>83</sup>

In early 1965, KANU continued its aggressive "constitutional" attack on regional powers. Specifically, the Constitution of Kenya Amendment Act No. 14 of 1965: (1) replaced the "exclusive legislative competence" of Regional Assemblies with a rule that required "concurrent competence in these matters in [the national] Parliament;" (2) eliminated Regions' "exclusive executive authority" in all policy

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<sup>81</sup> Kenya's first constitutional amendment renamed Kenya's Supreme Court the "High Court."

<sup>82</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 38, December 1964.

<sup>83</sup> As Ghai and McAuslan argue, this was a continuation of a strategy used by Kenya's British colonial administration. Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present.*

areas; and (3) changed the name of “regions” to “provinces,” thus emphasizing their inferior status to national level institutions.<sup>84</sup> With the passage of this constitutional amendment, in the words of Ghai and McAuslan, Kenya’s federal system, for all intents and purposes, became “at best a glorified system of local government.”<sup>85</sup>

In addition to reducing the powers of the regions to purely nominal ones, the Constitutional Amendment Act of 1965 also removed the specially entrenched provisions for constitutional change in their entirety. Thus, from this time forward, any section of Kenya’s Constitution could be amended by a 65 percent majority in each house. Although, given Kenya’s status as a *de facto* one party state, these changes appeared merely *pro forma*, since it remained constitutionally possible for opposition parties to emerge in Kenya, this amendment was a constitutional safeguard against resistance any future opposition party might pose.

#### Kenya’s Second Brief Experiment with Multiparty Politics: The KPU:

The 1965 Constitutional Amendment Act, as it turns out, was prescient in that a year later, in April 1966, Oginga Odinga, Kenya’s vice-president and the unofficial leader of the Luo community, resigned from both KANU and the Kenyatta government to form a new political party, the Kenya People’s Union (KPU). From early in his political career, Odinga had been a consistent champion of the interests of poor farmers and urban workers in Kenya. Although land reform, workers’ rights and

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<sup>84</sup> Ibid., p. 213.

<sup>85</sup> Ibid.

promotion of socio-economic equality, in theory, were central to KANU's political platform in the May 1963 elections, Odinga argued that since KANU's merger with KADU in November 1964, KANU's original policy agenda and values had become completely subverted.

Instead of being advocates for the poor and landless, as they had promised, Odinga pointed to the fact that a small clique within KANU had acquired vast amounts of land and wealth.<sup>86</sup> Moreover, Odinga argued, “[g]radually political control and business interests have begun to intertwine...[such that]...[m]any have begun to use their positions in politics to entrench themselves as a propertied economic group.”<sup>87</sup> In his advocacy for the interests of Kenya's urban and rural poor, Odinga found himself increasingly marginalized in Cabinet decisions. Thus, in a major political upset to the Kenyatta regime, given the support he commanded from Kenya's Luo community, he ultimately decided to resign.

Odinga's departure from KANU was followed by twenty-eight additional KANU MPs, all of whom immediately declared their solidarity with the KPU. In response, KANU used their still overwhelming majority in parliament to push through yet another constitutional amendment, which required MPs who defected from their political party to vacate their seats and seek re-election in by-elections scheduled for the end of the parliamentary session within which the defection occurred. In her in-

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<sup>86</sup> As Odinga insisted: “If Kenya started *uhuru* [independence] without an African elite class she is now rapidly acquiring one. Ministers and top civil servants compete with one another to buy more farms, acquire more directorships and own bigger cars and grander houses. Odinga, *Not Yet Uhuru*, p. 302.

<sup>87</sup> *Ibid.*, p. 303.

depth study of this period, Susanne Mueller reports that the amendment had the effect of preventing an additional twenty to thirty MPs from defecting from KANU, since they did not want to risk losing their seats in potentially KANU-controlled by-elections.<sup>88</sup>

Thus, twenty-nine by-elections were ultimately convened in the summer of 1966, known as Kenya's "Little General Election."<sup>89</sup> One political strategy, among others discussed below, used by the Kenyatta regime to subvert KPU's mobilizing potential was to restrict its organizing base to the Luo community, thus fueling state propaganda that KPU was merely a "Luo party," and not truly a multiethnic party representing the class interests of poor farmers and workers in Kenya, as it claimed. As a consequence of this strategy, and others discussed below, of the twenty-nine contested seats in the Little General Election, only nine were won by the KPU and the remaining twenty were won by KANU.<sup>90</sup>

Despite this poor showing in the 1966 by-elections, because of its mobilizing potential, the KPU still represented a political threat to the Kenyatta regime and, over the next three years,<sup>91</sup> the regime revived a series of colonial laws and introduced and enacted several additional constitutional amendments to thwart the KPU's organizing

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<sup>88</sup> Susanne D. Mueller, "Government and Opposition in Kenya, 1966-1969," Boston: African Studies Center, Boston University, 1983, p. 20.

<sup>89</sup> That is, Odinga's seat, plus the twenty-eight additional MPs that followed him.

<sup>90</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook Elections*, p. 487.

<sup>91</sup> The KPU existed as an opposition political party in Kenya for almost three and a half years, from April of 1966 to October of 1969, when it was finally banned by the Kenyatta regime, as is discussed below.

efforts. These colonial legal “revivals” and constitutional amendments, and their impact on KPU organization, are discussed in some detail below, as these same laws were mobilized throughout the remainder of Kenyatta’s regime, as well as through his successor Daniel arap Moi’s regime, to repress opposition party and organizational mobilization, including the emergence of Kenya’s contemporary human rights and democracy movement. Because of this, these statutory laws and constitutional amendments, as is discussed in chapters Five through Seven, became a major focus of the movement’s reform efforts.

Colonial Legal Revivals, Constitutional “Reforms” and Political Repression:

The most important colonial laws revived during this period were: (1) the Societies Ordinance, which became the Societies Act; (2) the Public Order Ordinance, which became the Public Order Act, Cap 56; (3) the Outlying Districts Ordinance and Special Districts Ordinance, which became the Outlying Districts Act and the Special Districts (Administration) Act; (4) the Preservation of Public Security Act; (5) the Film and Stage Plays Act; and (6) the Books and Newspapers Act<sup>92</sup> In addition, Penal Code (Amendment) Act 24 of 1967 broadened the definition of the crime of sedition, and made its punishment much more severe. Finally, by continuing the political strategy it established during its first year of rule, the Kenyatta regime continued to introduce and enact a series of constitutional amendments whose ultimate effect was

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<sup>92</sup> These last two Acts, in particular, were made more draconian as the result of amendment to Kenya’s APenal Code in 1966 and 1967; specifically, the Penal Code (Amendment) Act, 1966 and Penal Code (Amendment) Act, 1967.



to further constrain opposition mobilization and further concentrate power in Kenya's executive.

First, the Societies Act required all organizations or "societies" to formally register with the Registrar of Societies, an appointee of the Attorney General, who was in turn an appointee of the President, and given broad legal discretion in deciding whether and when to allow an organization to register. According to the Act, a "society" was "any club, company, or association of ten or more people" and covered political parties, but excluded registered or probationary trade unions.<sup>93</sup> Once a society was registered, the Registrar had to be updated if the group changed its name, constitution or officers. The penalty for belonging to an unregistered society was up to seven years in prison, and the police were given extensive powers of entry, arrest and search without warrant, if they suspected that an unregistered society was convening a meeting.<sup>94</sup> Moreover, the Societies Act made no provision for appeal to Kenya's courts. In some cases, but not all, the refusal, cancellation or suspension of an organization's registration by the Registrar could be taken to the Minister of State, but given that this individual was also an appointee of Kenya's President, there was no institutional guarantee that appeals would be given a fair hearing.

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<sup>93</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," in *Constitutional Law and Politics in Africa: A Case Study of Kenya*, Kivutha Kibwana, ed, Nairobi: Claripress Limited, 1998, p. 155. This report was released in 1994, and is based on research conducted by the staff and volunteers at KHRC. The report was written by Maina Kiai, KHRC's executive director at the time. See also: Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 444, footnote 115.

<sup>94</sup> Ibid.

The Kenyatta-KANU regime first used the Societies Act to hinder the KPU's ability to campaign for the Little General Election by delaying approval of its registration until just before candidate nominations were due. The Act was then consistently used between 1966 and 1969 to prevent the KPU from establishing party branches and sub-branches. As Susanne Mueller reports in her important study of KPU: "the government refused to register an average of 42.7 percent of the KPU's applications for branches and sub-branches" during this period [April 1966 through October 1969].<sup>95</sup> She notes that "[d]uring this same three and one-half year period, the average refusal rate for KANU was only 1.8 percent."<sup>96</sup> In addition, she explains that these figures still underestimate the degree of state bias against KPU, since "the figures do not measure how many local KPU groups did not make formal applications for registration out of fear of reprisals, because they felt that the difficulties were too overwhelming, or because the chances of refusal seemed too obvious."<sup>97</sup> Moreover, as Mueller points out, it was unknown how many formally registered branches and sub-branches eventually shut down simply as the result of KANU intimidation.

Second, the Public Order Act gave the Kenyan police and Provincial Administration broad powers to control public gatherings. A "public gathering" was defined by the Act as "a public meeting, a public procession, and any other meeting,

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<sup>95</sup> Mueller, "Government and Opposition in Kenya, 1966-1969," pp. 9–10.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p. 10.

gathering or concourse of ten or more persons in any public place.”<sup>98</sup> A “meeting” was defined as “any gathering or assembly of persons convened or held for any purpose including any political purpose but excluding religious, social, cultural, trade union, etc. purposes,” and “public place” was defined as “any place to which for the time being the public or any section of the public are entitled or permitted to have access whether on payment or otherwise.”<sup>99</sup> All public meetings under this Act had to be registered with and approved by the District Commissioner (DC) of the district within which the meeting was to be held. As with the Registrar of Societies, the DC was granted wide discretion in deciding whether or not to license a public gathering.

For example, he or she could refuse to do so, if in his or her opinion the gathering was likely to “prejudice the maintenance of public order,” or was to be used for “any unlawful or immoral purposes.”<sup>100</sup> No meeting could be advertised before it was approved, and even approved meetings could be cancelled if, in the opinion of the DC, this was “necessary or expedient in the interest of public order.”<sup>101</sup> Like the Societies Act, the Public Order Act also granted broad powers to the police to search, enter and inspect any suspected premises. Moreover, if the police suspected that an unlicensed gathering was about to take place, they could prevent access to the venue

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<sup>98</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 447.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid., p. 448

<sup>101</sup> Ibid.

by any means that they believed expedient. Finally, it was not only an offense to organize an unlicensed gathering, but also an offense to participate in one.

Thus, not only did the Kenyatta-KANU regime hinder KPU organization by delaying or preventing the party's national, branch and sub-branch registrations, but it also did so by denying party members the ability to convene public meetings.

Moreover, as Mueller explains, the Public Order Act was used both "to restrict KPU's ability to hold political meetings and gatherings, and also to keep the party from holding annual delegates conferences and to prevent its branch officials from assembling informally."<sup>102</sup> Mueller reports that in a telegram sent to all Provincial Commissioners (PCs) just prior to KPU's registration by the Registrar of Societies, Kenyatta instructed:

Licenses to hold public meetings to be issued to KANU members only stop. Seven days notice required stop. All other applications to be referred to the President's Office stop. Permits issued to non KANU members to be cancelled with immediate affect stop. . .<sup>103</sup>

Finally, Mueller's research finds that from mid-July 1966 though mid-June 1967, "KANU was issued with 505 licenses to hold public meetings while the KPU received none."<sup>104</sup>

The Outlying Districts Ordinance and the Special Districts Ordinance, which became the Outlying Districts Act and the Special Districts (Administration) Act, were

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<sup>102</sup> Mueller, "Government and Opposition in Kenya, 1966-1969," p. 11.

<sup>103</sup> Ibid., pp. 11 – 12.

<sup>104</sup> Ibid. Mueller notes that this data "comes from files of licenses that were issued and refused. The file may not have been complete; however, they do reflect the general bias." See Mueller, p. 27.

also used to thwart KPU's ability to organize. These Acts had their historical roots in colonial ordinances enacted in the early 1900s to control the freedom of movement specifically among "Natives,"<sup>105</sup> and were used throughout the colonial period, then reactivated by the Kenyatta regime (and, later again, by the Moi regime) to restrict opposition party mobilization. The Outlying Districts Act granted District Commissioners the power to declare any district, or part of a district in Kenya, "closed," and in so doing, entry into this district became illegal without special permission. The Special Districts (Administration) Act allowed the closed district ordinance to be applied not only to any part of the country, but also to "any person or class of persons from its operation."<sup>106</sup>

This typically worked in two ways. First, any person, or "class of persons," could be exempted from the rules governing a "closed district," and second, if any person, or class of persons, was determined to be acting in a "hostile manner toward the Government," either the Provincial or District Commissioner could order the arrest of that person, or that *entire class of persons*, as well as "prohibit them from leaving areas reserved for their use and order the seizure and detention of all their property."<sup>107</sup>

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<sup>105</sup> "Natives" was the term used throughout the colonial period to refer to the indigenous people who inhabited the area prior to the arrival of the British.

<sup>106</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 418.

<sup>107</sup> Ibid.

The way in which the Kenyatta-KANU regime used these acts to hinder KPU organization is clearly expressed through one of Mueller's interviews with a KPU official:

The government's designation of some areas as "closed districts" is used by them to intimidate the opposition . . . [For example], people can go in and out of Meru [a province in central Kenya] freely in spite of the [fact that it has been declared a "closed" district], however, if a KPU organizer tries to go in, the government will insist that he doesn't. Generally if you want to enter a closed district you get permission from the nearest District Commissioner. Thus if you live in Nairobi you get a permit from the Nairobi DC. If, however, a KPU person asks for a permit, the Nairobi DC claims that he must telegram the DC in the district that the KPU wants to visit. Furthermore, he makes the KPU person give him the money for the telegram to the district and for the reply back. This whole process takes several days and sometimes weeks. Sometimes he gets the permit and sometimes he is refused entry.<sup>108</sup>

Not only did each of these acts restrict freedoms of association, assembly and movement, but in so doing, they also severely restricted freedoms of speech. Two other colonial laws that also worked to restrict free speech, and that were revived during this time, were: (1) the Film and Stage Plays Act and (2) the Books and Newspapers Act. The Films and Stage Plays Act allowed the government to censor films and plays if it "considered [it] necessary in the interests of public order or security, health or morals..."<sup>109</sup>

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<sup>108</sup> Mueller, "Government and Opposition in Kenya, 1966-1969," p. 10. Note: Meru is a predominantly Kikuyu district just outside of Nairobi. It was especially important to the Kenyatta-KANU regime to prevent KPU from mobilizing poor Kikuyu farmers, squatters and workers, and splitting the Kikuyu (critical to their political base) along economic lines.

<sup>109</sup> *The Laws of Kenya*, prepared by A.M.F. Webb, et al., Nairobi: Government Printer, 1962 – 2004: Films and Stage Plays Act, 1965.

The Books and Newspapers Act required that individuals post a minimum bond of Ksh. 10,000 with the Registrar before being allowed to print or publish a newspaper, in case the paper or printer should be fined.<sup>110</sup> Given that the average Kenyan's salary at the time was less than Kshs. 1000, this amount clearly stood as a barrier to free speech.<sup>111</sup> Moreover, a 1966 amendment to the Penal Code empowered the Minister of Information "to declare any publication a prohibited publication," if he or she believed this was necessary "in the interests of public order or security, health or morals."<sup>112</sup> These restrictions were further developed by the Penal Code Amendment Act of 1967, which stated that "any person who prints, publishes, sells, offers for sale, distributes or reproduces any seditious publications, or imports such publication, unless he has no reason to believe that it is seditious, is guilty of an offence and liable to imprisonment for up to ten years."<sup>113</sup> Further amendments to the Penal Code also made it an offense "to have a seditious publication in one's possession, punishable by imprisonment for up to seven years."<sup>114</sup>

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<sup>110</sup> Ibid., Books and Newspapers Act.

<sup>111</sup> In 1969, per capita income in Kenya was approximately Kshs. 928.20. See United Nations University data set. Accessed via: <http://www.unu.edu/unupress/unupbooks/uu33pe/uu33pe0c.htm>

<sup>112</sup> *The Laws of Kenya*, Penal Code (1965). In addition, if the publication was a periodical, the Minister was empowered to ban "all its past and future issues, or in the case of a publisher, all his past or future publications." Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 451.

<sup>113</sup> *The Laws of Kenya*, Penal Code (1965). See also Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 251.

<sup>114</sup> Ibid., p. 251.

Finally, amendments to the Penal Code in 1967 also more broadly defined the crime of sedition, and increased its penalty from three to seven years. According to this amendment, “[i]t is sedition for any person to do or attempt to do, or make any preparation to do, or conspire with any person to do, any act with a seditious intention; or to utter any words with a seditious intention...”<sup>115</sup> “Seditious intention” was defined as:

an intention to overthrow the Government by unlawful means, to bring into hatred or contempt or to excite disaffection against the person of the President of the Government, to excite the inhabitants of Kenya to attempt to procure the alteration by unlawful means, of any matter or things established by law . . .to raise discontent or disaffection among the inhabitants, or to promote feelings of ill-will or hostility between different sections or classes of the population.<sup>116</sup>

As Ghai and McAuslan remark, “[t]his would cover most acts of criticism of the Government.”<sup>117</sup>

Brief mention should also be made at this time of changes to Kenya’s national broadcasting laws. In 1964, the Kenya Broadcasting Corporation (KBC), formerly a public corporation that was legally separate from the government, was “nationalized” and became part of the government under the Ministry of Information and Broadcasting.<sup>118</sup> As a consequence, the government was given a monopoly over both radio and television broadcasting through its agency, the Voice of Kenya (VOK).

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<sup>115</sup> *The Laws of Kenya*, Penal Code, (1965).

<sup>116</sup> *Ibid.*

<sup>117</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 453.

<sup>118</sup> The Kenya Broadcasting (Nationalization) Act No. 12 of 1964. Cited in *ibid.*, p. 452.



Although, in theory, the VOK was obligated to give fair coverage to differing political perspectives, once it came entirely under government direction, it rarely did so. In the case of the KPU, this resulted in news blackouts and state misinformation designed to lead Kenyans to believe that KPU was solely an “ethnic” party of the Luo, rather than a multiethnic party that promoted the interests of poor Kenyan farmers and workers.

Finally, KANU also pushed through several additional constitutional amendments with the general aim of thwarting the KPU’s ability to organize. First, in June of 1966, just prior to the Little General Elections, the Constitution of Kenya Amendment Act No. 18 was passed. This Act, also known as the “Preservation of Public Security Act,” was a direct descendant of the British colonial Emergency Powers Order in Council of 1939 and gave the government, and specifically the executive, extensive powers to detain individuals considered risks to “public security,” without offering them access to a public trial. Like its colonial predecessor, the Act broadly defines “public security” to include “situations of political instability or subversion, the breakdown of economic order, and natural disasters.”<sup>119</sup> If, in the opinion of the president, such a situation existed, he or she was empowered to make laws by regulations for any of the purposes specified in the Act.

As Ghai and McAuslan explain, these purposes were vast and included the search of individuals and premises, “the detention or the compulsory movement of persons, censorship or the prohibition of communications, control or prohibition of

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<sup>119</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 18 of 1966 (Public Security Act), cited in Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 435.

processions and meetings, compulsory acquisition of property, forced labour, control of trade and prices, and the modification of any law.”<sup>120</sup> Moreover, the Act had a “residual provision” that allowed regulations on “any matter not expressly specified which is necessary or expedient for the preservation of public security.”<sup>121</sup> The final section of the Act also made provisions for “the apprehension and punishment of persons” who violate presidential regulations, which included “the imposition of penalties, including death, and the forfeiture of any property connected in any way with the offence.”<sup>122</sup>

In theory, individuals detained under this Act had to be given a detailed explanation for their detention in writing within five days, and had to be informed of his or her rights under the Constitution. However, as we shall see below, this was rarely done. The scope for abuse of power under this act is also clear, and its first victims were KPU candidates and their supporters. Two weeks after its passage, eight KPU officials were detained without trial under the Act.<sup>123</sup> In her research, Mueller found that at least seventeen of the nineteen individuals who were ultimately detained under the Act from August of 1966 to October of 1969 were members of the KPU.<sup>124</sup>

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<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, p. 436.

<sup>123</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), “Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya,” p. 128.

<sup>124</sup> Mueller, “Government and Opposition in Kenya, 1966-1969,” p. 14. Source: *Kenya Gazette*, vol. LXVIII, 9 August 1966 – 7 November 1969. See Mueller, footnote 43, p. 27.

As a consequence of this political and “legal” harassment, as well as the continuing discriminating effects of Kenya’s SMD plurality electoral system, as mentioned above, KPU candidates were only able to win nine of the twenty-nine seats contested in the 1966 by-elections.<sup>125</sup> Due to KANU intimidation tactics, only 33 percent of eligible voters turned out for these by-elections. Significantly, of this 33 percent, the KPU received approximately 54.3 percent of the votes for vacant seats in the House, and 55.5 percent of votes for vacant seats in the Senate.<sup>126</sup> As a consequence of Kenya’s SMD plurality electoral system, which allows malapportionment of districts, especially in cases where the national electoral commission is not independent from the regime, as was the case in Kenya, this translated into only 36.8 percent of the vacant House seats, and only 20 percent of the vacant Senate seats.<sup>127</sup> Despite their small numbers, and the numerous ways in which the above laws frustrated their ability to mobilize, KPU members both inside and outside of parliament strongly resisted further encroachments by the Kenyatta regime on Kenyans’ fundamental political and civil rights –although with little political effect.

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<sup>125</sup> Seven of nineteen seats were won by KPU in Kenya’s House of Representatives, and two of ten seats were won in the Senate. Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, p. 487.

<sup>126</sup> *Ibid.*, p. 485.

<sup>127</sup> *Ibid.*, p. 487. As mentioned above, the KPU won only 7 of 19 seats in the House, and only two of ten seats in the Senate, despite winning more total votes than KANU in both races. *Ibid.*, p. 485, 487.

Political Preparations for Kenya's 1969 General Elections:

By December 1966, just after the KPU by-elections, the Kenyatta regime began preparing for its first post-independence general elections by resuming its tried and true “legal” strategy of enacting constitutional amendments that further concentrated its power and further subverted Kenyans’ human and democratic rights. Specifically, the Constitution of Kenya Amendment Act No. 40 of December 1966 was drafted to achieve three key aims in preparation for the general elections: (1) abolish Kenya’s Senate, (2) extend the life of the current parliament by two years, from June 1968 to June 1970,<sup>128</sup> and (3) fundamentally change the composition of Kenya’s Electoral Commission.<sup>129</sup> Prior to the introduction of this constitutional amendment, the Kenyatta regime also passed a legislative act that required Kenya’s national electoral commission to review existing constituency boundaries for the House of Representatives and increase the number of constituencies from 117 to a minimum of 160 and a maximum of 175. This was proposed in order to absorb Kenya’s 41 Senate seats into the House, preserving Senators’ parliamentary positions and privileges, and, in so doing, enticing Senators to support the amendment. As the Kenyatta regime presented its case, Senators’ parliamentary privileges would not only be preserved by its proposal, but in fact enhanced, given the greater power wielded by Kenya’s lower House. Moreover, as mentioned above, amendment would also extend the political terms of all Senators, as well as all members of the House, by two years.

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<sup>128</sup> As discussed below, however, these elections ultimately were convened in December of 1969.

<sup>129</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 40, 1966.

Once the Electoral Commission carried out its revisions and recommended the creation of 175 constituencies, however, the Kenyatta regime realized that of the thirteen new seats that would have to be contested, a majority were in areas considered to be KPU strongholds. Thus, the regime repealed this Act and introduced a new Act, which required that the Electoral Commission divide the country into only 158 constituencies, in order to fully absorb the 41 members of the Senate, but leave no additional seats open for contestation. The number of constituencies in Kenya then remained at 158, until the 1988 general elections, when this number was raised to 188, as is discussed below.

Once this redistricting was achieved, Kenya's Senate ultimately gave its approval to the amendment and, despite protests by KPU MPs, Kenya became a unicameral parliamentary system with general elections successfully postponed until June of 1970.<sup>130</sup> In addition, as mentioned above, the December 1966 amendment also fundamentally changed the composition of Kenya's Electoral Commission in preparation for these elections. The speaker of Kenya's new parliament, called the National Assembly, was made chair of the Commission, and was to be assisted by two additional members, both of whom were to be appointed by Kenya's President. This was significant in that it, for the first time, gave presidential appointees a majority on the Commission.

Local government elections were then held two years later, in 1968, and an additional constitutional amendment, the Constitution of Kenya Amendment Act No.

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<sup>130</sup> As mentioned above, general elections were ultimately held in December of 1969.

2 of 1968, further undermined the ability of opposition candidates to mobilize in these elections. Because KPU members and candidates continued to be so severely harassed by the Kenyatta regime, many local government candidates who were supportive of KPU's political agenda, but fearful of KPU affiliation, hoped to stand for election simply as independent candidates. Anticipating this political strategy, the Kenyatta regime introduced and passed the 1968 constitutional amendment, which ultimately abolished the right of individuals to stand for election as independents.

In addition, in a political movement that surprised even KANU loyalists, and allegedly on instructions from Kenyatta, District Commissioners in Kenya, who were also the local election returns officers, "disqualified *all* of KPU's 1800 candidates from nomination on the grounds that their papers were incorrectly filled out."<sup>131</sup> As a consequence, not only did KANU "win" all local council seats in the 1968 elections, but those holding local government positions, who had taken the risk and registered with KPU, also lost their seats. Thus, KANU came to dominate all local government positions at this time.

Finally, two additional constitutional amendments passed by Kenya's parliament in 1968 and early 1969 were also aimed at consolidating KANU support for the up-coming general elections. First, the Constitution of Kenya Amendment Act No. 45 of 1968 had four main objectives: (1) it required that presidential candidates be nominated by a registered political party; (2) it provided for national elections of the president, after having been nominated by her or his party; (3) it changed the

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<sup>131</sup> Mueller, "Government and Opposition in Kenya, 1966-1969," p. 14.

procedure for presidential succession such that, following the death or resignation of the president, it mandated there would be automatic succession by the vice-president for 90 days, when new elections would be held; and (4) instead of the twelve specially elected members of the National Assembly being elected by a majority in parliament, henceforth they were to be simply appointed by Kenya's president.<sup>132</sup>

Because Kenya was a *de facto* single party state at this time, the amendment ensured that all that was ultimately required for presidential "election" in Kenya's next general elections was nomination by KANU. As is discussed below, once nominated by KANU, Kenyatta, and later his successor Moi, were automatically declared elected. Second, the Constitution of Kenya Amendment Act No. 5 of 1969 had two main goals: (1) it allowed the president to nominate the chair of the Electoral Commission,<sup>133</sup> thus resulting in *all* members of the Commission being nominated by the president; and (2) it mandated that all previous amendments (1963 – 1969) be consolidated into a revised Constitution of 1969.<sup>134</sup>

In addition to these 1968 and 1969 constitutional amendments, the context for the 1969 general elections was shaped by two important, and related, national events: (1) the assassination of Tom Mboya, Kenya's Minister for Economic Planning and Development, Secretary-General of KANU, and a popular Luo leader; and (2) the

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<sup>132</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 45, 1968.

<sup>133</sup> As discussed above, previously the chair was the elected Speaker of the House, according to Constitution of Kenya Amendment Act No. 40 of 1966.

<sup>134</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 5, 1969. As a consequence of this revision, Kenya's Bill of Rights was moved from Chapter II to Chapter V of the Constitution, but its text remained unchanged.

banning of KPU. Tom Mboya made his entry into national politics in Kenya through his participation in and leadership of trade union activities in Kenya. He founded the Kenya Labour Workers Union in 1952 and served as its National Secretary General until 1963. He also served as the General Secretary of the Kenya Federation of Registered Labour Unions from 1953 – 1963.

Especially after Odinga's falling out with KANU, Mboya's support was crucial to the Kenyatta regime in consolidating, as much as possible, Luo support within KANU. Like Odinga, however, Mboya became increasingly critical of corruption within KANU, and especially critical of what was broadly perceived as concentration of political and economic power among Kenyatta's own tribe, the Kikuyu. After making statements in parliament to this effect, the issue became highly charged –both within and outside of parliament. Shortly afterwards, on July 5<sup>th</sup>, 1969, Mboya was shot and killed on a major street in Nairobi. Following his assassination, there were street protests and rioting throughout Kenya and, as one might expect, these protests were particularly volatile in "Luoland" in Nyanza Province. Although it was widely rumored that Mboya was murdered by henchmen of the KANU-Kikuyu clique, this claim was never ultimately substantiated.<sup>135</sup>

Kenyatta's first visit to Nyanza Province after Mboya's death was in October of 1969 as part of a campaign effort to mobilize KANU support for the December 1969 elections. When his motorcade was stoned by angry protestors, Kenyatta's

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<sup>135</sup> In the end, as Maina Kiai reports, "a lone gunman, Nahashon Njenga, was arrested and charged with the murder." Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," p. 129.



security guards opened fire on the crowd. As a result, it was estimated that approximately twenty people were killed in the incident, and another 100 seriously injured.<sup>136</sup> Kenyatta then immediately banned the KPU as a threat to national security, and all of its leaders, including all KPU MPs, were indefinitely detained without trials under the Preservation of Public Security Act.<sup>137</sup>

Thus, less than three and a half years after KPU had been founded, Kenya's second brief experiment with multiparty politics had come to an end. Although it was not (yet) strictly unconstitutional for an opposition party to mobilize in Kenya, the laws and constitutional amendments discussed above worked to suppress emergent competitors to KANU, and Kenya remained a single-party state for the next twenty-two years. Despite Kenya's single party status, however, national elections continued to be held every five years during this period. Thus, elections were held in 1969, 1974, 1979, 1983 and 1988. The following sections briefly examine the conditions and consequences of these elections, which helped set the stage for the emergence of Kenya's contemporary human rights and democracy movement in the mid-1980s.

#### The 1969 General Elections and the Rift Valley Opposition:

With the banning of the KPU in late October of 1969, and the detainment of its leaders and MPs, Kenya's December 1969 general elections, its first since the pre-

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<sup>136</sup> Ibid., p. 129.

<sup>137</sup> Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, pp. 14–15; Mueller, "Government and Opposition in Kenya, 1966–1969," p. 20; Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 523.

independence elections of May 1963, took place in a highly politically controlled and ethnically polarized environment. Prior to the elections, KANU's Governing Council met to introduce new, more stringent, nominating rules into the party's constitution. The three most important of these were that all prospective candidates had to: (1) produce proof that they had been members of KANU for a minimum of six months prior to the election, in order to disqualify former KPU members; (2) make a loyalty oath both to KANU and Kenyatta, as the party's sole presidential candidate; and (3) make a deposit of Ksh. 1000 with party headquarters.<sup>138</sup> KANU's National Executive Committee then vetted all prospective candidates, and if an individual's candidacy was approved, they were issued a certificate of compliance. Due to these conditions, voter turnout for the 1969 elections was only forty-five percent, compared to seventy-one percent in 1963.<sup>139</sup> Despite this low turnout, however, five of nineteen cabinet ministers were voted out of office, as well as thirteen of twenty-six assistant ministers and 77 of 158 sitting MPs.<sup>140</sup> Perhaps not surprisingly, the highest turnover was in Nyanza Province, where all but two of 22 sitting MPs lost their seats.<sup>141</sup>

This high turnover in parliament brought in a cadre of new MPs who generally supported the former KPU's platform supporting greater redistributive policies in Kenya. The clear trend during Kenyatta's first decade of rule was that a

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<sup>138</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 523.

<sup>139</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, pp. 485 – 486.

<sup>140</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 524.

<sup>141</sup> *Ibid.*

disproportionate amount of state resources –general development funds, school funds, civil service jobs, low interest loans for land purchase—went to Central Province, Kenyatta’s home province and the area of the country where most Kikuyu were concentrated. As a consequence, although Kenya remained a *de facto* single party state since the banning of the KPU, two dominant factions emerged within KANU after the 1969 elections: (1) the “Family” faction, which included Kenyatta’s closest associates and relatives, based primarily in Kiambu District in Central Province, Kenyatta’s home district; and (2) a populist faction, known as the “Rift Valley Opposition,” which included representatives from the following districts in Rift Valley Province: Nyandarua, Nakuru, Nandi, parts of Baringo, Uasin-Gishu, Trans-Nzoia, and Elgeyo-Marakwet.<sup>142</sup>

Three key leaders of the Family faction were: Mbiyu Koinange, Minister of State in the Office of the President, who was responsible for overseeing the Provincial Administration and internal security matters in Kenya, and who was also Kenyatta’s brother-in-law; Njoroge Mungai, Kenya’s Foreign Minister and also Kenyatta’s nephew; and Odongo Omamo, a Luo and the “Family’s” chief rival to Odinga in Luoland. The two dominant leaders of the Rift Valley Opposition were Josiah Mwangi Kariuki, popularly know as “J.M.,” a Kikuyu raised in Nyandarua District, and Jean-Marie Seroney, a Kalenjin from Nandi District. Both Nyandarua and Nandi districts are located in Rift Valley Province.

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<sup>142</sup> Jennifer Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, p. 85.

As the Rift Opposition became increasingly outspoken in parliament during the early 1970s, the Kenyatta regime, for the first time, sought to tighten controls on freedoms of speech and association within the party and within parliament. Up until this time, although the regime had moved quickly to shut down emergent opposition parties and movements, a degree of dissent had been allowed within the party and on the floor of parliament, as long as no adverse criticism was directed at Kenyatta himself. Moreover, up until this time, KANU MPs had been relatively free to organize and conduct what were known as “harambees” or fund-raisers. “Harambee” is a Kiswahili word that literally means “let us pull together.” Although it has indigenous roots in almost all of Kenya’s vernacular languages, Kenyatta elevated this traditional concept to a national symbol and philosophy of development.

Typical harambee projects included building and maintaining schools, health clinics, water projects and small-scale agricultural projects. Harambee proposals were to be initiated and planned at the local level, then presented to the community’s MP. Depending on the type of project (agricultural, educational, health related, etc.), the local MP would then approach the relevant ministry with funding requests. In addition, MPs would also lobby other MPs for support, with the implicit understanding that contributions would be reciprocated at some future time. When actual harambees were held, all members of the community were expected to contribute, and matching national funds were then channeled through local MPs from relevant ministries, in addition to independent contributions by local MPs and their colleagues. As Jennifer Widner reports in her insightful study of this process, these

projects provided an important means for MPs to forge coalitions with other MPs, as well as build support networks that could function as a counter-balance to executive power.<sup>143</sup>

In April of 1972, however, leaders of the Rift Opposition, in particular, Kariuki and Seroney, lodged complaints in parliament over the fact that members of Kenya's Provincial Administration were, with increasing frequency, intervening to stop harambee meetings --especially in Rift Province. Although Kenya's Attorney General, Charles Njonjo, stated that only political meetings needed licenses, and not harambee meetings, over the course of the next year, members of the Rift Opposition found their efforts to conduct harambees increasingly constrained. MPs' "performance" at harambees, that is, their ability to bring national resources to their local communities, was also often the primary criteria considered by constituents in their re-election. Finally, in April of 1973, Seroney, over the objections of members of the Family faction, introduced a motion into parliament to amend the Public Order Act, which had been used as the legal basis for restricting harambee activities.<sup>144</sup> He argued:

The mischief of this Act lies in the section where the DC [District Commissioner] has to comply with directive from the Ministry of State, the Commissioner of Police, and the Provincial Commissioner. This means that even if the DC decides to allow a meeting by an MP... he still has to follow directives from any of those three services....The very concept of the Act is wrong...We do not need a permit to address the very people who elected us to this parliament.<sup>145</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid., p. 99.

<sup>145</sup> *East African Standard*, April 23, 1973. Cited in Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"* p. 99.

The motion was defeated, and a month later, in retaliation, the DC for Seroney's district, Nandi in Rift Valley, banned all harambee meetings sponsored by Seroney. Shortly afterwards, the PC for Western Province did the same in order to prevent Rift Opposition member Martin Shikuku from addressing his constituents. In so doing, the Family faction within KANU moved to effectively shut down the Rift faction. By June of 1973, Kenya's vice-president, Daniel arap Moi, who had been appointed Kenya's vice-president shortly after Odinga's resignation in 1966, issued a new statement on behalf of the government which declared that, in fact, harambee meetings did have to be officially licensed by the state. As Widner points out, with this decision "[t]he major [remaining] means available to the opposition for securing a soapbox from which to speak and for cultivating ties with potential allies in other provinces and districts disappeared."<sup>146</sup>

Despite the fact that the Family faction, primarily through Koinange, Minister of State in the Office of the President, made extensive use of Kenya's Provincial Administration and internal security apparatus to shut down the Rift Opposition, and these efforts grew increasingly intense as the 1974 general elections drew close, key members of the Rift Opposition, Kariuki and Seroney, in particular, easily won re-election in their constituencies. Important members of the Family faction, on the other hand, including Foreign Minister and Kenyatta's nephew, Dr. Njoroge Mungai, and

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<sup>146</sup> Ibid., p. 100.

Odongo Omamo were defeated in their re-election bids.<sup>147</sup> Moreover, Kariuki won a landslide victory, despite the fact that the Provincial Administration prevented him from holding a single campaign meeting, and Seroney was elected Deputy Speaker of the House in the new parliament.

The following March (1975), however, J.M. Kariuki was found dead in the Ngong' hills, just southwest of Nairobi. A controversial parliamentary investigation, which included Seroney and his Rift Opposition colleague, Charles Rubia, among others, found that members of Kenya's internal security force, the General Services Unit (GSU), under the control of the Family faction, were directly involved in the assassination.<sup>148</sup> In particular, the report directly implicated Mbiyu Koinange, the Minister of State and Kenyatta's brother-in-law. After heated debate, the parliament voted narrowly to accept the report, "but only after the final page, calling for the investigation of Mbiyu Koinange . . . in connection with the killing, had been torn out by Kenyatta himself."<sup>149</sup> Three ministers, John Keen, Masinda Muliro and Peter Kibisu, who voted against the government in accepting the report, also had their ministerial posts immediately revoked.

In response to the murder, and the implication of senior government officials close to Kenyatta, protests broke out throughout Kenya. In Nairobi, students at the

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<sup>147</sup> Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 21.

<sup>148</sup> The General Services Unit (GSU) is Kenya's paramilitary force, which reports directly to the Office of the President.

<sup>149</sup> *Ibid.*, p 20.

University of Nairobi took to the streets, and the university was closed for several months. Most close observers of Kenyan politics agree that Kariuki's assassination marked a turning point in the extent to which the regime was willing to tolerate dissent within its party ranks. By the end of 1975, both Jean-Marie Seroney and Martin Shikuku were indefinitely detained without trial for criticizing the government and, by the end of the 1977, other members of the Rift Opposition, including MPs George Anyona, Mark Mwithaga, and Seroney's protégé, Chelegat Mutai, all were detained without trials under the Preservation of Public Security Act.<sup>150</sup> Ngugi wa Thiong'o, a prominent playwright, internationally recognized Kenyan author and Chair of the Literature Department at the University of Nairobi, was also detained at this time. One of his plays, *Ngaahika Ndeenda*, "I'll Marry When I Want," which focused on political issues such as poverty, landlessness and state repression, was not only banned from production, but its theater, Kamirithu Social Hall, was burned to the ground.<sup>151</sup>

**Majoritarian Institutions and the Erosion of Rights Protections:  
The Moi Years, 1978 – 1988:**

By the time of Kariuki's murder in early 1975, it was clear that, barring further changes to Kenya's Constitution, vice-president, Daniel arap Moi, would likely be Kenyatta's successor. As mentioned above, the Constitution of Kenya Amendment Act No. 45 of 1968 provided that, upon the death or resignation of the president, the

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<sup>150</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," pp. 130 – 131.

<sup>151</sup> Ibid.



vice-president would take over the presidential post for 90 days, when new party nominations would be held. By late 1975, when Kenyatta was in his eighties, a campaign had begun, initiated by prominent Kikuyu politicians within the Family faction, to further amend the Constitution to prevent Moi's automatic succession to the presidency for the initial 90-day period. It was strongly believed by members of this group that once Moi stepped into presidential power, he would then use this 90-day period to rig party elections in his favor to secure the presidency.

Although Moi had been completely loyal to the Kenyatta regime during his tenure as vice-president, because he was a Kalenjin from Rift Valley, powerful Kikuyu politicians from Central Province, and Kiambu District in particular, did not believe he could be trusted with state power and, specifically, with protection of their economic and political interests. Instead, they wanted to further amend Kenya's Constitution such that the Speaker of Parliament, rather than Kenya's vice-president, would take over as president, in the event of the president's death, until party elections could be held.

The "Change the Constitution" campaign began in December of 1975, although it was September of 1976 before its first sizable public meeting was held. This meeting was attended by 20 MPs, including the former KPU leader, Oginga Odinga.<sup>152</sup> The fact that the Kiambu faction had managed to forge a coalition with the Luo community, via Odinga, represented a significant threat to the Moi group. It was widely rumored that one of the main reasons Odinga consented to support the

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<sup>152</sup> Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*, pp. 115 – 116.

movement was because he believed Charles Njonjo, Kenya's Attorney General, and a close ally of Moi's, was behind continued state refusals to allow his participation in Kenyan politics. Although Odinga had finally been released from detention, he was denied clearance by KANU to participate in the 1974 general elections.

The "Moi group" was comprised of representatives of almost all other ethnic groups in Kenya, in addition to Kikuyus from outside Kiambu District --Nyeri, Kirinyaga and Nyandarua, all of whom resented the privileged position of the Kiambu Kikuyu in controlling Kenya's political and economic affairs. Two politically powerful individuals who were particularly important in mobilizing support for Moi were: (1) Maasai leader Stanley Oloitipitip, who gathered signatures from 98 MPs pledging to oppose to the Family's constitutional amendment, and (2) Kenya's powerful Kikuyu Attorney General, Charles Njonjo. Not only did Oloitipitip's parliamentary petition send a strong signal to Kenyatta's Kiambu elite that they did not have a sufficient majority in parliament to pass their proposed constitutional amendment, but Njonjo also wielded considerable power within the Kenyatta regime. Although a Kikuyu, Njonjo was not from Kiambu, and thus he was also resentful of the disproportionate advantages that had accrued to the Kiambu elite during the Kenyatta years.

Two days after Oloitipitip presented his petition with MP signatures, Njonjo made a public statement reminding Kenyans of the content of Kenya's sedition laws: "It is a criminal offence for any person to encompass, imagine, devise, or intend the

death or deposition of the President.”<sup>153</sup> Shortly after this, somewhat surprisingly, Kenyatta himself moved against the “Change the Constitution” group, and supported Njonjo’s warning. Although it is not known for certain why Kenyatta shut down the Kiambu faction in support of Moi, many believed that he understood the danger that continued uneven development --that is, Kiambu privilege-- presented to national unity.<sup>154</sup> Reportedly in a speech that Kenyatta gave the week after his announcement in support of Njonjo, and indirectly of Moi, the word *unity* appeared more than thirty times.<sup>155</sup>

Kenyatta died in his sleep on August 22, 1978, and as the Constitution mandated, Moi assumed the presidency for the next 90 days, as the party prepared for presidential nominations. As the Kiambu faction feared, the Moi group quickly moved to take control of KANU headquarters and the election process, and a ban was immediately placed on political meetings throughout the country during the election period.<sup>156</sup> Not even three weeks after Kenyatta’s funeral, *The Economist* reported that “[h]undreds of party branches all over the country have called for [Moi’s] unopposed election.”<sup>157</sup> By the time KANU convened its special delegates conference a month later, the 1600 KANU delegates attending gave their unanimous support to Moi.

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<sup>153</sup> Cited in *ibid.*, p. 116.

<sup>154</sup> *Ibid.*, p. 117.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*, p. 125.

<sup>157</sup> *The Economist*, 9 September 1978, “International Report,” p. 62. Accessed through: [http://web.lexisnexis.com/universe/document?\\_m=dd0e227d7929ffac0d1ca4f1cd8797a5&\\_docnum=30&wchp=dGLbVlb-zSkVb&\\_md5=c664c89a6](http://web.lexisnexis.com/universe/document?_m=dd0e227d7929ffac0d1ca4f1cd8797a5&_docnum=30&wchp=dGLbVlb-zSkVb&_md5=c664c89a6)

Thus, as mandated by Kenya's Constitutional Amendment Act No. 45 of 1968, Moi automatically became Kenya's second post-independence president, as the sole nominee of the sole political party, KANU. President Moi was inaugurated eight days later, on October 14, 1978.

### The Moi Regime:

Moi's presidency was initially widely celebrated both nationally and internationally. He chose Mwai Kibaki, a prominent Kikuyu, and Kenyatta's Minister of Finance, as his vice-president, and he maintained Kenyatta's powerful Kikuyu Attorney General, Charles Njonjo. In so doing, Moi signaled to the Kikuyu community that they would not be excluded from his regime, despite tensions with the Kiambu group. Because Moi was not a Kikuyu, and was from one of Kenya's smaller tribes, the Kalenjin, many believed his regime would bring a much needed change in the national distribution of resources and more equitable development in Kenya. Recognizing his need to bolster support for his regime outside -as well as within- the Kikuyu community, Moi presented himself as a populist leader –a president for the “wananchi,” or “common people” of Kenya.

One of Moi's first policy directives as president included state provisions for free milk for all primary school children in Kenya, which made him enormously popular. He also “increased the size of the civil service, presented hundreds of land titles to peasants, distributed food and money in the name of charity, and embarked on

programmes to increase the capacities in rural hospitals.”<sup>158</sup> Finally, he also publicly championed the principles and ideals of human rights and democracy, and soon after his inauguration, he released all political detainees who had been imprisoned during the Kenyatta years.<sup>159</sup> Although some viewed this action cynically and remarked that it was to Moi’s political advantage to release individuals who would be “potential allies against the Kiambu-based coalition,” most celebrated the gesture and, for the first time in Kenya’s history, students at the University of Nairobi marched in *support* of the government.<sup>160</sup>

As the 1979 general elections approached, however, it seemed that the political honeymoon was over. As during the Kenyatta years, former KPU leaders Oginga Odinga, and his close ally, Achieng’ Ouko, also a Luo, were refused clearance to stand for election on the KANU ticket. Also, unlike Kenyatta, who worked primarily through the Provincial Administration, Moi actively campaigned for a slate of candidates throughout the country, making his personnel preferences clear. Although the elections proceeded with little violence, Throup and Hornsby, close observers of Kenyan elections since independence, report that “[t]he 1979 general elections in the central Rift Valley provided the worst example of electoral rigging since the 1968

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<sup>158</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), “Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya,” p. 132.

<sup>159</sup> There were a total of twenty-six political detainees when Kenyatta died in 1978. They included four members of parliament --Jean Marie Seroney, the former Deputy Speaker, George Anyona, Martin Shikuku, and Wasonga Sijey. See Amnesty International, *Kenya: Torture, Political Detention and Unfair Trials*, New York: Amnesty International USA Publications, 1987. Also released was Ngugi wa Thiong’o, a prominent Kenyan author and playwright.

<sup>160</sup> Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, p. 131.

local government elections.”<sup>161</sup> In these districts, near Moi’s home district, the district administration, apparently acting on orders from the Office of the President, blatantly interfered with the electoral process to ensure that Moi’s main rivals among the Kalenjin were defeated.<sup>162</sup> As Throup and Hornsby explain: “Throughout the Kalenjin heartland. . . long-serving MPs were replaced by Moi’s henchmen; in some seats, troops from the dreaded GSU were deployed to dragoon voters to the polls and to ensure that they voted the right way.”<sup>163</sup> Moi also undertook a major cabinet reshuffle after the elections, placing the candidates he had sheparded through the electoral process into key positions.

Shortly after the 1979 general elections, and with his newly constituted cabinet, President Moi began to aggressively pursue a political strategy that came to be a signature of his regime –tying KANU more tightly to the Office of the President. This was done to more effectively manage political dissent within the party and to more closely monitor emergent splinter groups.<sup>164</sup> In April of 1980, four months after the 1979 general elections, Moi convened a KANU delegates conference, at which he stated: “I shall not hesitate to take disciplinary action again those Party members of

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<sup>161</sup> Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 29.

<sup>162</sup> As is discussed above, Kalenjin politicians were divided in their support for Moi, as many believed that he sold out Kalenjin interests when he switched party loyalties to KANU in 1964. Moreover, they believed he continued to compromise on issues that were of fundamental importance to the community in return for preferential treatment by the Kenyatta administration. See Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 29.

<sup>163</sup> Ibid.

<sup>164</sup> Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”* p. 132.

parliament . . . should I find them working against the interests of our nation and our people.”<sup>165</sup> He also reactivated party rules that allowed the leadership to apply “loyalty tests” and announced that all government officials would have to demonstrate 100 percent loyalty to the government or quit.<sup>166</sup>

Shortly after this announcement, the regime banned the University Academic Staff Union (UASU), a union representing university workers and students, which had been resurrected shortly after Moi’s release of Ngugi from detention in December of 1978.<sup>167</sup> Also banned were ethnic associations, which had proliferated in the final years of the Kenyatta regime, and had, in some respects, come to function as emergent opposition political parties.<sup>168</sup> The primary target of this presidential directive was the Gikuyu, Embu, and Meru Association (GEMA).<sup>169</sup> This group brought together key ethnic groups in Central Province, and specifically Kiambu District, who, in the wake of tightening controls on dissent in KANU, began to use GEMA as a means to more effectively promote their political and economic interests within KANU.

In the face of increasingly authoritarian tactics within KANU, George Anyona, a former KPU member and close associate of Odinga’s, announced on May 30<sup>th</sup>, 1982

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<sup>165</sup> Daniel arap Moi, *Continuity and Consolidation in Kenya: Selected Speeches, December 1979 – July 1981*, Nairobi: East African Publishing House, 1982, p. 11.

<sup>166</sup> Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”* p. 132.

<sup>167</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), “Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya,” pp. 132 - 133

<sup>168</sup> See Widner’s interesting discussion of this: Widner, *The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*, pp. 92 – 94, 110, 112-118, 120-121, 124-126, 131, 142-144, 198, 201 and 231.

<sup>169</sup> “Gikuyu” is another name for the Kikuyu people.

that the “time was ripe for a second party in Kenya.”<sup>170</sup> Together with Odinga, he proposed the formation of an opposition party, the Kenyan African Socialist Alliance (KASA).

In response, the Moi regime immediately detained both Anyona and Odinga, together with their lawyer, John Khaminwa, under the Preservation of Public Security Act. In addition, the regime called an immediate meeting of the Governing Council of KANU, and then ordered Kenya’s Attorney General to prepare a constitutional amendment to make Kenya a *de jure* single party state. The Leader of Government Business in parliament, a position constitutionally held by Kenya’s vice-president, Mwai Kibaki, then moved a procedural motion reducing the publication period of the bill from the normal fourteen days to six. Debate on the Amendment was kept highly controlled and, in the end, only two MPs voted against it. The entire process reportedly took less than two hours.<sup>171</sup> This constitutional amendment, the Constitution of Kenya Amendment Act No. 7 of 1982, popularly known as “Section 2A” of the Constitution, made KANU the only constitutionally allowable party in Kenya, and became constitutional law on June 9<sup>th</sup>, 1982.

#### 1982 Coup Attempt and Its Political Consequences:

Less than two months later, on Sunday, August 1, 1982, junior officers and rank-and-file members of Kenya’s Air Force (KAF) launched an abortive coup against

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<sup>170</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), “Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya,” p. 133.

<sup>171</sup> *Ibid.*, p. 134.



the Moi regime. Although the exact reasons behind this attempted coup are still not known, it is believed that regime's constitutional amendment prohibiting opposition political parties was a catalyst for disaffected members of the KAF, many of whom were Luos, to rebel against the regime.<sup>172</sup> It was also widely rumored, however, that, in fact, more than one coup attempt was in play at the time, as the Kenya's military was slow to respond to the initial KAF advance. KAF rebels were able to seize several strategic building in Nairobi, including Broadcasting House, which housed Kenya's main radio service, before being shut down by segments of the military and General Services Unit (GSU). The entire episode was over by later that afternoon, however; and although Nairobi's streets were deserted the following day, by the next day, business had resumed its normal pace.

Not surprisingly, the coup attempt deeply shook the Moi regime, however. In response, Moi immediately disbanded the entire Air Force, and more than 3000 rank-and-file members and officers were detained.<sup>173</sup> In addition, the University of Nairobi was closed for almost a year, and approximately 100 students were held in custody on charges of demonstrating in support of the coup before. Court martial and military trials, as well as civilian trials, were also quickly convened to begin hearing evidence. Although most of these trials were kept highly secretive, allegations were leaked that

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<sup>172</sup> Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"* p. 146; Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," p. 134; Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 31.

<sup>173</sup> *Africa Contemporary Record: Annual Survey and Documents 1982 – 1983*, vol. 14, Colin Legum, ed., New York: Africana Publishing Company, 1983, p. B 181.

some senior politicians, mainly Kiambu Kikuyus, as well as some members of the military might have also been involved in the attempt to overthrow the government. The Moi regime firmly denied that Kenya's Army played any role, however, and what little information that was made public suggested the coup attempt was the work of a handful of junior officers in the Air Force, almost all of whom were Luos. Except for twelve junior Air Force officers, who were charged with treason and sentenced to death, most of those who either pleaded guilty, or were found guilty, received sentences from two to twenty-five years in prison.<sup>174</sup> When Moi finally announced the suspension of court-martials in March 1983, it was estimated that approximately 900 KAF personnel had been sentenced to between six months and life imprisonment.<sup>175</sup>

The abortive coup marked an important turning point for the Moi regime. After this, measures to suppress all forms of opposition were stepped up, and many more detentions followed. These included numerous university professors,<sup>176</sup> as well as Peter Oloo Aringo, a Luo and former Minister of Information; Raila Odinga, a Luo, son of Odinga and a former engineering professor; Otieno Mak'onyango, also a Luo and a senior newspaper executive; and Vincent Otieno, also a Luo and former dean of

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<sup>174</sup> Ibid.

<sup>175</sup> Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"* p. 146; Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," p. 134; Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 31.

<sup>176</sup> Including: Alamin Mazrui, of the Linguistic Department; Maina Kinyatti, of the History Department; Willy Mutunga, of the Law School, Katami Mkangi of the Sociology Department; Edward Oyugi of the Education Department; and Mukaru Ng'ang'a, of the Institute of African Studies. See Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*, p. 146.

the College of Engineering at the University of Nairobi.<sup>177</sup> In addition, six student leaders at the University of Nairobi were tried and jailed for sedition.<sup>178</sup> Although the Moi regime had begun to tie KANU more closely to the Office of the President just after the 1979 general elections, following the coup attempt, these efforts were redoubled. In April of 1983, for example, the Moi regime announced the launching of a KANU party newspaper, the *Kenya Times*, and its Kiswahili version, *Kenya Leo*. In addition, the regime announced that Kenya's next general elections would be held a year early, in September of 1983, in order to "clean house."

#### The 1983 General Elections and Repression within KANU:

In preparation for the 1983 general elections, the Moi-KANU launched a major countrywide recruitment drive to increase KANU membership. As was the case with the 1979 general elections, the regime maintained rigorous clearance procedures for screening candidates and, once again, Odinga and his associates were denied clearance to stand on the KANU ticket. Because of the repressive political atmosphere at the time, voter turn out in the 1983 general elections was only forty-six percent, compared to sixty-seven percent in the 1979 elections. And, as was expected, only those candidates that KANU had cleared as proven "Moi loyalists" won seats in the new parliament.

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<sup>177</sup> *Africa Contemporary Record: Annual Survey and Documents 1982 -1983*, vol. 14, Colin Legum, ed., New York: Africana Publishing Company, 1983, p. B 182.

<sup>178</sup> Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," p. 135.

Controls on party participation and discipline continued over the next five years. In June of 1984 membership in KANU was made obligatory for all civil servants, and the state automatically deducted party dues from their paychecks. The Moi regime also became increasingly suspicious of any form of dissent, and in September of 1984, President Moi made the following speech:

I call on all Ministers, assistant Ministers and every other person to sing like parrots in issues I have mentioned. During Kenyatta's period I persistently sang the Kenyatta tune. . . I had to sing whatever Kenyatta wanted. . . Therefore, you ought to sing the song I sing. If I put a full stop, you should also put a full stop. This is how the country will move forward. . .<sup>179</sup>

Shortly after making this speech, Kenya's former Attorney General and current Minister of Constitutional Affairs, Charles Njonjo, three former ministers, four assistant ministers and a number of prominent parliamentary backbenchers were all expelled from KANU.<sup>180</sup> Since the enactment of Section 2A, suspension or expulsion from KANU became a common regime strategy for silencing critics within the party.

In early 1985 it was announced that KANU elections at branch and national levels would be held later that year, the first since independence in 1963.<sup>181</sup> In preparation, another the regime launched another major KANU recruitment drive,

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<sup>179</sup> Cited in *Africa Contemporary Record: Annual Survey and Documents 1984-1985*, Volume 16, Colin Legum, ed., New York: Africana Publishing Company, 1985, p. B 262.

<sup>180</sup> The three former ministers were: Stanley Oloitipiti, Joseph Kamotho and G.G. Kariuki. The four assistant ministers were: AO Olang, Clement Lubeme, Francis Lotodo, Jackson Kalweo. Parliament's former Chief Whip, Sheikh Said Hemed, and former Deputy Speaker-Moses Keino, were also expelled from KANU at this time. See Widner, "*The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*", pp. 147 – 149.

<sup>181</sup> An attempt was made to hold party elections in 1978, but due to Kenyatta's death in August, just prior to the scheduled elections, they were indefinitely postponed.

which was widely reported to be coercive in many parts of the country. Moreover, purportedly as an effort to save money and address accusations of electoral fraud, KANU's secret ballot system was replaced by a "queuing" system. In this system, KANU members were to form queues behind posters of the candidates they supported for leadership positions in the party. As is discussed below, the regime later insisted that this system be used in the first round of voting for the 1988 general elections, and it was this action, among others, that served as a major impetus for the emergence of Kenya's human rights and democracy movement.

The Moi regime continued KANU membership drives throughout 1986 and 1987. During a major membership drive in August 1986, Shariff Nasser, an MP from Coast Province and close associate of President Moi's, announced that employers should "compile lists of all those who had refused to keep membership current in KANU."<sup>182</sup> Moreover, it was required that "[a]ll members . . . wear their party badges to show they had paid their fees."<sup>183</sup> The KANU leadership also developed youth wings at this time to "patrol the country, instill support for the party, and monitor dissent."<sup>184</sup> Although KANU branches had made use of youth groups for some time, beginning with the 1985 KANU elections, these groups took on increasingly powerful, and controversial, roles –acting as vigilante groups for the party, patrolling market places to ensure that all those participating were active members of KANU, and

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<sup>182</sup> *Africa Contemporary Record: Annual Survey and Documents, 1986-1987*, vol. 18, Colin Legum, ed., New York: Africana Publishing Company, 1987, p. B 325.

<sup>183</sup> *Ibid.*, p. B 324.

<sup>184</sup> Widner, "*The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*", p. 132.

harassing, and in some cases even arresting, those not professing complete loyalty to the party.<sup>185</sup> As a consequence, even numerous high-ranking of KANU became critical of the party's use of youth wingers for political and social control. But, despite their controversial role, the Moi regime formally institutionalized the youth wing within KANU by the end of the 1980s.<sup>186</sup>

By November of 1986, the Moi regime's position on the role that KANU should play in national politics was made clear. In a statement on Kenya's government-controlled public radio station, the Kenya Broadcasting Corporation (KBC), President Moi stated that KANU was in fact "supreme over Parliament and the High Court."<sup>187</sup> Moreover, in December of 1986, KANU's Governing Council, under Moi's leadership, insisted that it had the authority to summon ministers before it to account for their performance. In addition, it was decided that Kenya's ministries should implement decisions made by the KANU Governing Council, since the Governing Council's 300 members, in theory, represented all forty-two branches of KANU.<sup>188</sup> After this time, KANU also became increasingly aggressive in suspending

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<sup>185</sup> Although youth wingers did not formally have the power of arrest, as Widner reports, "several groups in Nairobi, Nakuru, and elsewhere had assumed that right anyway, while others had become bodyguards for local officials." Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*, p. 159.

<sup>186</sup> Ibid.

<sup>187</sup> Radio Nairobi, November 16, 1986. *Africa Contemporary Record: Annual Survey and Documents 1986 - 1987*, vol. 18, Colin Legum, ed., New York: Africana Publishing Company, 1987, p. B 325.

<sup>188</sup> Ibid., p. B 324.

party members, including senior government officials, for alleged acts of “indiscipline.”<sup>189</sup>

The year 1987 was declared the “Year of Discipline” by the KANU leadership. It continued its membership drives, published a new party constitution that emphasized the importance of discipline and loyalty to the party, and appointed David Okikiki Amayo as head of the party’s Disciplinary Committee. In a revealing interview published in one of Kenya’s most widely read news journals, *The Weekly Review*, Amayo reiterated Moi’s statements made in late 1986 regarding KANU’s superiority to parliament. In addition, he commented that the Disciplinary Committee was “competent to deal with criminal charges against party members” and could also assume police functions because “the security of the country is not left only to the police.”<sup>190</sup> Lawyers were not allowed to defend those charged under KANU’s Disciplinary Code, and Amayo compared the Committee to a traditional committee of Kenyan elders who could hear cases under tribal law. Finally, Amayo went so far as to say that even Kenyans who were not KANU members could be brought before the Committee because “[w]hatever one practices he does so with a licence authorized by KANU, and one can be deprived of that . . .”<sup>191</sup>

In addition to tightening discipline within KANU, the Moi regime, with its increasingly “Moi loyalist” and pliant parliament, especially in the wake of the 1983

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<sup>189</sup> Ibid.

<sup>190</sup> Ibid., p. B 317.

<sup>191</sup> Ibid. It should be noted that KANU’s Disciplinary Committee was finally disbanded by Moi in September 1987 because Amayo began to assume too much power.

general elections, passed three additional constitutional amendments, in 1986, 1987 and 1988 respectively, that served to further consolidate executive power over Kenya's judiciary and the civil service. First, the Constitution of Kenya Amendment Act No. 14 of 1986 removed security of tenure from the offices of the Attorney General, the Auditor-General and Controller.<sup>192</sup> Previous to this amendment, an independent three-person tribunal had to approve decisions to remove individuals in each of these offices. The Amendment Act of 1986 also gave the president power to dismiss any senior official, and even eliminate government offices, should he or she see fit. With this authority, Moi abolished the office of Kenya's Chief Secretary, the head of the civil service, because he believed it wielded too much power.<sup>193</sup> Finally, this amendment also authorized Kenya's Electoral Commission to increase the number of constituencies in Kenya from 158 to between 168 and 188 in preparation for the 1988 general elections.

The second constitutional amendment, the Constitution of Kenya Amendment Act No. 20 of 1987 made all crimes that carried the death penalty unbailable offenses.<sup>194</sup> These crimes included treason, murder, robbery with violence and attempted robbery with violence. Although, as close observers of Kenyan politics have noted, a tradition had already been established by the courts of denying bail in

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<sup>192</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 14, 1986.

<sup>193</sup> As Christopher Mulei notes, although the office of Chief Secretary of the Civil Service was abolished, two new offices, the "Secretary to the Cabinet" and the "Head of the Civil Service," were created in its place. Christopher Mulei, "Historical Perspectives of Elections in Kenya," in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project*, Nairobi: Institute for Education in Democracy (IED), p. 47.

<sup>194</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 20, 1987.



most of these cases, the Moi regime felt compelled to formalize this practice in constitutional law in order to ensure that government critics were not granted bail by one of the few remaining judges that was not definitively “pro-regime.”<sup>195</sup>

Finally, the third amendment, the Constitution of Kenya Amendment Act No. 4 of 1988 gave the president the sole right to appoint and dismiss all judges, thus putting the final nail in the coffin for judicial independence in Kenya.<sup>196</sup> In addition, this Amendment Act also extended the period in which a person suspected of a capital crime could be held before being brought to court from twenty-four hours to fourteen days.<sup>197</sup> As Kenyan constitutional scholar Christopher Mulei points out, “[t]his amendment was made at a time when allegations of torture of [government critics charged with treason by representatives of the regime] in police custody were rife,”<sup>198</sup> and thus gave the regime the constitutional authority to continue to engage in these activities for extended periods.

#### Political Preparations for the 1988 General Elections:

In addition to the Constitution of Kenya Amendment Act No. 14 of 1986, which authorized the Electoral Commission to increase the number of electoral constituencies in Kenya from 158 to a maximum of 188, two further highly

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<sup>195</sup> Mulei, “Historical Perspectives of Elections in Kenya,” p. 47.

<sup>196</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 4 of 1988.

<sup>197</sup> *Ibid.*

<sup>198</sup> Mulei, “Historical Perspectives of Elections in Kenya,” p. 47.

controversial statutory laws were passed by Kenya's parliament in August of 1986 in preparation for the 1988 general elections. The first of these, as mentioned above, was modeled on changes made to KANU's electoral code for the 1985 party elections and eliminated the secret ballot in the first round of voting in future general elections. In its place, the "queuing system," as described above, was instituted.

Since 1969, Kenya's general elections were comprised of two rounds: (1) a party primary, open only to members of KANU; and (2) a general election, open to all members of the electorate—that is, all Kenyan citizens who met eligibility criteria and were registered voters, but not necessarily members of KANU. Because Kenya had effectively been a single party state since 1969, however, the second round of voting in the 1969, 1974, 1979 and 1983 general elections was merely a formality.<sup>199</sup> The second controversial law passed in preparation for the 1988 elections became known as the "seventy percent rule" and stated that candidates receiving more than seventy percent of the vote in the first round of voting would automatically be declared an elected MP without having to stand for election in the second round.

The Moi regime justified these proposed changes as cost-saving measures and means of preventing electoral fraud. President Moi also argued that the queuing system was, in fact, much more consistent with African traditions and African forms of democracy, where citizens stood publicly to be counted, rather than use a secret ballot. Both laws passed with little dissent in Moi's loyalist parliament, with only three MPs—Masinde Muliro, Kimani wa Nyoike, and Charles Rubia—speaking out

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<sup>199</sup> This is because only KANU members were allowed to stand for elections and, historically, there were never enough eligible voters who were not members of KANU to affect election results.

against the queuing system.<sup>200</sup> The laws drew immediate criticism and condemnation, however, from Kenya's professional legal society, the Law Society of Kenya (LSK) and dominant church organizations, including the National Council of Churches of Kenya (NCCCK), an organization that conjoined all Protestant Church organizations in Kenya, as well as the Kenya's national council of Catholic bishops—all of whom became dominant leaders of Kenya's contemporary human rights and democracy movement.<sup>201</sup> As will be discussed in the following chapter, it was the enactment of these electoral laws, and the consequent 1988 general elections, that served as major catalysts for the mobilization of Kenya's contemporary human rights and democracy movement.

#### The 1988 "Mlongo" Elections:

With these new electoral laws and constitutional amendments in place, the 1988 general elections, which became known as the "Mlongo" or "queuing" elections, were held in March of 1988. As in the 1979 and 1983 general elections, the regime's strategy was to provide maximum support to those MPs judged to be Moi loyalists. Once again, Odinga and his associates were not allowed to stand for elections. Provincial administrators were also widely reported to openly favor KANU loyalists over others, and violent clashes were reported between provincial administrators and

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<sup>200</sup> Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*, p. 172.

<sup>201</sup> Kenya is estimated to be approximately 45 percent Protestant and 33 percent Catholic. *The World Factbook: Kenya*, CIA, 2004. Accessed via: <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

competitive candidates judged not to be completely loyal to KANU.<sup>202</sup> Electoral fraud and bribery were also reported to be rampant.<sup>203</sup>

As a consequence, voter turnout in the 1988 elections was only 36.8 percent, the lowest in Kenya's political history, and the elections were widely perceived to be illegitimate. The first round of voting was held on March 21, 1988. Following this round, sixty-five parliamentary candidates were declared elected under the 70 percent rule, despite the fact there was negligible turnout in many constituencies. In Mathare constituency, a highly populated slum area just outside of Nairobi, for example, less than *seven* percent of registered voters voted, yet Josephat Karanja, a close associate of President Moi's, who was later to replace Mwai Kibaki as Kenya's vice-president, was declared elected under the 70 percent rule.<sup>204</sup> In other cases, election returning officers (District Commissioners) either simply elevated the number of votes of Moi loyalist candidates, or even reversed vote tallies, so that the Moi candidate received the votes actually earned by his or her opponent.<sup>205</sup> As election analysts Throup and Hornsby explain: "Queuing ensured that there were no embarrassing ballot papers left over after the poll and the Returning Officer . . . could merely declare a result, however

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<sup>202</sup> Institute for Education in Democracy, *National Elections Data Book: Kenya 1963 – 1997*, Nairobi: Kenya, Institute for Education in Democracy (IED), July 1997, pp. 153 – 155.

<sup>203</sup> Ibid. See also Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, pp. 42 – 45.

<sup>204</sup> As will be discussed in Chapter Four, Karanja ended up replacing Mwai Kibaki as Kenya's vice-president when Moi demanded that Kibaki to resign. This was despite the fact that Kibaki received nearly 95 percent of the vote in his constituency in the 1988 elections.

<sup>205</sup> Throup and Hornsby provide several examples of this in their analysis of the 1988 elections. See Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, pp. 42 – 45.

fraudulent, while candidates who secured more than 70 per cent of the primary vote did not have to submit to the ignominy of a secret ballot.”<sup>206</sup>

Although Kenya’s parliament had become increasingly quiescent since the 1979 general elections, observers of and participants in Kenyan politics agreed the 1988 general elections took electoral fraud to another level. After these elections, any semblance of executive-legislative balance that might have remained prior to 1988 was completely eroded. As Throup and Hornsby explain:

The adoption of the queue voting symbolized the end of the National Assembly as any form of watchdog on the executive. The abuses [of the 1988 general elections] were so extensive that the legitimacy of the Assembly was . . . destroyed in the minds of Kenyans, and the state was seen even more clearly as concerned only with its own interests, at the expense of those of the ordinary people. Henceforth, the Assembly served as little more than an impotent talking shop. MPs were seen as tools of the center, not local representatives, because their success was due to state rigging, not popular support.”<sup>207</sup>

### **Judicial Independence and Judicial Review, 1963 - 1988:**

Given that the erosion of Kenyans’ fundamental rights protections was largely the consequence of constitutional amendments and statutory laws that clearly violated the spirit, if not the letter, of Kenya’s Bill of Rights, an obvious question that arises is why the judiciary did not stand up to legislative majorities and executive transgressions, given that it was constitutionally empowered with judicial review to do so? First, as was seen above, the independence of Kenya’s judicial branch was

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<sup>206</sup> Ibid, p. 42.

<sup>207</sup> Ibid, p. 44.

gradually whittled away during the first twenty-five years of independence. Beginning with the Kenyatta regime's Constitution of Kenya Amendment Act No. 38 of December 1964, which eliminated the requirement for Kenya's president to get approval from four of seven regional presidents in the appointment of the High Court's Chief Justice, and granted the president sole authority to appoint High Court judges, the independence of the High Court became increasingly compromised. With the Moi regime's Constitution of Kenya Amendment Acts No. 14 of 1986 and No. 4 of 1988, which removed security of tenure of the Attorney General and High Court judges, as mentioned above, the final nail was placed in the coffin of judicial independence.

In addition to these constitutional amendments, both the Kenyatta and Moi regimes also made extensive use of what were known as "British 'contract judges.'" These judges were British citizens who contracted with the Kenyan government to work in Kenya's judiciary. At independence these judges were considered necessary because of the scarcity of senior indigenous Kenyan lawyers available to assume judgeships.<sup>208</sup> Contract judges' salaries were paid both by the Kenyan government and by supplements provided by the British Overseas Development Administration (ODA), with ODA supplements constituting approximately two-thirds of their salaries.<sup>209</sup> Contracts were typically signed for a period of two and a half to three

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<sup>208</sup> As will be discussed in greater detail in Chapter Four, during the colonial era, the British instituted various obstacles to prevent indigenous African Kenyans from studying law and qualifying at the bar, so the shortage of Kenyan lawyers was a direct result of colonial policy.

<sup>209</sup> Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. 23.

years, at which time they came up for renewal. Renewal of contracts was entirely dependent on approval of the judges' performance by the Kenyan government, and as analysts of Kenya's judicial system have noted, "these contracted judges [felt] no patriotic allegiance to the country, but [were] motivated by a desire to safeguard their [own] positions, status and security in the country."<sup>210</sup>

Another argument put forward for hiring contract judges, in addition to the scarcity of qualified indigenous Kenyans, was that they were less likely to be corrupted than Kenyan judges because they would not be "subject to ethnic loyalties."<sup>211</sup> Even a cursory examination of judicial politics in Kenya during this period reveals this not to be the case, however. Both the Kenyatta and Moi regimes consistently placed contract judges in positions of significant judicial power, and these judges, almost without exception, could be counted on to make regime-friendly decisions.

The most influential offices within Kenya's judiciary are generally considered to be: the Chief Justice, the Criminal Duty Judge, the Civil Duty Judge, and the Attorney General.<sup>212</sup> In theory, the Chief Justice was to be appointed by the president on the advice of the Judicial Service Commission (JSC). All five members of the JSC,

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<sup>210</sup> *New Law Journal*, London: Butterworths, June 28, 1991. Cited in Africa Watch, *Kenya: Taking Liberties: An Africa Watch Report*, New York: Human Rights Watch, July 1991, p. 148.

<sup>211</sup> RFK delegation interview with Kenyan Ambassador to the United States, Denis Afande, July 1, 1991. Cited in Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. 76, footnote 50.

<sup>212</sup> Africa Watch, *Kenya: Taking Liberties: An Africa Watch Report*, p. 145.

however, were appointed either directly or indirectly by Kenya's president.<sup>213</sup> Moreover, since there was no legal requirement for the president to accept the JSC's recommendations, as Kenyan constitutional scholar Kivutha Kibwana explains, "the JSC, at best, merely approve[d] executive appointments."<sup>214</sup> The Chief Justice, as chief administrator of the judiciary, wielded considerable judicial power during Kenya's first twenty-five years of independence. For most of this period (1963 – 1988), this position was held by British contract judges known to be pro-government, and it was not atypical for Chief Justices to make public statements urging judges and lawyers "to be loyal to the Government and to the Head of State."<sup>215</sup>

Although Chief Justices, as chief administrators of Kenya's judiciary, were constitutionally empowered to assign judges in all cases, beginning in the 1980s, this task was largely delegated to one of two "duty" judges: (1) the Criminal Duty Judge, or (2) the Civil Duty Judge.<sup>216</sup> Duty judges were mandated to serve no longer than three to four months; but, throughout most of the 1980s and 1990s, as is discussed in the following chapter, dependably pro-regime contract judges were kept in these positions for extended periods. For this reason, both Criminal Duty and Civil Duty

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<sup>213</sup> The five members of the JSC were: The Chief Justice (as chair), the Attorney General, two High Court judges, formerly appointed by the president on the advice of the Chief Justice, but since 1968, appointed by the president at this discretion, and the Chairman of the Public Service Commission. See Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 251.

<sup>214</sup> Kivutha Kibwana, "Courts, Lawyers and the Judicial System," in *Constitutional Law and Politics in Africa: A Case Study of Kenya*, Kivutha Kibwana, ed., Nairobi: Claripress Limited, 1998, p. 498.

<sup>215</sup> This, in fact, is a direct quote from former Chief Alan Robin Justice Hancox, Kenya's former Chief Justice. See Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. 31.

<sup>216</sup> *Ibid.*, p. 27.



Judges also held significant power within Kenya's judiciary. All criminal cases heard in the High Court had to first go before the Criminal Duty Judge, who decided whether to hear the case him or herself, or allocate the case to another judge. Thus, in politically sensitive cases, pro-regime contract judges would typically decide either not to hear the case at all, or to hear the case him or herself; or, in some cases, he or she would refer the case to another judge, but only if this judge was also reliably pro-regime.

Similarly, all civil cases heard in the High Court had to first go before the Civil Duty Judge. In its extensive 1991 study of Kenya's judicial system, Africa Watch explains:

It is in this court that challenges to human rights violations take the form of a constitutional challenge or a judicial review. For a judicial review. . . the civil duty judge must first "give leave" to allow the case to proceed. All such cases must, therefore, first come before Justice Dugdale [the civil duty judge at the time]. Justice Dugdale has consistently refused leave in sensitive cases. . . Once leave has been refused, an application may not proceed. Thus a case can be killed before it is heard. Applications for *habeas corpus* have never been known to be successful in the high court.<sup>217</sup>

Kenya also has a Court of Appeal, which is a seven-member court with power of review over original jurisdiction cases of the High Court, as well as review of appellate decisions of the High Court on matters of law. The Court of Appeal does not have the authority to review constitutional decisions made by the High Court,

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<sup>217</sup> Africa Watch, *Kenya: Taking Liberties: An Africa Watch Report*, p. 146.

however; in these cases, the High Court is the court of last resort.<sup>218</sup> Regarding constitutional decisions in the High Court, a study published by the Robert F. Kennedy Center for Human Rights in 1992 found that “Kenyan High Court Judges have evinced an indifference, if not hostility, toward constitutional litigation . . .”<sup>219</sup> In interviews conducted by the Center, they found that “judges felt that for lawyers to bring a constitutional suit was tantamount to challenging the authority and sovereignty of the Kenyan government.”<sup>220</sup> Moreover, in a constitutional case brought before the High Court in 1988, the then Chief Justice Cecil Miller, a British contract judge, stated that a constitutional court could not be constituted to decide the case because procedural rules had not yet been promulgated for this.<sup>221</sup> A year later, in 1989, this decision was affirmed by the Civil Duty Judge, another British contract judge, who dismissed a voting rights case by arguing that “section 84 of the Constitution is not operative.”<sup>222</sup> When Kenya’s new Chief Justice, Chief Justice Alan Robin Hancox, yet another British contract judge, was asked why these rules had not been promulgated, he simply responded that he had not had time.<sup>223</sup>

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<sup>218</sup> Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. 16.

<sup>219</sup> *Ibid.*, p. 9

<sup>220</sup> *Ibid.*, p. 31.

<sup>221</sup> *Gibson Kamau Kuria v. Attorney General*, H.C.C.C. No. 551 of 1988, reprinted in *Nairobi Law Monthly*, no. 15, March/April 1989, pp. 33-35. Cited in Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. 78, footnote 72.

<sup>222</sup> Section 84 is the Section of the Constitution under which suit for the protection of fundamental rights may be brought. See *ibid.*, p. 32.

<sup>223</sup> *Ibid.*, p. 33.

Finally, the office of Attorney General also wielded considerable influence on the development of Kenya's judicial system during this period, and since independence, the independence of the judiciary, or lack thereof, has greatly depended on this office. The Attorney General is the principal legal advisor to the Kenyan government, and as such, he or she has primary responsibility for advising the government on the following important matters, among others:

- (1) Constitutional matters, by advising on appointment to constitutional offices, interpretation of the constitution in the government, and guardian of the constitution;
- (2) Advicing on all prosecutions matters, undertaking all criminal prosecutions and representing the state in appeals and revisions;
- (3) Undertaking civil litigations involving government and its agencies;
- (4) Undertaking drafting of bills, subsidiary legislation, notice of appointments to state corporations, constitutional offices and public offices. . . .<sup>224</sup>

For all intents and purposes, Kenya had only two attorney generals during its first twenty-eight years of independence, Charles Njonjo (1964 – 1983) and Mathew Muli (1983 – 1991), both of whom played important roles in the drafting and passage of the various constitutional amendment acts discussed above. After nearly two decades as Attorney General, Njonjo eventually resigned his position in order to seek election to parliament in Kenya's 1983 general elections. As political analyst Jennifer Widner explains: "The sitting MP, Amos Ng'ang'a, who had won a narrow victory [in the 1979 elections], stepped down in Njonjo's favor. Shortly thereafter, Ng'ang'a

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<sup>224</sup> The Republic of Kenya, Ministry of Justice and Constitutional Affairs, The Attorney General's Office. Accessed via: <http://www.kenya.go.ke/justice/ag.html>

became chairman of the Tana River Authority, and the strongest of the candidates he had edged out in the . . . 1979 election received a prestigious job as chairman of the Kenya Ports Authority.”<sup>225</sup> With his election neatly assured, Njonjo went on to become the MP for his home constituency and soon after was appointed Minister for Constitutional Affairs in Moi’s government, thus continuing his influence on judicial development in Kenya. Mathew Muli, also a close associate of President Moi’s, was appointed to succeed Njonjo. As is discussed in the following chapter, Muli served as Attorney General until Kenya’s emergent human rights and democracy movement finally demanded his replacement due to his lack of professionalism and prosecutions that “rais[ed] suspicions of witch-hunting on the part of the government.”<sup>226</sup>

In addition to an independent judiciary empowered with judicial review, in order for constitutional cases to be heard by Kenya’s courts, not only did Kenyan citizens need to be aware enough of their constitutional rights to demand their protection, but individual lawyers and/or advocacy groups also had to be willing to bring these cases forward. As the following chapter documents, however, it was not until the early to mid-1980s that either of these conditions were met. Specifically, it was only with the emergence of Kenya’s contemporary human rights and democracy movement that Kenyan citizens began to demand that their government fulfill its obligations under domestic and international law, and protect their human and

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<sup>225</sup> Widner, “*The Rise of a Party-State in Kenya: From “Harambee!” to “Nyayo!”*”, pp. 139 – 140.

<sup>226</sup> Africa Watch, *Kenya: Taking Liberties: An Africa Watch Report*, p. 155.

democratic rights as defined by these documents.<sup>227</sup> Moreover, it was not until a fundamental transformation in Kenya's professional legal association, the Law Society of Kenya (LSK), and its technical and material support from international human rights organizations based abroad, as well as later donor states, that Kenyan lawyers and advocacy organizations were able to successfully win rights protections from Kenya's incumbent authoritarian regime, in the courts, in the parliament and in the streets.

### **Conclusion:**

The central argument of this chapter is that, in addition to colonial authoritarian legacies, Kenya's independence Constitution itself contributed to the emergence of authoritarianism and fundamental human and democratic rights violations of Kenyan citizens during the country's first twenty-five years of independent rule (1963 – 1988). Specifically, given Kenya's ethnic composition, two majoritarian features of Kenya's independence Constitution --its single-member district plurality electoral system and weak bicameralism --contributed to a predominantly two-party race in 1963, and the virtual exclusion of minority representation from Kenya's lower house, where nearly all political power was concentrated. As a consequence, not only were minority rights protections systematically dismantled by Kenya's first post-independence regime, the Kenyatta regime (1963-1978), but its first legislature also ceased to function as an effective

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<sup>227</sup> As discussed in Chapter 1, in addition to Kenya's constitutional Bill of Right, Kenya became party to the International Covenant on Civil and Political Rights (ICCPR) on May 1, 1972.

check on executive power. Through a series of constitutional amendment, the Kenyatta regime and its successor, the Moi regime (1978 – 1988),<sup>228</sup> then proceeded to undermine the independence of Kenya’s judiciary and its national electoral commission. In addition, Kenya’s parliamentary system was replaced with presidentialism; institutions promoting decentralized and federal rule were replaced with centralized and unitary structures; bicameralism, albeit in weak form, was replaced with unicameralism; and constitutional rigidity and judicial review were also undermined. As consensus theorists of democracy have argued, each of these institutional features can importantly facilitate democratic functioning, especially in ethnically plural societies such as Kenya’s.

Ironically, as the chapter documents, all of these changes were achieved through the formally “legal” process of introducing a series of statutory, administrative and constitutional “reforms” through Kenya’s institutionally weak legislature. As a consequence, the independence Constitution that was designed, in theory, to promote democratic governance and protect fundamental human and democratic rights, ultimately contributed to the emergence of two post-independence authoritarian regimes that systematically violated these rights of its citizens.

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<sup>228</sup> The Moi-KANU regime was in power until December 2002, but this chapter focuses only on the 1978 – 1988 period.

**Table 3.1: Kenya's 1963 Parliamentary Elections**

	House of Representatives			Senate		
	Seats <sup>229</sup>	%Seats <sup>230</sup>	%Vote <sup>231</sup>	Seats <sup>232</sup>	%Seats <sup>233</sup>	%Vote <sup>234</sup>
KANU	72 / 83	64.3 / 66.9	53.6	20 / 23	52.6 / 60.5	59.2
KADU	32 / 33	28.6 / 26.6	25.8	16 / 15	42.1 / 39.6	27.3
APP	8 / 8	7.1 / 6.5	7.4	2 / 0	5.3 / 0	8.5
Independents	0 / 0	--	11.8	0 / 0	0 / 0	4.7
BPU	0 / 0	--	0.8	0 / 0	0 / 0	0.3
CPP	0 / 0	--	0.5			
Total:	112 / 124 <sup>235</sup>			38 / 38		

<sup>229</sup> The first number indicates elected seats, and the second is the number of seats after the House's twelve "National Members" were elected with the House sitting as an electoral college. Clyde Sanger and John Nottingham, "The Kenya General Election of 1963," *The Journal of Modern African Studies*, vol. 2., no. 1, 1964, p. 34.

<sup>230</sup> Although there was to be a total of 129 seats in the House of Representatives --117 popularly elected by the SMD plurality formula and 12 National Member seats elected by the House sitting as an electoral college, because Kenyan Somalis boycotted the 1963 elections, five seats remained vacant. Thus, the total number of popularly elected seats was 112, and the total number of seats with National Members was 124. *Ibid.*, p. 29.

<sup>231</sup> Vote share is calculated on the basis of vote tallies provided by *ibid.*, p. 34.

<sup>232</sup> *Ibid.* Sanger and Nottingham report that "[u]ntil the second day of counting, the balance of the Senate was in doubt. But, KANU eventually led with 20 to KADU's 16 and APP's two . . ." *Ibid.*, p. 35. At the first meeting of the Senate, however, apparently one of the KADU Senators from the remote constituency of Tana River "unaccountably crossed the floor to join KANU." *Ibid.*, p. 36. Shortly after this, APP also forfeited its seats to join with KANU; thus, the final results were 23 seats for KANU and only 15 for KADU. *Ibid.* As discussed in this chapter, this behavior is predicted by Duverger's Law. That is, both the mechanical and psychological effects of single-member district plurality systems tend to "create and maintain two-party systems." Maurice Duverger, "Duverger's Law: Forty Years Later," in Bernard Grofman and Arend Lijphart, eds., *Electoral Laws and Their Political Consequences*, New York: Agathon Press, Inc., 1986, p. 69.

<sup>233</sup> Seats shares are calculated on the bases of 38 total seats. Although there were to be 41 seats in the Senate, one for each of Kenya's administrative districts, as was the case with the House of Representatives, three seats remained left vacant due to the Kenyan Somali boycott of the 1963 elections.

<sup>234</sup> Dieter Nohlen, Michael Krennerich and Bernhard Thibaut, eds., *Elections in Africa: A Data Handbook*, Oxford: Oxford University Press, 1999, p. 485.

## Chapter Four

### Movement Emergence: The Politics of Repression, Resistance and Regime Liberalization, 1982 – 1991

Multiparty politics will only bring chaos and violence to Kenya . . . We should resist the imposition of foreign ideologies and practices in our country . . . Those Kenyans who advocate multipartyism are political subversives . . . [and] will be crushed like rats.

--President Daniel arap Moi, October 4, 1991

We should open up and repeal that section of the Kenya constitution, Section 2(A) [which prohibits multiparty politics].

--President Daniel arap Moi, December 3, 1991  
Kasarani Stadium,  
Nairobi

#### Introduction:

On Saturday, July 7<sup>th</sup>, 1990, a day that was to go down in Kenyan history as “*Saba Saba*” day,<sup>1</sup> tens of thousands Kenyans gathered at Kamukunji grounds, a site made famous during Kenya’s colonial period for anti-colonial demonstrations. This time, however, Kenyans had gathered to protest fundamental human and democratic rights violations of their post-colonial, independent government, and to demand, in particular, that the regime open up and allow multiparty politics. Although a small group of Kenyan lawyers had begun to challenge regime abuses in the early 1980s, and by the mid-1980s this group had grown and forged coalitions with dominant church organizations in Kenya, as well as nongovernmental human rights organizations based abroad, this demonstration marked the emergence of Kenya’s

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<sup>1</sup> *Saba* is the Kiswahili word for the number seven; thus, *Saba Saba* Day refers to the seventh day of the seventh month --July 7<sup>th</sup>.



first mass-based human rights and democracy movement since independence, despite nearly thirty years of single-party authoritarian rule.

Specific demands of this movement included: the right to free association – and, in particular, the right to form and join opposition political parties; the right to free and fair elections by secret ballot; the right to free assembly, free speech and free press; the freedom from arbitrary arrest, search, seizure and torture; the right to life and security of the person; the right to equal treatment under the law; and the right to a fair and public hearing, should any of these rights be violated.<sup>2</sup> All of these rights were recognized by Kenya's independence Constitution, enacted in December 1963,<sup>3</sup> as well as by the International Covenant for Civil and Political Rights (ICCPR), which Kenya ratified in May 1972.<sup>4</sup> As was documented in Chapter Three, however, the vast majority of these rights were consistently violated by both of Kenya's post-independence regimes, the Kenyatta and Moi regimes.

These movement demands grew to dominate not only Kenya's domestic political agenda, but also the international agenda, until finally, on Tuesday, December 3, 1991, much to the surprise of national and international observers alike, Kenya's president of more than fifteen years, Daniel arap Moi, announced to a

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<sup>2</sup> As documented below, this list is compiled primarily from interviews with movement leaders and participants, as well as longitudinal analysis of movement documents and relevant news media. As the movement achieved some of these goals, its demands and priorities changed, as is documented in later chapters. These were central demands for the period examined in this chapter (1982 – 1991), however.

<sup>3</sup> Although Kenya's independence Constitution was substantially amended to concentrate executive power, as documented in Chapter Three, the constitutional chapter defining Kenyans fundamental political and civil rights, its Bill of Rights, remained unchanged.

<sup>4</sup> As discussed in Chapter One, the ICCPR is the only legally binding international human rights covenant. It entered into force in 1976.

crowded Nairobi stadium of nearly 3600 state party delegates his intention to reverse state policy of more than two and a half decades and allow multiparty politics.<sup>5</sup> The president had convened the delegate's conference a week earlier and most suspected that his purpose was to reiterate his firm commitment to single-party rule. So, when, instead, Moi stood and announced his intention to repeal Section 2(A) of Kenya's Constitution,<sup>6</sup> most were stunned.<sup>7</sup> As was the case throughout most of Moi's rule, however, as soon as the presidential declaration was made, it was met with thunderous applause and unanimous approval. Two days later, Constitution of Kenya Amendment Act No. 2 of 1991, which formally legalized opposition politics in Kenya, was introduced into Kenya's National Assembly, and less than a week

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<sup>5</sup> As documented in Chapter Three, Kenya became a *de facto* one party state in December 1964, a year after formal independence from Britain in December 1963. An opposition party, the Kenya Peoples' Union (KPU), formed in April 1966, but was banned by the state in October 1969. Kenya then remained a *de facto* single-party state from 1969 to 1982, when, as discussed below, a constitutional amendment was passed formally prohibiting opposition political parties.

<sup>6</sup> Section 2(A) of Kenya's Constitution refers to Constitution of Kenya Amendment Act No. 7 of June 1982, which prohibited the formation of opposition political parties in Kenya.

<sup>7</sup> Although it is likely that a small number of senior level cabinet officials were aware that President Moi would make this announcement at the KANU delegates' conference, what is especially puzzling from the perspective of democratic transitions theory, is that Moi's decision was clearly not prompted by divisions between regime hard-liners and soft-liners. As discussed in Chapter Two and again below, democratic transitions theory, which came to dominate the comparative politics literature in political science in the mid 1980s through the 1990s, argues that this was the dominant catalyst of political openings witnessed in Southern Europe and Latin America during the 1970s and 1980s. The classic theoretical work in this area is Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore: The Johns Hopkins University Press, 1986, 3<sup>rd</sup> ed., 1991. In the Kenyan case, however, as is documented below, serious regime splits did not appear until *after* President Moi opened up Kenya's political system. Smith Hempstone, the U.S. Ambassador to Kenya at the time, provides an insightful discussion of the days leading up to President's Moi announcement. He was intimately involved in the process and, controversially, openly supported Kenya's human rights and democracy movement. Hempstone also reports that Moi's concession to the movement on December 3, 1991 came as "[an] astonishment to almost everyone." Smith Hempstone, *Rogue Ambassador: An African Memoir*, Sewanee, TN: University of the South Press, 1997, p. 258.

later, it was signed into law.<sup>8</sup> Kenya's first multiparty elections since the "Little General Elections" of 1966<sup>9</sup> were convened a year later, in December of 1992.

What explains this apparently radical reversal of state policy? Although Kenya's constitution did not legally prohibit the formation of opposition parties until the Moi regime introduced the Constitution of Kenya Amendment Act No. 7 of June 1982, as Chapter Three documented, Kenya became a *de facto* single-party state in December 1964, only a year after formal independence from Britain. In April 1966, an opposition political party<sup>10</sup> was formed, but it was banned by the state three and a half years later. Kenya then remained a *de facto* single-party state from this time until the Moi regime's 1982 constitutional amendment, when it became a single-party state by law. Given that this was state policy for nearly two and a half decades, this chapter addresses the political puzzle of why a resistant authoritarian ruler, especially without pressure from within his political party, would decide to liberalize his regime and introduce competitive politics. The chapter argues that this unexpected reversal of state policy, which constituted a fundamental democratic opening in Kenya's

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<sup>8</sup> Throup and Hornsby explain that "[t]he proposal was rushed through parliament in six days (rather than the usual fourteen)...so that President Moi could discuss the decision in his Independence Day *Uhuru* Day speech on December 12th." David W. Throup and Charles Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, Oxford: James Currey Ltd, 1998, pp. 87-88.

<sup>9</sup> As discussed in Chapter Three, the 1966 by-elections were convened when twenty-nine state party members left the party and formed a second political party, the Kenyan Peoples' Union (KPU). A new constitutional amendment, passed after these individuals left the state party, required them to re-contest their seats in by-elections. These elections became known as the "Little General Elections." By the time Kenya's next general elections were convened in December 1969, as noted above, the KPU had been banned by the Kenyatta regime.

<sup>10</sup> The Kenya Peoples' Union Party (KPU).

authoritarian regime, was the direct consequence of sustained challenges to the regime by a transnational human rights and democracy movement.<sup>11</sup>

This thesis challenges conventional explanations of democratic openings in the political science literature and raises a series of questions and puzzles for political scientists. (1) Why, despite evidence of fundamental human and democratic rights violations by the Kenyan state dating from shortly after independence in 1963, was there no successful challenge to regime abuses until the early 1990s? (2) What explains the emergence of Kenya's professional legal association, the Law Society of Kenya (LSK), as leaders of Kenya's contemporary human rights and democracy movement, while it remained silent to earlier state abuses? (3) What explains movement mobilization on the basis of the Kenyan state's obligations under the International Covenant on Civil and Political Rights (ICCPR), as well as the state's obligations under domestic constitutional law? (4) Why did Kenya's donor states condition aid delivery on human and democratic rights reform in the early 1990s, but take no action against similar state abuses prior to this time? Finally, (5) Why and how was this transnational movement, comprised entirely of nonstate actors, able to force a democratic opening in Kenya's resistant authoritarian regime after nearly two and a half decades of single-party rule?

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<sup>11</sup> The independent variable of this study, *transnational social movement*, is defined as a group of nonstate organizations and/or individual actors, who share a sense of collective identity, and work together across national borders to promote a common set of social and political goals.

### Theories of Democratization and the Puzzle of the Kenyan Case:

There are four dominant theoretical approaches in the political science literature that address the question of why an historically authoritarian regimes might open up and allow competitive elections: (1) modernization theories, (2) democratic transitions theories, (3) civil society theories and (4) realist and neo-realist theories.<sup>12</sup> Although each of these theoretical approaches provides some insight into the Kenyan case, none fully explains, or would predict, Kenya's democratic opening in December 1991. In the comparative politics literature, for example, modernization theories<sup>13</sup> argue that democratic openings are catalyzed by capitalist economic development, which mobilizes bourgeois and/or working classes, who then become the driving force for democratization in historically authoritarian states. Although within this general approach Marxist theorists insist that the working classes are the only true agents of democracy, other modernization theorists argue that middle classes play a determining role. These theorists focus on the social structural impact of capitalist development, such as urbanization, increased literacy and access to mass

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<sup>12</sup> See Chapter Two for a more thorough discussion and critique of these theoretical perspectives. In this discussion that follows, I simply highlight dominant assumptions found in each of these theoretical approaches in order to underscore the theoretical puzzle posed by the Kenyan case.

<sup>13</sup> Within this general approach, I include: Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *American Political Science Review*, vol. 53, March 1959, pp. 69-105; Karl W. Deutsch, "Social Mobilization and Political Development," *American Political Science Review*, no. 55, September 1961, pp. 493-514; Samuel P. Huntington and Jorge Domínguez, "Political Development," in Fred Greenstein and Nelson Polsby, eds., *Handbook of Political Science*, vol. 3, 1975, pp. 1-98; Myron Weiner, *Modernization: The Dynamics of Growth*, New York, Basic Books, 1966; and Daniel Lerner, "Modernization: Social Aspects," *International Encyclopedia of the Social Science*, 1968. Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Boston: Beacon Press, 1966. Dietrich Rueschemeyer, Evelyne Huber Stephens and John D. Stephens, *Capitalist Development and Democracy*, Chicago: University of Chicago Press, 1992.

media, and argue that these effects create an increasingly “modern” and moderate middle class. This class, then, becomes a dominant force for promoting democratization.

In the Kenyan case, although segments of an urbanized and educated middle class played an important role in its human rights and democracy movement, the driving force behind their mobilization was not economic development. Like a majority of other sub-Saharan states, Kenya’s economy was in a state of decline at the time of the movement’s emergence and its democratic opening,<sup>14</sup> and Kenya’s mass media, especially radio media, the main source of information for most Kenyans, remained tightly controlled by the regime. In addition, largely as a consequence of ethnic and racial divisions in the country, as well as fear of state reprisals, Kenya’s business class and its central trade union organization, the Central Organization of Trade Unions (COTU),<sup>15</sup> maintained close ties to the regime during this entire period (1982 – 1991). Thus, contrary to modernization theory assumptions, these classes were not significant forces in Kenya’s initial democratic opening. Finally, because, in general, modernization approaches tend to focus predominantly on domestic level variables, most cannot explain the emergence and

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<sup>14</sup> A majority of sub-Saharan states, Kenya included, suffered conditions of severe economic decline beginning with the oil-shocks and global recession of the 1970s and 1980s. These conditions were then further exacerbated by the introduction of structural adjustment programs in the mid to late 1980s and 1990s. Smith Hempstone, the U.S. Ambassador to Kenya at the time reports that by 1991, “the standard of living of the average Kenyan had declined by at least sixteen percent over the past two years, . . . unemployment had skyrocketed to an estimated forty percent, . . . Kenya’s trade deficit was continuing to rise (to \$1.3 billion) . . . with inflation raging at twenty-five percent.” Hempstone, *Rogue Ambassador: An African Memoir*, p. 249.

<sup>15</sup> COTU’s leadership and activities were tightly controlled by both of Kenya’s post-independent regimes.

political impact of a *transnational* movement advocating human and democratic rights reform, as was the case in Kenya.<sup>16</sup>

“Democratic transitions” theorists, on the other hand, contend that democratic openings are catalyzed by emergent divisions between regime “hard-liners” and “soft-liners,” where regime soft-liners proclaim the need for regime liberalization, while hard-liners insist on the continuance of authoritarian rule.<sup>17</sup> Although these theorists acknowledge a role for societal actors in regime transitions, they argue that it is only *after* “soft-liners have prevailed over the hard-liners, [that] a generalized mobilization is likely to occur . . .”<sup>18</sup> Thus, their model does not recognize the role of societal, or foreign-based actors in shifting elite preferences, causing regime splits, and/or forcing resistant elites to introduce democratizing reforms. As we will see in the Kenyan case, however, transnational movement mobilization not only preceded regime splits, but was also a direct cause of these splits and eventual regime concessions.

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<sup>16</sup> There are important exceptions to this, however, including Rueschemeyer, Stephens and Stephens work. Rueschemeyer, Stephens and Stephens, *Capitalist Development and Democracy*.

<sup>17</sup> As mentioned above, the classic work in this theoretical approach is Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, 3<sup>rd</sup> ed., 1991, pp. 15–17. This volume is the last in a four volume series. The first three volumes in this series, edited by Guillermo O’Donnell, Philippe C. Schmitter and Laurence Whitehead, provide rich empirically based analyses of transitions in Southern Europe and Latin America. Although this series is often referred to as the foundational work in the “transitions” literature, it builds on theoretical, methodological and epistemological insights found in Dankwart Rustow’s important article, “Transitions to Democracy: Toward a Dynamic Model,” *Comparative Politics*, vol. 2, April 1970, pp. 337-363.

<sup>18</sup> O’Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, p. 48.

Because of the limitations of modernization and democratic transitions theories in explaining democratic openings in sub-Saharan states during the 1990s, scholars of African politics have been embraced and developed civil society theories<sup>19</sup> to explain these changes.<sup>20</sup> Although this literature is quite diverse, in general, civil society perspectives argue that as African states became increasingly dysfunctional through the 1980s,<sup>21</sup> citizens formed their own “self-help”

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<sup>19</sup> As discussed in Chapter Two, the “civil society” literature is a very large and growing literature in African politics. An excellent edited volume that brings together some of the most influential contributions is: John W. Harbeson, Donald Rothchild, and Naomi Chazan, eds., *Civil Society and the State in Africa*, Boulder, CO: Lynne Rienner Publishers, Inc., 1994. This work includes contributions by renown theorists in the civil society literature, including: John Harbeson, Crawford Young, Michael Bratton, Victor Azarya, Nelson Kasfir, E. Gyimah-Boadi, Ali Mari Tripp, Janet MacGaffey, Jennifer Widner, Jane Guyer and Donald Rothchild. The volume also includes an important critical essay of this general approach by Thomas Callaghy. Other important works in this literature include: Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: The Johns Hopkins University Press, 1999; Stephen N Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa*, West Hartford, CT: Kumarian Press, 1996; Robert Fatton, *Predatory Rule: State and Civil Society in Africa*, Boulder, CO: Lynne Rienner, 1992; Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument*, Bloomington, IN: Indiana University Press, 1999; Richard Joseph, ed., *State, Conflict, and Democracy in Africa*, Boulder: Lynne Rienner, 1999; Marina Ottaway and Thomas Carothers, eds. *Funding Virtue: Civil Society Aid and Democracy Promotion*, Washington, DC: Carnegie Endowment for International Peace, 2000; Stephen N. Ndegwa, eds., *A Decade of Democracy in Africa*, Leiden, The Netherlands, Koninklijke Brill NV., 2001; Célestin Monga, *The Anthropology of Anger: Civil Society and Democracy in Africa*, translated by Linda L. Fleck and Célestin Monga, Boulder, CO: Lynne Rienner, 1996; John L. and Jean Comaroff, eds., *Civil Society and the Political Imagination in Africa: Critical Perspectives*, Chicago: University of Chicago Press, 1999.

<sup>20</sup> As noted in Chapter One, whereas in the five years prior to 1990, only nine of forty-seven sub-Saharan states had held competitive legislative elections, between 1990 and 1994, this number had more than quadrupled to thirty-eight, and by the end of the decade, only three of forty-eight states had not held multiparty elections. Of these thirty-eight elections, twenty-nine were considered “founding” elections in that “the position of head of government [was] openly contested following a period in which such political competition had been denied.” Bratton and van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, footnote 14, p. 15. Remarkably, during this short five-year period, fourteen African national executives were democratically replaced, more than during the entire preceding three decades of independence rule. Ibid.

<sup>21</sup> In addition to the sources of economic decline discussed above, other sources of state dysfunction included conditions of rampant corruption, and the effects of efforts to promote import substitution industrialization, which over-taxed agricultural products to promote development of industrial sectors. Not only did these tax proceeds get privatized through regime patronage networks, but an unintended



organizations at the societal level to provide services that were formerly provided by states. These “civil society organizations,” they contend, became increasingly well organized and powerful through the 1980s, such that by the 1990s, they were in a position to effectively challenge the authority and legitimacy of incumbent regimes.

Civil society approaches, however, do not provide a compelling theoretical explanation as to why and how civil society organizations were able to develop within repressive authoritarian contexts, nor why, for example in the Kenyan case, they choose to frame their demands in terms of international human rights in general, and political and civil rights in particular. That is, civil society theorists do not examine the *political* and *strategic* dimensions of organizational formation, or the political impact of specific reform strategies used by civil society organizations. In addition, like democratic transitions theories, civil society theories tend to discount the role of international level variables in explaining regime openings. As the Kenyan case demonstrates, however, foreign-based actors and organizations were critical allies of and participants in Kenya’s movement, and Kenya’s democratic opening could not have been secured without them.

Finally, at the international level, realist and neo-realist approaches from international relations theory provide some insight into the timing of Kenya’s political opening, but also leave many questions unanswered. As is seen below, Kenya’s donor states in general, and the United States in particular, played an important role in pressuring the Moi regime to liberalize and observe its obligations

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consequence of this policy was that it created disincentives for farmers to produce export crops, thus further exacerbating an already serious foreign currency crises.

under international law to provide for free and fair elections, and fundamental rights protections for its citizens. Realist and neo-realist approaches, however, do not provide a compelling explanation as why and how the foreign policy interests of powerful states, such as the United States, change over time, or why domestic reforms continued in Kenya, despite inconsistent support by these states.<sup>22</sup>

Moreover, because realist approaches assume that states are the basic unit of analysis in the international system, they would not predict that a transnational movement, comprised entirely of nonstate actors, could play such a dominant role in this process as Kenya's human rights movement did. In fact, if nonstate actors are considered at all in their analyses, they are assumed to be the agents of states, and not independent actors in their own right. Thus, in the Kenyan case, realist approaches cannot explain why and how Kenya's transnational human rights and democracy movement not only acted independent of dominant state interests, but also the extent to which it was, in fact, responsible for changing the foreign policy content of powerful states in the international system.<sup>23</sup>

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<sup>22</sup> Although inconsistencies in U.S. support for Kenya's human and democratic rights movement are examined in this chapter, further evidence is provided in Chapters Five and Six. These chapters focus on the continued development and political impact of Kenya's movement after the initial political opening in December of 1991, which marks the end of Chapter Four.

<sup>23</sup> Hans Peter Schmitz also makes this argument in his chapter contribution to *The Power of Human Rights: International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., Cambridge: Cambridge University Press, 1999. Hans Peter Schmitz, "Transnational Activism and Political Change in Kenya and Uganda," pp. 39 – 77. Interestingly, although Hans Peter Schmitz and I reach very similar conclusions in the Kenyan case, our research was carried out completely independently. Audie Klotz also makes a similar argument in her analysis of democratic reform in South Africa. Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid*, Ithaca: Cornell University Press, 1995.

### **Transnational Movements and Legal Mobilization Strategies:**

To address the questions and puzzles posed by the Kenyan case, the study argues that a new theoretical approach is needed that builds on insights from social movements and legal mobilization theories, and integrates state, societal and international levels of analysis. As discussed in Chapter Two, which develops the study's theoretical framework, the vast majority of the social movements literature has focused on the question of movement emergence, and different theoretical approaches have emphasized different explanatory variables. Structural/grievance theories emphasize the role of structural change and societal grievances; resource mobilization theories focus on the role of resources –and, specifically, organizational and material resources; political process theories focus on the role of expanding political opportunity structures (POS) and framing processes. From these approaches emerge three dominant concepts that have become central to contemporary social movements theory --*mobilizing structures*, *political opportunity structures* and *framing processes*. Although these concepts have been used primarily at domestic levels of analysis, the study argues that their theoretical insights can be fruitfully extended to the international level to explain the emergence and development of *transnational* movements.

Because social movements theories focus almost exclusively on questions of movement emergence and development, and not on specific reform strategies that might promote democratic change or catalyze regime transitions, the study's theoretical framework also incorporates insights from legal mobilization theories. As the Kenyan case demonstrates, mobilization of international and domestic legal

norms and institutions was a dominant reform strategy employed by Kenya's human rights and democracy movement. As Chapter Two argues, theoretical insights from the legal mobilization literature helps us understand why and how these strategies both enabled and constrained movement reform efforts. Specifically, the chapter below demonstrates why and how these strategies were used to: (1) create a common agenda and sense of common identity among diverse domestic and foreign-based movement actors; (2) mobilize international allies to support and protect domestic movement actors and organizations; (3) place political pressure on donor states to make aid delivery contingent on human and democratic rights reforms; and, ultimately, (4) force Kenya's resistant authoritarian regime to introduce competitive elections --after more than two and a half decades of single-party authoritarian rule.

The following sections briefly review the concepts of mobilizing structures, political opportunity structures and framing processes, and examine their relevance to the Kenyan case. The chapter then examines the way in which these concepts interacted with each other, as well as with legal mobilization strategies, to explain the emergence and political impact of Kenya's transnational human rights and democracy movement between 1982 and 1991. As social movement theorists McAdam, McCarthy and Zald have argued, "political opportunities" for effective movement mobilization only become variables in determining movement emergence when *potentially* favorable shifts are defined as such by a large enough group of people to launch a movement.<sup>24</sup> Implicit in this statement are two interactive

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<sup>24</sup> Doug McAdam, John D. McCarthy, Mayer N. Zald, "Introduction," in Doug McAdam, John D. McCarthy, Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political*

processes that are critical to movement emergence: (1) the relationship between “objective” changes in political opportunity structures and framing processes; and (2) the relationship between these framing processes and mobilizing structures.<sup>25</sup> The chapter examines these processes in the context of the Kenya case to explain why and how Kenya’s transnational human rights and democracy movement was ultimately able to force a democratic opening in Kenya’s resistant authoritarian regime in December 1991.

### Mobilizing Structures:

Mobilizing structures are defined by contemporary social movements theorists as “*those collective vehicles, informal, as well as formal, through which people mobilize and engage in collective action.*”<sup>26</sup> As argued in Chapter Two, successful mobilizing structures provide emergent movements with four critical resources: (1) membership; (2) effective communication networks; (3) structures of solidarity; and (4) leadership. As will be seen below, each of these resources was made available to Kenya’s emergent movement once members of Kenya’s professional legal association, the Law Society of Kenya (LSK), were able to forge effective coalitions with the leadership of dominant church organizations in Kenya, specifically the National Council of Churches in Kenya (NCCK), an umbrella

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*Opportunities, Mobilizing Structures, and Cultural Framings*, New York: Cambridge University Press, 1996, p. 6.

<sup>25</sup> Ibid., p. 7.

<sup>26</sup> Ibid., 3.

organization that conjoins most of Kenya's Protestant Churches, and the Roman Catholic Church in Kenya,<sup>27</sup> as well as with nongovernmental human rights organizations based abroad.

First, early participants in Kenya's emergent movement were almost exclusively lawyers, members of the clergy and their parishioners. This supports one of the most consistent findings in the empirical literature on social movements –that social movement members tend to be recruited along established lines of social interaction.<sup>28</sup> The early leadership of lawyers and clergy in Kenya is explained, in part, by the fact that these two organizations were two of the few who were able to maintain a degree of autonomy from the state's increasingly centralized and monolithic single-party structure during Kenya's post-independence period.

Second, as Jennifer Widner has argued in her insightful analysis of Kenya's "party state," lawyers and clergy were perhaps uniquely situated to mobilize against the regime because, despite increasingly repressive regime tactics through the 1980s and 1990s, "lawyers could still speak with their clients, at least up to a point, and clergy could still speak with members of their congregations or parishes. Through these men and women limited communication could take place . . ."<sup>29</sup> As demonstrated below, privileged attorney-client communications in Kenya, as well as

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<sup>27</sup> Protestants comprise approximately 45 percent of Kenya's population, and Catholics approximately 33 percent. Thus, together these two groups constitute approximately 78 percent of Kenyans. <http://www.cia.gov/cia/publications/factbook/geos/ke.html>

<sup>28</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 44.

<sup>29</sup> Jennifer A. Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!,"* Berkeley: University of California Press, 1992, p. 188.

the relatively protected speech between clergy and their parishioners, were critical in enabling Kenya's emergent movement to develop effective communication networks domestically.<sup>30</sup>

Moreover, as individual lawyers and clergy reached out to foreign-based colleagues, effective *transnational* communication networks among lawyers and clergy also began to develop. As is documented below, these transnational networks were ultimately responsible for publicizing regime abuses internationally, for supporting threatened domestic movement actors, and for lobbying donor states to put political and economic pressure on the resistant Moi regime to allow a democratic opening. As social movement theorists have argued, and the Kenyan case clearly supports, it is the "strength and breadth" of these communication networks that "largely determin[e] the pattern, speed, and extent of movement expansion."<sup>31</sup>

Third, whereas Mancur Olson argues that "*separate and 'selective'* incentives," or rewards, are necessary for successful collective action, so that individuals are either "coerced" or "induced" to participate,<sup>32</sup> in the Kenyan case, we instead see that both the LSK and religious organizations, as well as foreign-based human rights groups, provided "structures of solidarity" that importantly facilitated

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<sup>30</sup> As noted in Chapter Three, enactment of the Kenya Broadcasting (Nationalization) Act No. 12 in 1964 gave the Kenyan state a monopoly over Kenyan radio and television. Although few Kenyan families in the rural areas, where a majority of Kenya's population live, have access to television, most have access to radio.

<sup>31</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 46.

<sup>32</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge, MA: Harvard University Press, 1965, p. 51.

movement recruitment and participation.<sup>33</sup> Although, as is examined below, the outspokenness of individual Kenyan lawyers and clergy in the early stages of movement emergence was contentious within their organizational structures, as social movement theorist Doug McAdam asserts in his study of the civil rights movement in the United States, overtime “movement participation [became nearly] synonymous with organizational membership,” as a consequence of solidarity incentives provided by each organization.<sup>34</sup>

Finally, fourth, the LSK, dominant Kenyan religious organizations and foreign-based human rights organizations all provided important leadership resources to Kenya’s emergent movement. Whereas members of the LSK and their international colleagues provided important technical skills in terms of effectively initiating legal mobilization strategies at local, state and international levels, it was the moral authority and extensive domestic organizational networks of Kenya’s dominant church organizations that provided the movement with its domestic legitimacy and mass base. As is discussed in greater detail below, without the leadership of Kenya’s dominant church organizations, the movement would have likely remained an elite movement, and without the leadership of the LSK and their international colleagues, the legal mobilization strategies that united diverse political

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<sup>33</sup> McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, p. 45. This is not to say, however, that the positions taken by leaders of the LSK and religious organizations, especially in the early stages of movement mobilization, were not contentious within their organizations, as is documented below.

<sup>34</sup> *Ibid.*, p. 46. Although I agree with McAdam’s general criticism of Olson’s theory, as will be demonstrated in the Kenyan case, McAdam also underestimates the extent to which new “structures of solidarity” often must also be created within emergent movements. This is discussed below.



actors and ultimately forced the resistant Moi regime to introduce democratic reforms, could not have been effectively deployed. Thus, two key characteristics of mobilizing structures in the Kenyan case that were important to transnational movement success were: (1) the existence of domestic leadership that was perceived, both nationally and internationally, as legitimate bearers of the human rights and democracy message<sup>35</sup> and (2) the existence of domestic and international leadership with the technical ability to effectively mobilize legal institutions and norms to promote human and democratic rights protections.

#### Political Opportunity Structures (POS):

As discussed in Chapter Two, the concept of *political opportunity structures*, and its significance to understanding movement emergence, lacked analytical clarity until the publication of McAdam, McCarthy and Zald important work in 1996. In this volume, the authors argue that four constituent elements of political opportunity structures are especially relevant to explaining movement emergence: “(1) the relative openness or closure of the institutionalized political system; (2) the stability of . . . elite alignments; (3) the presence or absence of elite allies; (4) the state’s capacity and propensity for repression.”<sup>36</sup> Through a critical assessment of these

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<sup>35</sup> In the Kenyan case, as will be seen below, although dominant church leadership had already established this legitimacy among a broad and diverse cross-section of Kenya’s population, because of the LSK’s history as a predominantly colonial organization, this legitimacy had to be earned by them over time through working closely with the church leadership.

<sup>36</sup> McAdam, McCarthy and Zald, “Introduction,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 10.

constituent elements in Chapter Two, this study reduces them to three: (1) the relative openness or closure of the institutionalized political system; (2) the presence or absence of powerful movement allies; and (3) the degree of state vulnerability.<sup>37</sup> Moreover, as is discussed in Chapter Two, each of these variables is assessed at *international*, as well as domestic, levels of analysis.

In the Kenyan case, this study finds that three key shifts in domestic and international political opportunity structures catalyzed movement emergence. These were: (1) the increasing repressiveness, or closure, of the Moi regime as a consequence of: (a) enactment of Section 2A of the Constitution, which constitutionally banned opposition political parties, and the abortive *coup* attempt and repressive response that followed, and (b) enactment of new electoral laws for the 1988 general elections, which eliminated Kenya's secret ballot in the first round of voting; (2) the emergence of new movement allies as a consequence of: (a) a growing transnational network of nongovernmental human rights organizations, and (b) new post-Cold War international political realignments; and finally (3) increased state vulnerability following: (a) the collapse of single-party states in Eastern Europe; (b) a wave of national constitutional conferences that swept sub-Saharan Africa; and

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<sup>37</sup> As is discussed in Chapter Two, the concept of "state vulnerability" is borrowed from Keck and Sikkink's work. Keck and Sikkink, *Activists Beyond Border: Advocacy Networks in International Politics*, p. 208. Although Keck and Sikkink's definition of the concept applies only to the international level, I argue that it also contains an important domestic dimension, and operationalize it at both international and domestic levels. Thus, for the purposes of this study, "state vulnerability" is defined as the degree of state sensitivity to international and/or domestic pressure, and it is operationalized both materially and normatively at these levels. At the international level, material sensitivity is measured in terms of aid, trade and other potential economic dependencies; and, normative sensitivity is measured in terms of the state's prior normative commitments and "desire to maintain good standing in valued international groups." Ibid. Domestically, this concept is measured in terms of the relative improvements or decline in a country's economy, and normatively, in terms of its general legitimacy among its citizenry.

(c) delivery of donor aid being made contingent on human and democratic rights reforms. As is discussed below, some of these political events are interrelated. For example, the fact that donor aid was finally linked to human and democratic rights reform was itself a consequence of effective lobbying by international human rights organizations, as well as post-Cold War international political realignments.

### Framing Processes:

*Framing processes* are defined by social movement theorists as the processes by which individual and collective actors begin to *perceive* the organizational and structural possibilities available to them to translate individual and group grievances into successful collective action. Contemporary social movement theorists outline four types of framing processes as central to movement emergence. These are: (1) frame bridging, (2) frame amplification, (3) frame extension, and (4) frame transformation. Each of these is discussed in detail in Chapter Two and is further evaluated in terms of the Kenyan case below. In addition to these four framing processes, social movement theorists argue that the success of emergent movements in achieving their goals is ultimately determined by the extent to which framing accomplishes four main tasks: (1) “diagnostic framing,” or identifying some aspect(s) of social and political life as problematic and/or unjust; (2) “attributional framing,” or attributing responsibility for this injustice to some identifiable individual, or set of individuals; (3) “prognostic framing,” or proposing a solution/specifying what needs

to be done; and (4) “motivational framing,” or persuading others of the efficacy of collective action in rectifying this injustice.<sup>38</sup>

As the Kenyan case demonstrates, leaders of Kenya’s human rights and democracy movement were largely able to achieve these central tasks of framing. Specifically, movement leaders were able to successfully identify dominant injustices in Kenya as caused by the regime’s blatant violation of Kenyans’ fundamental human and democratic rights. Leaders then produced and publicized compelling evidence that directly implicated the Moi regime, and specifically President Moi and his closest associates, as being responsible for these wrongs.

In order to rectify these injustices, movement leaders insisted that opposition political parties must be allowed to mobilize in Kenya so that future elections would produce government that was accountable to its citizenry. Although, even in the early stages of movement development, some movement participants believed that comprehensive constitutional reform was necessary to provide formal protections for rights subverted by the Kenyatta and Moi regimes, a majority believed that by simply forcing the regime to concede multipart elections, a new reformist and democratic government could then institute these necessary changes.

Finally, movement leaders also effectively engaged in “motivational framing” by pointing to the success of other human and democratic rights movements around the world, and specifically those in Eastern and Central Europe, and later in other

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<sup>38</sup> David A. Snow and Robert D. Benford, “Ideology, Frame Resonance, and Participant Mobilization,” *International Social Movement Research*, v.1, pp. 197-217; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

sub-Saharan states. In so doing, they were able to persuade many Kenyans, who had previously been either too fearful or too complacent to mobilize, of the efficacy of collective action in achieving their goals. As will be seen below, movement leaders also focused on strategic timing of political protests and high profile litigation in order to focus national and international attention on the degree of rights repression in Kenya and to generate greater movement support.

### **The Interaction of Mobilizing Structures, Political Opportunity Structures and Framing Processes: The Kenyan Case:**

As has been already implied by the discussion above, in order to fully understand and explain movement emergence and impact, one must assess not only the individual concepts of mobilizing structures, political opportunity structures and framing processes, but also the way in which these concepts interact each other. As contemporary social movements theorists have argued, “[n]o matter how momentous a change appears in retrospect, it only becomes an ‘opportunity’ when defined as such by a *group* of actors sufficiently well organized to act on this shared definition of the situation.”<sup>39</sup> That is, unless one examines the effect of political opportunity structures and framing processes on mobilizing structures, one cannot understand the puzzles often posed by the timing of movement emergence. Specifically, in the Kenyan case, one cannot explain why Kenya’s transnational human rights and democracy movement emerged in the 1980s, despite nearly three decades of rights

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<sup>39</sup> McAdam, McCarthy and Zald, “Introduction,” in McAdam, McCarthy and Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 8.

abuse, nor why Kenya's professional legal association, the Law Society of Kenya (LSK), became a dominant movement leader, while it remained silent to earlier regime abuses.

The following section provides a brief organizational history of the LSK, a central movement mobilizing structure, to shed light on the puzzle of why the organization remained silent to regime abuses during Kenya's first two decades of authoritarian rule. It then examines the impact of the three aforementioned changes in domestic and international political opportunity structures, as well as the role of framing processes and legal mobilization strategies, to explain the organization's emergence as dominant leader of Kenya's contemporary human rights and democracy movement.

#### Mobilizing Structures: The LSK's Organizational Development and Relationship to Human and Democratic Rights:

Although the Law Society of Kenya (LSK) was founded in the 1920s, approximately thirty years after the beginning of official British colonial rule in Kenya,<sup>40</sup> it did not achieve a significant degree of autonomy as an organization until 1949.<sup>41</sup> It was with the passage of two legislative acts in 1949, the Law Society of Kenya Acts No. 10 and No. 55, that the LSK finally was established as a self-governing body with its main objectives defined as

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<sup>40</sup> British colonial rule was officially established in Kenya on June 15, 1895.

<sup>41</sup> In fact, many political analyses of Kenya date the founding of the LSK as 1949.

the maintenance and improvement of the standards of conduct of the legal profession in Kenya, the representation and protection of, and assistance to members of the profession as regards their conditions of practice and others, and the protection of and assistance to members of the public in all matters touching law.<sup>42</sup>

An amendment to these Acts passed three years later, in 1952, made membership in the Society mandatory and, two years later, in 1954, the Society's Disciplinary Committee was granted unchecked powers to discipline its members. As Kenyan constitutional scholar Amos O. Odenyo explains, "[w]ith [its] closed-shop status. . . and its power to discipline its members, self-regulation in the profession was at an all time high."<sup>43</sup> As Odenyo further comments, however, the Society used its powers of self-regulation primarily to "regula[te] potential African lawyers out of the profession."<sup>44</sup>

Constitutional scholars Yash Ghai and J.P.W.B. McAuslan concur with this assessment and report that during the entire first period of the LSK's history,<sup>45</sup> it remained "exclusively a European organization" whose main work was to service the legal needs of a small group of wealthy non-African elite in Kenya."<sup>46</sup> Although the

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<sup>42</sup> The Law Society of Kenya Act, No. 10 of 1949. Cited in Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, New York: Oxford University Press, 1970, p. 386.

<sup>43</sup> Amos O. Odenyo, "Professionalism and Change: The Emergent Kenyan Lawyer," in Clarence J. Dias, Robin Luckham, Dennis O. Lynch and James C.N. Paul, eds., *Lawyers in the Third World: Comparative and Developmental Perspectives*, New York: International Center for Law in Development, 1981. p. 182.

<sup>44</sup> *Ibid.*

<sup>45</sup> That is, from its founding in the 1920s through 1949.

<sup>46</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 385.

organization was opened to non-Europeans in 1949, despite the protests of many, it remained dominated by non-Africans until the mid-1980s --more than two decades after independence. In fact, there were *no* indigenous African Kenyan lawyers in Kenya until well into the 1960s, and even then, there were only a few.<sup>47</sup> This was due not only to hostility from LSK members, but also to a long-standing colonial policy, which was actively supported by the LSK, and which prevented indigenous African Kenyans from obtaining a legal education. As Yash Ghai explains:

The [British colonial government] was obsessed with fear that lawyers would promote political difficulties for it. Indigenous lawyers were regarded with extreme distrust. This attitude stemmed in part from British experience in India, where lawyers like Gandhi and the Nehrus led the struggle for independence, and partly from West Africa, where African lawyers were already agitating for the safeguarding of the rights of Africans. . . . Since few [Kenyan] African families had the means to educate their children at post secondary levels, the government was able to prevent the emergence of African lawyers by the simple expedience of refusing government bursaries to African students aspiring to study law.<sup>48</sup>

This colonial policy was not finally changed until a year after the convening of Kenya's first Lancaster Constitutional Conference in January 1960. At this time it was recommended that a committee be formed "to inquire into the question of legal education for Africa, and to make recommendations for a suitable scheme of

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<sup>47</sup> As discussed below, by 1968, five years after independence, of 292 advocates in Kenya, only 11 were African --or less than four percent. Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 403.

<sup>48</sup> Yash P. Ghai, "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations," in Clarence J. Dias, et al., eds., *Lawyers in the Third World: Comparative and Developmental Perspectives*, New York: International Center for Law in Development, 1981, pp. 148 – 149.



training.”<sup>49</sup> As a consequence of this committee’s recommendations,<sup>50</sup> East Africa’s first three-year post-graduate law school was established in Dar es Salaam later in 1961, despite continued resistance from the LSK.<sup>51</sup> Shortly after this, a one-year profession legal program was also established in Nairobi.

Even with these efforts to open up Kenya’s legal profession to indigenous Kenyans, by 1968, five years after independence, only 11 of 292 lawyers in Kenya, or less than four percent, were African.<sup>52</sup> At this time, the Kenyatta regime decided to establish a Faculty of Law at the University of Nairobi in order to expedite Africanization of the profession. The Nairobi Law Faculty had its first intake of students in 1970, and graduated its first class in 1973.<sup>53</sup> As mentioned above, however, it was not until almost a decade later, in the mid-1980s, that indigenous African Kenyans finally constituted a majority within the LSK.<sup>54</sup>

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<sup>49</sup> J. B. Ojwang and D. R. Salter, “Legal Education in Kenya,” *Journal of African Law*, vol. 33, no. 1, 1989, p. 80.

<sup>50</sup> The Denning Committee.

<sup>51</sup> The LSK, in fact, rejected the recommendations of the Denning Report and attempted to prevent its implementation, but to no avail.

<sup>52</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 403.

<sup>53</sup> Ojwang and Salter, “Legal Education in Kenya,” p. 82, footnote 28.

<sup>54</sup> Stanley D. Ross reports that in 1974, 144 of 440 practicing lawyers in Kenya were African, or just over thirty percent. By 1980, however, of 451 practicing lawyers, approximately 193 were African, or just over forty percent. Stanley D. Ross, “The Rule of Law and Lawyers in Kenya,” *The Journal of Modern African Studies*, vol. 30, no. 3, 1992, p. 422. See also S.M.C. Thomson, “Kenya,” in Dennis Campbell, ed., *Transnational Legal Practice: A Survey of Selected Countries*, Vol. II, Denver, 1982, p. 237, cited in Ross, “The Rule of Law and Lawyers in Kenya,” p. 422, footnote 5. Ojwang and Salter report that by 1987, approximately 80 percent of practicing lawyers in Kenya were African. Ojwang and Salter, “Legal Education in Kenya,” p. 82.

In addition to the complete exclusion of indigenous Kenyan lawyers from Kenya's legal profession during the colonial period and in the early years of independence, British colonial laws such as the Native Court Regulations of 1897, the East Africa Court Amendment Ordinance of 1902, the Native Tribunal Rules of 1911 and 1913, and the Native Tribunals Ordinance of 1930 all resulted in the development of a "dual" legal system in colonial Kenya, which, for all intents and purposes, remained in tact until Kenya's independence in 1963.<sup>55</sup> This dual system established one set of legal institutions, rules and principles for British colonial settlers, and another for indigenous Kenyans. Specifically, the system for British settlers was based on judicial principles found in the English legal system and functioned to promote rights protections and due process. It was organized by a hierarchy of superior and appellate courts leading up to the Judicial Committee of the Privy Council,<sup>56</sup> as well as a hierarchy of subordinate courts, all of which were ultimately under control of the High Court.<sup>57</sup> The indigenous Kenyan, or "Native," system, as it was called, was premised on administrative, rather than judicial, principles. As mentioned above, this system functioned primarily as a structure for enforcing colonial policy.<sup>58</sup>

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<sup>55</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, pp. 125 – 174.

<sup>56</sup> The Privy Council is based in London.

<sup>57</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 138.

<sup>58</sup> *Ibid.*, p. 139.

Thus, not only was the LSK an entirely non-African organization prior to independence, and for nearly a decade afterwards, but as a consequence of the dual legal structure that developed during the colonial period, it rarely even came into contact with the problems and concerns of ordinary African Kenyans. As Ghai and McAuslan comment in 1970:

[e]ven in the field of human rights and Rule of Law, which the legal profession generally has always claimed to be its special responsibility . . . the Bar has never given a lead since it first acquired self-government in 1949. The harsh, and at time lawless, regime of the Emergency Regulations [in response to the pre-independence rebellion, Mau Mau (1952 – 1956)] occasioned the Law Society no public alarm –indeed it was a leading member of the Society who, in the Legislative Council, called for still harsher measures.<sup>59</sup>

Thus, when independence from colonial Britain was finally attained in 1963, the LSK found itself in an awkward position. Whereas previously it had been “an accepted part of the colonial society,” it suddenly became “a rather conspicuous non-African part of an African society.”<sup>60</sup> As a consequence, whereas “[i]n the past it held aloof from political and constitutional development out of choice,” after independence, as Ghai and McAuslan report, it held aloof “out of necessity, for any public comment critical of government action would be quickly seized upon as evidence that the Bar was not loyal to the new state of Kenya, since similar comment had not been forthcoming in the colonial era.”<sup>61</sup>

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<sup>59</sup> Ibid., p. 401.

<sup>60</sup> Ibid., p. 403.

<sup>61</sup> Ibid.

This reticence to speak out on behalf of human and democratic rights continued through Kenya's first independence regime, the Kenyatta regime (1963 – 1978), and the early years of the Moi regime (1978 – 1982), despite evidence of consistent violations by both regimes, as is documented in Chapter Three. It was not until 1982, in response to increased closure/repressiveness of the Moi regime, that a handful of indigenous African Kenyan lawyers, for the first time in Kenya's post-independence history, began criticizing regime abuses. As is examined below, their critiques were framed explicitly in terms of the Kenyan state's violations under domestic constitutional law and international law.<sup>62</sup> In so doing, these lawyers

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<sup>62</sup> That is, the International Covenant for Civil and Political Rights (ICCPR), as mentioned above, which Kenya ratified in May 1972, and which entered into force in March 1976. Given the extent to which this Covenant became mobilized by Kenya's contemporary human rights and democracy movement, the puzzle emerges as to why the Kenyatta regime ratified the ICCPR in the first place. From discussion with movement leaders and participants, three dominant hypotheses emerge. First, especially attractive to many newly independent African nations at the time, given their recent colonial experiences, was Part I of the ICCPR, which emphasized the right of all peoples to self-determination --the right to "freely determine their political status and freely pursue their economic, social and cultural development." <http://www.ohchr.org/english/law/ccpr.htm>. Articles 2 and 3 of Part I were of equal importance: Article 2: "All people may, for their own ends, freely dispose of their national wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law . . ."; Article 3: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." Second, however, it is highly unlikely that the Kenyatta regime ever imagined that the ICCPR would or could be mobilized domestically and internationally against the Kenyan state. Although it must have been obvious to the regime that it was in violation of many of its articles, at the time there was still the strong assumption that because the Kenyan state was finally a sovereign, independent state, it thus had the prerogative to violate the political and civil rights of its own citizens --especially in the interests of "national security" and to promote rapid economic development, which were typical regime justifications. Thus, the ends justified the means, and from the regime's perspective, it would be unconscionable that members of the international community, especially former colonial and/or imperial powers, would criticize the newly independent regime for violations of political and civil rights, given the recent history of colonialism. Finally, it seems there was also a "signaling game" of sorts among many newly independent African nations at the time as they became party to international human rights agreements in the 1970s and 1980s. It was as if, by becoming party to these international treaties and covenants, they sought to show the world that they were truly "modern" cosmopolitan nations --concerned and active in their promotion of human rights (again, especially coming from their recent colonial experiences). So, for example, not only did Kenya become party to the ICCPR in 1972, but a decade later, in 1984, they also became party to the

engaged in legal mobilization strategies, which served the function of frame bridging and frame amplification processes<sup>63</sup> at national and international levels. As a consequence, these lawyers were able to forge critical coalitions with other Kenyan lawyers, international human rights organizations based abroad, as well as dominant church organizations in Kenya. In so doing, they began building what was to become Kenya's first post-independence transnational and mass-based human rights and democracy movement. The sections below examine these processes in greater detail.

#### Political Opportunity Structures: Increased Regime Closure/Repressiveness:

As discussed in Chapter Three, despite President Moi's promising inaugural year, when he released all of Kenya's political prisoners<sup>64</sup> and committed to promoting and protecting Kenyans' fundamental rights, by the time Kenya's 1979

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CEDAW (Convention on the Elimination of Discrimination Against Women) –despite the fact that the vast majority of Kenyan laws violated the Convention, and there was definitely not political support within the regime, or even among a majority of the electorate, for reforming domestic laws to ensure that their international obligations, as specified by the Convention, were met.

<sup>63</sup> As discussed in Chapter Two, *frame bridging* refers to the process by which an emergent group of activists reaches out to other individuals and/or organizations to persuade them to join their efforts by framing their goals in terms of the stated interests and goals of these individuals or organizations. *Frame amplification* involves two separate, but related, processes: “value amplification” and “belief amplification.” “Value amplification” is defined as the “focusing, elevation and/or reinvigoration. . . of one or more values presumed basic to prospective constituents, but which have not [yet] inspired collective action,” and “belief amplification” is defined as on the ideas that “cognitively support or impede action in [the] pursuit of desired values.” Snow, Rochford, Worden and Benford, “Frame Alignment Processes, Micromobilization, and Movement Participation,” p. 467 – 469. Specifically, as discussed in Chapter Two, four kinds of beliefs are assumed to be especially important to movement emergence. These are: (1) beliefs about the seriousness of a particular problem; (2) beliefs about who is to blame for this problem; (3) beliefs about the potential efficacy of collective action; and (4) beliefs about the necessity of “standing up.” Ibid.

<sup>64</sup> As discussed in Chapter Three, some viewed this action cynically and remarked that it was to Moi's political advantage to release individuals who would likely be his allies in shoring up political support against Kenyatta's former predominantly Kiambu-based (Kenyatta's home region in Kikuyu country) coalition.

general elections were convened, the first under his rule,<sup>65</sup> it appeared that the political “honeymoon” was over. At this time, the Moi regime, like the Kenyatta regime before it, excluded regime critics from elections, re-activated “loyalty tests” in recruiting and sustaining KANU party members, banned the University Academic Staff Union, banned ethnic associations and, finally, in June of 1982, introduced and passed a constitutional amendment that made Kenya a *de jure* one party state.<sup>66</sup>

Less than two months later, in early August of 1982, a *coup* attempt resulted in intensified repression by the regime, with massive arrests and detentions. Not only were approximately 3000 Air Force members suspected of involvement in the attempted *coup* detained, but in the following five years (1982 – 1987), numerous lawyers, politicians, journalists, university professors and students were also imprisoned as suspected “enemies of the regime.”<sup>67</sup> Unlike cycles of repression during Kenyatta years, however, for the first time in Kenyan history, a handful of Kenyan lawyers began bringing forth court cases to defend these individuals’ human and democratic rights, as recognized under Kenyan constitutional and international human rights law.

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<sup>65</sup> As mentioned above, President Moi succeeded former President Kenyatta after his death in August 1978.

<sup>66</sup> See Chapter Three for a more detailed discussion of these political events.

<sup>67</sup> *Africa Contemporary Record: Annual Survey and Documents 1982 – 1983*, vol. 14, Colin Legum, ed., New York: Africana Publishing Company, 1983, p. B 181.

### Lawyers and Legal Mobilization Strategies:

Three particularly prominent human rights lawyers at this time were John Khaminwa, Gitobu Imanyara and Gibson Kamau Kuria. John Khaminwa was Oginga Odinga and George Anyona's lawyer, as they made preparations to announce the formation of an opposition political party, the Kenyan Peoples' Union (KPU), in May of 1982.<sup>68</sup> Khaminwa was in the midst of preparing his case, to be filed in Kenya's High Court as a challenge to the regime's violation of fundamental constitutional and human rights to free assembly, association and speech, when he, along with Odinga and Anyona, was arrested in early June of 1982.

Although Khaminwa was released shortly afterwards,<sup>69</sup> he was arrested again after representing Maina wa Kinyatti, a Kenyan historian detained for six years on charges of possessing a seditious publication.<sup>70</sup> Khaminwa based Kinyatti's case on the unconstitutionality of the government's use of detention without trial and its violation of the ICCPR. In this case, Khaminwa was arrested without charge or a trial, and held in government custody until the following year.<sup>71</sup> He was then released again, without explanation, but warned by the government that further "political" acts would be met with the full power of the state.

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<sup>68</sup> As discussed in the previous chapter, this move by former KPU leader, Odinga, and his close associate, Anyona, is what precipitated the Moi regime rushing Constitutional Amendment Section 2(A), prohibiting opposition party formation, through Kenya's parliament.

<sup>69</sup> Khaminwa was released after Kenya's Constitution had been successfully amended to prohibit opposition party formation.

<sup>70</sup> Africa Watch, *Kenya: Taking Liberties*, New York: Human Rights Watch, July 1991, p. 179.

<sup>71</sup> Ibid.

Another important human rights lawyer at this time was Gitobu Imanyara. In 1982, he defended approximately 100 members of Kenya's Air Force accused of involvement in the August 1982 coup attempt.<sup>72</sup> Shortly after his last trial, Kenya's Special Branch of the police brought him in for questioning. As Imanyara explains, "[t]hey wanted to know why so many [Air Force members] appointed me to act for them and implied that I was part of their conspiracy. . . Of course that wasn't true, and they didn't find anything."<sup>73</sup> He was ultimately released, but then arrested again shortly afterwards. This time the regime charged him with having misappropriated approximately 300,000 Kshs. of a client's funds a year earlier, in 1981.<sup>74</sup> Although it was extremely unusual in a case like this, Kenya's Attorney General at the time, Mathew Muli, personally prosecuted the case. Despite producing convincing evidence of his innocence,<sup>75</sup> and the fact that the crime was not a political crime, Imanyara was sentenced to five years in "Block E" at Kenya's Kamiti Maximum Security Prison --the wing reserved for Kenya's political prisoners.<sup>76</sup> While in Block E, Imanyara heard story after story of fundamental rights abuse by the regime's political prisoners, and he vowed to found a publication dedicated their cause upon his release.

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<sup>72</sup> William Horne, "Can this Man be Banned?" *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

<sup>73</sup> Ibid.

<sup>74</sup> Approximately \$15,000 U.S. dollars.

<sup>75</sup> In court, Imanyara produced evidence that a check to his client had mistakenly bounced and that the client had been paid in full as soon as the mistake was discovered.

<sup>76</sup> On appeal, the court upheld the conviction, but reduced his sentence to three years.



Imanyara was finally released from prison in July of 1987, and the first issue of his journal, the *Nairobi Law Monthly*, was printed two months later. Although the journal did not initially attract much public attention, a year later it had become a dominant mouthpiece of Kenya's emergent human rights and democracy movement. Despite the fact that the regime banned the journal multiple times, and continually threatened and harassed Imanyara, because he, together with a handful of his colleagues in the LSK, through successful legal mobilization and framing strategies, had been able to mobilize international human rights organizations in support of their cause, it became increasingly difficult for the regime to ban the journal outright, and/or detain Imanyara for long periods of time.<sup>77</sup>

Finally, Gibson Kamau Kuria was also an important activist human rights lawyer in Kenya in the early 1980s. Like Khaminwa and Imanyara, Kuria also took up cases of Kenyans charged as political dissidents and attempted to defend their democratic rights against the state and their human rights under international law. As he explains:

In taking up cases representing dissidents, I was doing two things, namely trying to prevent further erosion of the rule of law, and to put an end to the government's disrespect for human rights. My representation of these people acted as a kind of strategy for bringing about social change. . .<sup>78</sup>

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<sup>77</sup> This is discussed in greater detail below.

<sup>78</sup> "Interview with Gibson Kamua Kuria: The Rule of Law in Kenya and the Status of Human Rights," *Yale Journal of International Law*, vol. 16, no. 217, 1991, p. 219.

Shortly after Kuria filed suit against the Moi regime for the alleged torture and illegal detention of three political prisoners and death in custody of a fourth, Kuria was also detained --without charge and without a scheduled trial, for almost a year.<sup>79</sup> Like Khaminwa and Imanyara, Kuria also explicitly framed regime abuses in terms of violations of constitutional and international laws. This type of framing constituted a classic example of frame bridging, as individual Kenyan lawyers sought to reach out both to an increasingly visible and effective network of international human rights organizations, and Kenya's newly "Africanized" professional legal association, the LSK. As Kuria was to later explain, his eventual release from prison in December of 1987, after almost a year of detainment, was almost entirely due to the efforts of international human rights organizations in coalition with Kenya's emergent movement.<sup>80</sup>

#### New Electoral Laws and Mobilization of Dominant Religious Organizations:

Four years after the enactment of Section 2(A) of Kenya's Constitution, and the subsequent *coup* attempt, the Moi regime introduced new electoral laws in August of 1986 for Kenya's March 1988 general elections. As is discussed in detail in Chapter Three, these laws eliminated Kenya's secret ballot in the first round of voting in future general elections, and introduced what became known as "the 70 percent rule." As a consequence of these laws, not only were Kenyans required to

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<sup>79</sup> Kuria was detained in February of 1987 and released in December of 1987. Ibid. See also Amnesty International, *The Amnesty International Report 1987*, New York: Amnesty International, 1987, p. 47.

<sup>80</sup> Interview with Kuria, June 1999, Nairobi, Kenya.

publicly queue behind posters of candidates they supported in the first round of elections, but, if candidates received 70 percent of the vote in this round, they were automatically declared elected.<sup>81</sup>

In social movement's terms, these laws resulted in further "closure of the institutionalized political system" and were immediately framed by emergent LSK activists as patent violations of Kenyans' fundamental human and democratic rights. In so doing, activist LSK members engaged in frame bridging and value amplification processes to mobilize the leadership of the National Council of Churches of Kenya (NCCCK). By framing their goals in terms of fundamental human rights, values that the NCCCK professed to support, but until this time had not resulted in organizational mobilization, LSK activists succeeded in forging a critical coalition with the NCCCK's leadership. In so doing, emergent LSK activists gained access to the NCCCK's vast organizational, membership and leadership resources.

As mentioned above, this coalition between members of the LSK and the NCCCK leadership was of fundamental importance in providing Kenya's emergent movement with its domestic legitimacy and mass base. As Kenyan scholar Michael Bratton explains, the NCCCK is "the only formal organization in Kenya beside the ruling party with a mass following and a capacity to span clan loyalties," and has

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<sup>81</sup> These electoral laws and their political consequences are discussed in detail in Chapter Three. As is also discussed below, these laws resulted in such anomalies as candidates being elected under the 70 percent rule with less than seven percent voter turn out. One highly publicized case of this was the election of Josephat Karanja from Mathare constituency, a highly populated slum area just outside of Nairobi, who was a close associate of President Moi's. He was elected to parliament with less than seven percent of the constituency vote, then later appointed to replace Kenya's vice president, Mwai Kibaki, after Kibaki's falling out with President Moi. (All cabinet ministers in Kenya, including the vice president must be members of parliament.)

approximately fifty-two member churches and associates.<sup>82</sup> Although the chair of the NCKK at the time, Bishop Henry Okullu of the Maseno South diocese of the Church of the Province of Kenya (CPK),<sup>83</sup> had criticized regime abuses since the 1970s,<sup>84</sup> August of 1986 marked the first time that he, in his official capacity as leader of the NCKK, together with other prominent bishops in the organization, including Bishops Alexander Muge, David Gitari and Timothy Njoya, stood together with members of the LSK to condemn the regime's violation of Kenyans' fundamental human rights.

By following the LSK's lead, and engaging in frame bridging and frame amplification strategies, the NCKK leadership was also able to successfully mobilize foreign-based colleagues and organizations, including the powerful head of the Anglican Church in England, the Archbishop of Canterbury.<sup>85</sup> In so doing, Kenya's emergent movement gained access to transnational religious, as well as legal, networks. The international press also became alerted to the growing role and activism of NCKK leaders at this time, and the BBC even began broadcasting

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<sup>82</sup> Michael Bratton, "Civil Society and Political Transitions in Africa," in John W. Harbeson, Donald Rothchild, Naomi Chazan, eds., *Civil Society and the State in Africa*, Boulder: Lynne Rienner Press, 1994, p. 67. See also John Henry Okullu, *Quest for Justice: An Autobiography of Bishop John Henry Okullu*, Kisumu, Kenya: Shalom Publishers, 1997, p. 135. Kenyans and Kenyan scholars often refer generally to "the Church" in Kenya, but which they typically mean all "Christian" churches, which includes not only Protestant members of the NCKK, as well as numerous independent African churches that are also affiliated with the NCKK, but also members of the Catholic faith.

<sup>83</sup> The Church of the Province of Kenya (CPK) is the Kenyan Anglican church, ultimately under the leadership of the Archbishop of Canterbury in England.

<sup>84</sup> See, for example, Henry Okullu, *Church and Politics in East Africa*, Nairobi: Uzima Press, 1974. In particular, see excerpts from his essay "What is Democracy," in *ibid.*, pp. 71 – 74.

<sup>85</sup> Widner, *The Rise of the Party-State in Kenya: From Harambee! to Nyayo!*, p. 191.

sermons of some of Kenya's most outspoken clergy.<sup>86</sup> This enabled critiques by dominant religious leaders in Kenya to reach a much broader mass base than otherwise would have been possible.

Two months later, and two days after Moi had addressed a KANU rally to reconfirm his commitment to queue voting and Kenya's single-party state, on November 13, 1986, Kenya's Council of Roman Catholic bishops also joined with the LSK and NCKK in their condemnation of the regime. In an historically unprecedented pastoral letter presented to President Moi, which was read from pulpits throughout the country and published in one of Kenya's major newspaper, *The Daily Nation*, the Catholic bishops also framed their criticisms in terms of state violations of Kenyans' human and democratic rights. The letter condemned in the strongest terms not only growing infringements on Kenyans' voting rights, but also fundamental violations of freedoms of speech, assembly and association, as recognized under international and domestic laws. As their letter states, "[a]t present, discussion [in Kenya] is precluded by allegations of powerful party officials that any questioning of the system is tantamount to disloyalty . . . the party is assuming a totalitarian role. It claims to speak for the people and yet it does not allow the people to give their views."<sup>87</sup>

Two weeks later, on December 3, 1986, this emergent leadership of Kenya's movement, comprised of LSK members and leaders of the NCKK and Roman

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<sup>86</sup> In particular, Bishop Alexander Muge of the CPK's Eldoret diocese. Ibid.

<sup>87</sup> Lindsey Hilsum, "Kenyan Parliament Votes More Power to Moi," *The Guardian*, London: Guardian Newspapers Limited, December 3, 1986.

Catholic Church in Kenya, issued its first joint statement in response to the December 1986 enactment of Constitution of Kenya Amendment Act No. 14. As discussed in Chapter Three, this amendment removed security of tenure from the offices of the Attorney General, the Auditor-General and Controller.<sup>88</sup> By employing legal mobilization strategies that drew on both international human rights law and domestic constitutional law, this emergent leadership succeeded in forging a sense of common purpose and identity among diverse national and international political actors. As is seen below, not only did diverse national constituencies join in condemning Kenya's 1986 constitutional amendment, but so did nongovernmental human rights organizations based abroad, and ultimately, Kenya's major donors.

Kenya's emergent transnational movement continued to grow both domestically and internationally in the period leading up to Kenya's March 1988 general elections. Just prior to these elections, in February of 1988, Kenya's Catholic bishops published another pastoral letter calling for the establishment of a Kenyan branch of the Catholic Justice and Peace Commission. Justice and Peace Commissions began to be established globally by the Roman Catholic Church in the 1960s to promote peace, justice and human rights. From the mid to late 1980s, these commissions began to focus increasingly on human and democratic rights, in

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<sup>88</sup> As discussed in Chapter Three, previous to this amendment, an independent three-person tribunal had to approve decisions to remove individuals in each of these offices. The Constitution of Kenya Amendment Act of 1986 also gave Kenya's president power to dismiss any senior official, and even eliminate government offices, should he or she see fit. With this authority, Moi abolished the office of Kenya's Chief Secretary, the head of Kenya's civil service, because he believed it had come to wield too much political power. Finally, this amendment also authorized the Electoral Commission of Kenya to increase the number of constituencies from 158 to between 168 and 188 for the 1988 general elections.

particular, not only through educational outreach programs at parish levels, but also through collecting, analyzing and publishing data on states' violations. In Kenya, the founding of the Justice and Peace Commission marked an increased level of involvement by the Roman Catholic Church in Kenya's emergent movement. From this time forward, it not only issued regular statements condemning specific regime abuses, but also began "educating [Kenyans] at the grassroots level in working for the defense of human rights . . . in a systematic way."<sup>89</sup> Significantly, the Justice and Peace Commission in Kenya, for the first time in the history of the Roman Catholic Church in Kenya, emphasized the importance of *political and civil rights*, as well as their traditional emphasis on economic, social and cultural rights.

Also in February of 1988, Gitobu Imanyara's journal, the *Nairobi Law Monthly* published a special election edition entitled "The General Election: Know Your Law."<sup>90</sup> This issue juxtaposed KANU's new and controversial 1986 election rules with Article 21 of the Universal Declaration of Human Rights (UDHR). Without editorial comment, the cover story simply stated that Kenya had endorsed this international legal document, in addition to the ICCPR, and it detailed the provisions of Article 21: "The will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and *shall be held by secret vote or by equivalent free voting procedures.*" The simple question posed by the article was:

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<sup>89</sup> Justice and Peace Commission of Kenya, mission statement.

<sup>90</sup> *Nairobi Law Monthly*, no. 5, February 1988.

“Can those elected [by queuing and under the 70 percent rule] claim to have been ‘elected’ in compliance with this universally accepted mode of election?”<sup>91</sup> Despite the not-so-subtle criticism of the regime’s violation of international human rights law, with the international spotlight on Kenya as general elections grew nearer, the regime dared not ban the journal or detain Imanyara outright at this time.

#### The 1988 “Mlongo” Elections:<sup>92</sup>

When Kenya’s 1988 general elections, or the “Mlongo elections,” as they came to be called, were finally convened a month later, in March 1988, voter turnout was only 36.8 percent --the lowest in Kenya’s political history.<sup>93</sup> Because so few Kenyans participated in these elections, at the urging of Kenya’s emergent movement, as well as because of carefully documented evidence of state-sanctioned electoral fraud, the elections were widely perceived as illegitimate. Following the first round of voting, where the few Kenyans who voted had to queue behind pictures of the candidates they supported, sixty-five parliamentary candidates<sup>94</sup> were declared elected under the 70 percent rule, despite negligible turnout in many constituencies.<sup>95</sup> In Mathare constituency, for example, a highly populated slum area just outside of

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<sup>91</sup> Ibid., p. 2.

<sup>92</sup> “Mlongo” is the Kiswahili word for queuing.

<sup>93</sup> For a more detailed discussion of these elections, see Chapter Three.

<sup>94</sup> There were 188 elected seats in the 1988 elections.

<sup>95</sup> Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, pp. 42 – 45.



Nairobi, less than *seven percent* of registered voters voted, yet Josephat Karanja, a close associate of Moi's, who was later to replace Mwai Kibaki as Kenya's vice-president, was declared elected under the 70 percent rule.<sup>96</sup> President Moi, as the sole nominee of Kenya's sole political party, KANU, was once again declared automatically elected for a fourth five-year term. As is discussed in Chapter Three, although Kenyans had witnessed electoral fraud in all elections since independence, the 1988 elections took this abuse to a new level.

Unlike previous elections, where there was only isolated and muted criticism of regime fraud, however, for the first time in Kenyan history, the leadership of Kenya's human rights and democracy movement began publishing compelling evidence of regime violations –again framing these violations as patent abuses of Kenyans' constitutional and international human rights. The NCKK-sponsored magazine, *Beyond*, for example, devoted an entire issue to publishing evidence of regime involvement in electoral fraud. The issue also featured extensive critical commentary on the queuing system. In response, the regime immediately banned the publication as seditious under Section 52 of Kenya's Penal Code. Moreover, the journal's editor-in-chief, Bedan Mbugua, was charged with four counts of “failing to make annual returns to the Registrar of Books and Newspapers” and “failing to comply with Section 8.1 of the Books and Newspapers Act.”<sup>97</sup>

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<sup>96</sup> Ibid.

<sup>97</sup> *Nairobi Law Monthly*, no. 6, March 1988, p. 3. As discussed in Chapter Three, as movement leaders became more outspoken in their criticisms of the regime, the regime increasingly resorted to these laws, rather than banning them outright as seditious.

With international attention increasingly focused on the Moi regime, as a result of transnational movement mobilization, an emergent regime tactic was to criminalize the activities of movement activists and have them detained on these trumped-up charges, rather than on more politically controversial charges of sedition and treason. The regime also ensured that Kenya's courts delayed hearing dates for months, and when they finally did come to trial, judicial sentences were typically highly disproportionate to the "crimes" committed. In Mbugua's case, for example, his trial was not scheduled until August 1988, nearly six months after his arrest. Then, with questionable evidence, he was convicted of "failing to deliver annual returns to the registrar of books and newspapers"<sup>98</sup> and sentenced to a nine months in prison without bail. In addition to the banned March issue of *Beyond*, Kenya's Attorney General also order that "[a]ll past and future issues of the periodical publication entitled *Beyond*. . .[also] be prohibited."<sup>99</sup> Although the next issue of the *Nairobi Law Monthly* condemned this banning as a "breach. . .[of] Kenyans' fundamental right to freedom of the press and information," *Beyond* remained permanently banned.

#### Legal Mobilization Strategies and Movement Emergence:

Shortly after Mbugua's trial in August of 1988, the emergent movement's leadership again joined together to condemn the regime's violation of constitutional

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid., p. 16.

and international law through its enactment of the Constitution of Kenya Amendment Act No. 4. As discussed in Chapter Three, this amendment gave the president the sole right to appoint and dismiss all High Court and Court of Appeals judges in Kenya, without having to go through the tribunal process that was previously required, and without having to give reason.<sup>100</sup> In addition, the amendment also extended the period in which a person suspected of a capital crime could be held before being brought to court from twenty-four hours to fourteen days.<sup>101</sup> In response, a formal statement was issued by the NCCK leadership in which it called the amendment “a threat to the democratic principle of division of powers and functions and a[n] . . . infringement of the protection of fundamental rights and freedoms of the individual.”<sup>102</sup>

In response to this constitutional amendment, as well as to the conduct and political consequences of the March 1988 elections, the December 1988/January 1989 issue of the *Nairobi Law Monthly* called upon all Kenyans to mobilize to promote and protect their constitutionally given rights. Through legal mobilization strategies that served the function of frame amplification and frame extension processes,<sup>103</sup> the journal emphatically stated:

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<sup>100</sup> *The Laws of Kenya*, Constitution of Kenya Amendment Act No. 4, 1988.

<sup>101</sup> *Ibid.*

<sup>102</sup> “Kenya Lawyers and Churchmen Express Alarm at Constitutional Changes,” *The Standard*, Nairobi, August 3, 1988. Reported in BBC Summary of World Broadcasts, London: The British Broadcasting Corporation, August 5, 1988.

<sup>103</sup> *Frame amplification* is defined above, and discussed in detail in Chapter Two. *Frame extension*, also discussed in Chapter Two, refers to the process by which a movement’s goals are recast as “attending to or being congruent with the values and interests of [other] potential adherents.” Snow,

May all those upon whom the heavy responsibility of ensuring conformity with the Constitution note that history will never forgive them if they shirk the truly awesome burden of preserving, protecting and upholding the Constitution. Whom are we referring to? We refer to ourselves, the 22 million Kenyans. The responsibility is ours *all*.<sup>104</sup>

In an effort to engage in human rights consciousness-raising, the issue also featured an extended editorial on Amnesty International's recent 278-page report, entitled *The State of Human Rights in 1988*. Although the report focused on human rights violations throughout the world in 1988, read within Kenya's post-1988 election context, its content was patently political. Finally, the issue also explicitly reached out to members of COTU, Kenya's umbrella labor organization.<sup>105</sup> Following an extended critique of regime violations of workers' political, civil and labor rights, the blunt question was posed: "How can COTU fight for workers effectively within KANU? Isn't there a contradiction?"<sup>106</sup> As we shall see below, however, although "dissident" members of COTU joined ranks with Kenya's emergent human rights and democracy movement, especially as the movement gained considerable momentum in the period between July 1990 and December 1991, COTU's regime-selected leadership, and a majority of its rank-and-file, ultimately remained loyal to KANU throughout this entire period (1982 – 1991).

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Rochford, Worden and Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation," p. 472.

<sup>104</sup> *Nairobi Law Monthly*, December 1988/January 1989, p. 3.

<sup>105</sup> As discussed in Chapter Three, COTU stands for the Central Organization of Trade Unions in Kenya, the umbrella organization of central trade unions in Kenya.

<sup>106</sup> This comment refers to the official affiliation between COTU and the state party, KANU.

Political Opportunity Structures: International Human Rights Organizations as New Allies and Mobilizing Structures:

At approximately the same time that the Moi regime was becoming increasingly repressive and closed, and Kenyan lawyers were beginning to challenge regime abuses for the first time, international human rights organizations were also growing at historically unprecedented rates. Although some international human rights organizations date back to the late 1940s and early 1950s, just after the United Nations General Assembly unanimously approved the Universal Declaration of Human Rights (UDHR) in 1948,<sup>107</sup> most of these organizations remained relatively undeveloped until the early to mid-1980s. Although the numbers of these organizations began to grow in the 1970s, it was not until the mid-1980s that an effective transnational network of human rights organizations began to emerge. As Keck and Sikkink report in their study of the development of transnational human rights networks, “between 1983 and 1993 the total number of international human rights NGOs doubled, and their budgets and staff grew dramatically.”<sup>108</sup> As they explain, it was at this time that these groups became increasingly effective enforcers of international human rights policies and norms at both international and domestic levels.

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<sup>107</sup> For example, the International Commission of Jurists (ICJ) a prominent international human rights nongovernmental organization (NGO) was founded in 1952, and its Kenya chapter was founded in 1959. The Kenya Chapter of ICJ did not become active as a human rights organization, or an advocacy group for judicial reform, until the 1980s, however. See Chapter Five for a detailed discussion of the organizational development of ICJ-Kenya.

<sup>108</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 90. They state that “[t]wo separate coding efforts based on organizations listed in the Yearbook of International Organizations confirm this growth. . . Information on staff and budget changes [is] based on information from interview with staff of U.S. human rights organizations.” Ibid.

Keck and Sikkink attribute the growth in breadth and depth of transnational human rights networks to both cultural and technological factors. Culturally, they argue that international human rights agreements of the post World War II period (specifically, the UDHR, the ICCPR and the ICESCR) provided a shared normative basis for human rights internationally, and these norms became increasingly “mobilized” by such international events as the U.S. civil rights movement in the 1960s, the wave of authoritarianism that swept Latin America in the 1970s, and anti-apartheid struggles in South Africa through the 1980s. As a consequence, a “[n]ew public receptivity” to human rights began to emerge internationally.<sup>109</sup> Technologically, they argue that such developments as faster, cheaper, and more decentralized modes of communication (e.g. the internet, fax machines, CNN, etc), as well as less expensive air travel, greatly impacted the effectiveness of these networks by both facilitating communications and undermining governments’ ability to control citizen access to information.<sup>110</sup>

Longitudinal analysis of the LSK’s professional journal, *The Advocate*, relevant news media, as well as interviews with members of the LSK and representatives of international human rights organizations with links to Kenya’s movement, reveal that there was some transnational contact between members of the LSK and international human rights groups beginning as early as the mid-1960s.<sup>111</sup>

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<sup>109</sup> Ibid., p. 200.

<sup>110</sup> Ibid.

<sup>111</sup> Amnesty International adopted its first prisoners of conscience in Kenya in 1967. This was in response to the Kenyatta regime’s detention of six KPU members under the Preservation of Public Security Act (Constitutional Amendment Act No. 18) of June 1966. *Amnesty International Annual*

It was not until the early to mid-1980s, however, that transnational communication between these groups became more frequent. These “communications” included educational exchanges, joint conferences and workshops, as well as greater access to information generated by both domestic and international groups. As a consequence of these interactions, conflicts began to emerge within the LSK in the early to mid-1980s between those who perceived their “proper” role as remaining “apolitical” and focused on “administering” the law, and those who believed that to do so within an authoritarian context constituted a fundamental breach of their institutional duties and obligations.<sup>112</sup>

Throughout these debates, emergent activist lawyers, such as John Khaminwa, Gitobu Imanyara and Gibson Kamau Kuria, engaged in frame bridging and frame amplification processes to reach out to fellow LSK members and appeal to their vocational calling as lawyers to defend Kenyans’ constitutional and human rights. As mentioned above, although the LSK, as an organization, *professed to* support Kenyans’ constitutional and international human rights, prior to the early-1980s, its members had not mobilized in support of these rights, despite abundant evidence of regime violations. In addition to reaching out to fellow LSK members, activist lawyers in Kenya also engaged in frame bridging to reach out to international human rights organizations based abroad. This was achieved, as mentioned above,

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*Report, 1966 – 1967.* I am indebted to Betsy Ross at Amnesty International’s New York office for making this early Amnesty report available to me.

<sup>112</sup> These conclusions are based on the reading of various unpublished reports and internal memoranda of the LSK that I had access to while in Kenya, April – June 1998, as well as with interviews with LSK members at this time.

by framing their objectives in terms of the Kenyan state's violations of *international* human rights, as well as domestic constitutional rights.

Amnesty International:

In response to these legal mobilization and framing processes, which in turn had been catalyzed by the changes in domestic and international political opportunity structures discussed above, Amnesty International was the first international human rights organization based abroad to condemn the Kenyan government for its violations of international human rights law. Although Amnesty adopted its first Kenyan prisoners of conscience in 1967, it was almost a decade later before the ICCPR entered into force (1976) and it became an available means for effectively leveraging international human rights law.<sup>113</sup> Amnesty's first formal statement to the Kenyan government in which it mobilized this international legal covenant was issued on June 2, 1982, in response to framing efforts by emergent, activist members of the LSK.

In its statement, Amnesty explicitly condemned the Moi regime's use of "indefinite detention without trial," allowable under Kenya's Preservation of Public Security Act, as a fundamental "violation of the International Covenant on Civil and Political Rights, which Kenya [has] ratified."<sup>114</sup> Because nine prisoners of conscience continued to be held by the Moi regime at the beginning of 1983, in May of 1983,

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<sup>113</sup> Although the Kenyan government endorsed the Universal Declaration of Human Rights (UDHR), unlike the ICCPR, this document does not legally bind member states.

<sup>114</sup> Amnesty International, *Amnesty International Report*, London: Amnesty International Publications, 1983, p. 48.



Amnesty again wrote to President Moi about violations of the ICCPR and appealed, once again, for the release of prisoners of conscience. Although the Moi regime gave no official reply to Amnesty's letters, as a consequence of political pressure applied by Amnesty, and its detrimental impact on Kenya's international image and reputation,<sup>115</sup> the Moi regime ultimately released five of the nine prisoners of conscience by the following year, 1984.<sup>116</sup>

In 1986, again in response to framing efforts by Kenya's emergent movement, Amnesty sent a prominent human rights attorney from the United States, Professor David Weissbrodt,<sup>117</sup> to Kenya to investigate trials of numerous political prisoners. While in Kenya, Weissbrodt met with Kenya's Attorney General to discuss Amnesty's concerns and reported that "[t]he Attorney General denied that prisoners had been held unlawfully or [had been] refused legal representation and he rejected the allegations that torture had been used [to extract information]."<sup>118</sup> A month later, on January 30, 1987, Amnesty again wrote to President Moi "appealing for an urgent,

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<sup>115</sup> Up until this time, Kenya had historically been perceived as a "success" story on the African continent. Largely because of strategic Cold War considerations, and the importance of maintaining strong relations with the Kenyan state, human and democratic rights abuses perpetrated by both the Kenyatta and Moi regimes were rarely publicized, or even acknowledged, by Western states. This is discussed in greater detail below.

<sup>116</sup> Amnesty International, *Amnesty International Report*, London: Amnesty International Publications, 1984, p. 54.

<sup>117</sup> Professor David Weissbrodt was a 1969 graduate of Berkeley's School of Law and at the time of this writing is a law professor specializing in human rights at the University of Minnesota's Law School. In 2001, he was chosen to serve as chairperson of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. He has been a member of the U.N. Sub-Commission since 1996, and is the first U.S. citizen to head a U.N. human rights body since Eleanor Roosevelt. <http://www.law.umn.edu/FacultyProfiles/WeissbrodtD.htm>

<sup>118</sup> Amnesty International, *Kenya: Torture, Political Detention and Unfair Trials*, London: Amnesty International Publications, July 1987, p. 1.

impartial investigation into allegations of torture and for the introduction of further safeguards against torture . . .”

When no official response from the regime was forthcoming, except for President Moi’s statements that Amnesty should “leave Kenya alone,”<sup>119</sup> in July 1987, Amnesty published its first special report on human rights abuse in Kenya entitled: *Kenya: Torture, Political Detention and Unfair Trails*.<sup>120</sup> The report’s stated objective was “to alert the international community to the situation. . . in the hope that the Kenyan government will respond by taking steps to end these abuses and establish safeguards for the protection of human rights in the future.”<sup>121</sup> In so doing, Amnesty engaged in legal mobilization strategies that served frame amplification and frame extension functions, in an effort to mobilize other groups and individuals within the international community to support Kenya’s human rights and democracy movement.

The report, and numerous others that were to be published over the next fifteen years of Amnesty’s involvement with Kenya’s human rights and democracy movement, as we shall see in Chapters Five and Six, also provides a clear example of information and leveraging politics, as a consequence of legal mobilization strategies, as discussed in Chapter Two. That is, the report served “to quickly and credibly generate politically usable information and move it to where it [would] have the most

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<sup>119</sup> February 26, 1987, *The Nation*, Kenya. Cited in *ibid.*, p. 2.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, p. 2.

impact” and “to call upon powerful actors to affect [the] situation . . .”<sup>122</sup> The report documented that, in addition to ten prisoners of conscience, “[o]ver 75 other alleged political opponents have been imprisoned after unfair trails,” and that many of these individuals may also be prisoners of conscience.<sup>123</sup> It also detailed the background events to a wave of detentions in Kenya in 1986 and 1987, and provided information on unlawful custodies and disappearances, in addition to making public investigations into allegations of torture by many political prisoners. Finally, engaging in accountability politics, again as a consequence of legal mobilization strategies,<sup>124</sup> Amnesty’s report concluded with a series of specific recommendations to the Kenyan government to ensure that its obligations under international law were met, and called upon powerful states in the international community, who professed to support human rights, to withdraw their support of authoritarian regimes, such as Kenya’s, who violated these rights.

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<sup>122</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 16. Keck and Sikkink’s analysis builds on Alison Brysk’s work on human rights networks and movements in Latin America, where she also develops and uses the categories of “information politics” and “symbolic politics.” See Alison Brysk, “Hearts and Minds: Bringing Symbolic Politics Back In,” *Polity*, vol. 27, Summer 1995, pp. 559 – 585; Alison Brysk, “Acting Globally: Indian Rights and International Politics in Latin America,” in *Indigenous Peoples and Democracy in Latin America*, ed. Donna Lee Van Cott, New York, St Martin’s Press/Inter-American Dialogue, 1994, pp. 29 – 51; and Alison Brysk, “From Above and Below: Social Movements, the International System, and Human Rights in Argentina,” *Comparative Political Studies*, vol. 26, no. 3, October 1993, pp. 259-285.

<sup>123</sup> Amnesty International, *Kenya: Torture, Political Detention and Unfair Trials*, p. 1. A “prisoner of conscience” is defined by Amnesty as “someone imprisoned solely for the peaceful expression of their beliefs.” [http://www.amnestyusa.org/prisoenrs\\_of\\_conscience/](http://www.amnestyusa.org/prisoenrs_of_conscience/) The concept was developed by civil rights lawyer, Peter Benenson, one of the founders of Amnesty. Ibid.

<sup>124</sup> As Keck and Sikkink explain, “accountability politics” entails “the effort to hold powerful actors to their previously stated policies or principles.” Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 16. In the Kenyan case this refers to the fact that not only was the Kenyan state party to the ICCPR, but that the Moi regime, on numerous occasions, professed its commitment to upholding and protecting the human and democratic rights of Kenyan citizens.

In an effort to promote greater domestic awareness of Amnesty's work and their support of Kenya's movement, Gitobu Imanyara's October 1987 issue of *Nairobi Law Monthly*, entitled "Kenya Responds to Critics on Human Rights," published a summary of Amnesty's July 1987 report. A key strategy of the *Monthly* in publicizing human rights violations in Kenya, yet avoiding government censure, was to print verbatim press releases of representatives of the Moi regime, who, as Imanyara explains, "often undercut the government's position with their absurd allegations."<sup>125</sup> As another member of the LSK explains, "[Imanyara] was printing slightly embarrassing things [about the government] but in a very straight-forward way. . . He stuck his neck out and took the government on very deliberately."<sup>126</sup> Despite this strategy, or because of it, shortly after this issue hit Kenya's newsstands, Imanyara was arrested on charges of sedition. Because of growing transnational linkages between Kenya's domestic movement and its new international allies, however, international pressure was immediately put on the Moi regime, and he was soon released.

#### The Robert F. Kennedy Memorial Center for Human Rights:

In addition to Amnesty International, a second international human rights organization that became an active supporter of Kenya's emergent human rights and

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<sup>125</sup> William Horne, "Can this Man be Banned?" *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

<sup>126</sup> Ibid.

democracy movement at this time<sup>127</sup> was the Robert F. Kennedy Memorial Center for Human Rights, based in Washington D.C. Founded in 1968, the RFK Center focused solely on human rights concerns in the United States for its first sixteen years. In 1984, however, the Center took an increasingly international focus. The fundamental belief that informs the RFK's mission is that "one person can make a difference, and that each of us should try."<sup>128</sup> To support this mission, each year since 1984, with the assistance of respected human rights lawyers and judges from around the world, the RFK Center grants the "Robert F. Kennedy Human Rights Award." This award "recognize[s] individuals who, at great personal risk, struggle against government oppression."<sup>129</sup> Award recipients are then provided with human, political and financial resources to support their work on behalf of human rights in their countries, as they see fit.<sup>130</sup>

Four years after the establishment of its international mission, Kenyan lawyer Gibson Kamau Kuria was chosen by the RFK Center as the recipient of its 1988 Human Rights Award for his work on behalf of international human rights in Kenya. Because the Moi regime prohibited Kuria from traveling to the United States to

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<sup>127</sup> That is, prior to Kenya's initial democratic opening in 1991, which is the time period covered in this chapter.

<sup>128</sup> Drew S. Days, III, Nathaniel R. Jones, Marc-Andre Blanchard, and Jonathan Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, New York: Robert F. Kennedy Memorial Center for Human Rights, 1992, p. xiii

<sup>129</sup> *Ibid.*

<sup>130</sup> Fundamental to the philosophy of the RFK Center is that individuals chosen as recipients of the RFK Human Rights Award have complete autonomy to use the financial, political and human resources afforded by the award as they see fit. Interview with Margaret Popkin, Program Director, RFK Center, Washington DC, August 1997.

receive his award,<sup>131</sup> the RFK Center sent a delegation to Kenya, including its executive director, Kerry Kennedy, to personally present Kuria with his award. Although the delegation was three times denied visas by the Moi regime to enter Kenya, and was warned not to hold such a “subversive” meeting as the presentation of a human rights award, the delegation was finally allowed entry in 1989.

In the still protected space of one of Kenya’s largest churches, All Saints Cathedral in Nairobi, Kuria was presented with his award. Although it was expected that approximately 35 or so movement activists might attend the award ceremony, more than 500 showed up to demonstrate their support for Kuria, despite government threats if they dared do so. While in Kenya, the RFK delegation also met with many members of Kenya’s emergent movement and spoke out publicly to the Kenyan press about regime violations of its international human rights obligations. The regime’s response was to firmly denounce their statements as fundamental breaches of Kenya’s sovereignty, and to insist that their aim was to cause “chaos” and “bloodshed” in Kenya.<sup>132</sup> The RFK Center’s visit was important, however, not only in raising Kenyans’ awareness of regime abuses of human rights, but also in signaling to Kenyans the attention and support that its domestic movement was receiving from international human rights groups based abroad.

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<sup>131</sup> The Moi regime confiscated Kuria’s passport to prevent him from traveling abroad.

<sup>132</sup> As Keck and Sikkink explain in their most recent work, a typical initial response of norm violating regimes when confronted with their abuses is to invoke the principle of sovereignty. Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction,” in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999, pp. 20 – 24.

In July of 1991, the RFK Center sent a second delegation to Kenya.<sup>133</sup> The central aim of this delegation, in response to domestic leaders' requests,<sup>134</sup> was "to examine the independence of the judiciary and the structure of the Kenyan legal system as they affect the protection of human rights."<sup>135</sup> During its visit, the delegation met with Kenya's new Attorney General, Amos Wako;<sup>136</sup> its Chief Justice, Justice Alan Robin Hancox; numerous members and former members of Kenya's judiciary; representatives of the LSK; members of the clergy, as well as numerous other movement activists and leaders, including former detainees.<sup>137</sup> In addition, the delegation also visited Kenya's courts, and observed several High Court proceedings, including the contempt of court case involving the LSK.<sup>138</sup> Following their visit, the Center published a detailed report on the state of the judiciary in

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<sup>133</sup> This delegation was primarily lead by: Judge Nathaniel Jones of the Sixth Circuit U.S. Court of Appeals; Professor Drew Days III of Yale Law School and Director of the Orville Schell Center for International Human Rights; Marc-Andre Blanchard, a lawyer and graduate student at Columbia University's School of International and Public Affairs, and Jonathan Klaaren, a law clerk for the Third Circuit of the U.S. Court of Appeals. Days, Jones, Blanchard and Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. xv.

<sup>134</sup> In particular, as mentioned above, the RFK Center continued to work primarily through Kuria, who remained a highly visible and broadly respected movement leader through this time.

<sup>135</sup> Days, Jones, Blanchard and Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. xiv.

<sup>136</sup> As is discussed below, the movement ultimately succeeded in forcing Kenya's former Attorney General, Mathew Muli, to resign and the Moi regime appointed Amos Wako to replace him in May 1991. Wako had previously served on the U.N. Commission for Human Rights, so it was hoped that he would become an important voice for human rights reform within the Moi government. Kenya's human rights and democracy movement initially greeted Wako's appointment as a great win for the movement. As will be seen below, however, Wako ultimately failed to be the leader for human rights reform that the movement hoped.

<sup>137</sup> Days, Jones, Blanchard and Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. xvi.

<sup>138</sup> This case is discussed below. For details of whom the delegation met while in Kenya, and their primary work there, see Days, Jones, Blanchard and Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. xvi, and Appendix A, pp. 65 – 68.

Kenya, which included specific recommendations addressed to the Moi government to ensure that its international human rights obligations were met. This time, however, the regime responded favorably to the delegation's report, and vowed to address institutional failings and abuses highlighted by the report.<sup>139</sup>

Like Amnesty, the RFK Center continued to support Kenya's movement over the next fifteen years. In the period leading up to the Moi regime's initial democratic opening in December of 1991, it joined with domestic movement activists in condemning the 1988 general elections as fraudulent; in criticizing the subsequent banning of the NCKK journal, *Beyond*, and in the temporary bannings of the *Nairobi Law Monthly*. They also condemned enactment of Constitution of Kenya Amendment Act No. 4 of 1988, which eliminated judicial tenure and protested continued government harassments, detentions and torture of domestic movement activists.<sup>140</sup> In so doing, the Center served to "amplify" and publicize movement critiques and demands internationally.<sup>141</sup> In addition, the Center also provided expert testimony to U.S. congressional representatives on the status of human rights in Kenya.<sup>142</sup> As is discussed in greater detail below, these testimonies, in addition to published reports on human rights abuse and compromised judicial independence in

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<sup>139</sup> As is discussed in greater detail below, as Kenya's movement gained momentum both nationally and internationally, the regime's new strategy was to pay lip service to movement demands, while instituting very few substantive reforms, and continuing to harass domestic movement activists.

<sup>140</sup> Days, Jones, Blanchard and Klaaren, *Justice Enjoined: The State of the Judiciary in Kenya*, p. xiv.

<sup>141</sup> Keck and Sikkink argue that this is a key role of transnational advocacy networks in supporting domestic movement demands and ensuring that they receive international attention. Keck and Sikkink, *Activists Beyond Border: Advocacy Networks in International Politics*.

<sup>142</sup> Interview with Margaret Popkin, Program Director, The RFK Center, in Washington D.C., August 1997.



Kenya, were critical in persuading members of Congress to make aid delivery to Kenya contingent on human and democratic rights reforms.<sup>143</sup>

#### The Lawyers' Committee for Human Rights:

A third international human rights organization that became an important supporter of Kenya's human rights and democracy movement at this time was the Lawyers' Committee for Human Rights, based in New York City.<sup>144</sup> Founded in 1978, a central goal of the Lawyers' Committee is to "search for ways to put international [human rights] standards . . . into practice at the national level."<sup>145</sup> To achieve this broad objective, it has employed a wide range of strategies including "submitting recommendations to legislatures, lobbying officials, appearing in court as trial observers or as presenter of *amicus* briefs, and helping to orchestrate pressure at the international level."<sup>146</sup>

The Lawyers' Committee first became involved with Kenya's human rights and democracy movement in 1987, also in response to legal mobilization strategies employed by domestic movement leaders. In January of 1988, the chairperson of the

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<sup>143</sup> As discussed in Chapter Two, this exemplifies what Keck and Sikkink refer to as the "Boomerang Pattern," where movement actors mobilize external allies, such as the RFK Center, who, in turn, lobby legislative representatives in their respective states to place pressure on recalcitrant regimes, such as Kenya's, to enact reforms. Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 13.

<sup>144</sup> The Lawyers Committee for Human Rights has since this time officially changed its name to "Human Rights First."

<sup>145</sup> Lawyers Committee for Human Rights, *Lawyers Committee for Human Rights*, New York: Lawyers Committee for Human Rights, 1996, p. 7.

<sup>146</sup> Ibid.

Lawyers' Committee, Justice Marvin Frankel, visited Kenya together with Dr. Robert Kirschner, a pathologist working with the American Association for the Advancement of Sciences, to inquire into the death of a Kenyan lawyer, Peter Njenga Karanja, while in police custody, as well as to assess international human rights violations in Kenya's political trials.<sup>147</sup> Shortly after their arrival, Frankel and Kirschner were arrested by the Moi regime and charged with taking notes in a Kenyan court "without proper accreditation."<sup>148</sup> After being held for six hours of questioning and harassment, they were finally released.

In response to this experience, and continued close contacts with leaders of Kenya's movement, the Lawyers' Committee began closely tracking the harassment and detention of Kenya's human rights lawyers. A year later, in 1989, they published their first annual report on attacks made on lawyers and judges around the world, entitled *In Defense of Rights*.<sup>149</sup> In its section on Kenya, the report detailed the harassment and detainment of six Kenyan attorneys, all of whom were active participants and/or leaders in Kenya's human rights and democracy movement: Gitobu Imanyara, Gibson Kamau Kuria, Paul Muite, Mohammed K. Ibrahim, Mirugi Kariuki and Wanyiri Kihoro.<sup>150</sup> The Lawyers' Committee continued to publish this report on an annual basis since 1989 and, in so doing, as Chapters Five and Six

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<sup>147</sup> Karanja died while in police custody on February 28, 1987. *Ibid.*

<sup>148</sup> Frankel and Kirshner were arrested on January 11, 1988. *Nairobi Law Monthly*, January 1988, p. 5.

<sup>149</sup> Lawyers Committee for Human Rights, *In Defense of Rights: Attacks on Lawyers and Judges in 1989*, New York: Lawyers Committee for Human Rights, 1990.

<sup>150</sup> *Ibid.*

document, they continued to play an important role in supporting Kenya's human rights and democracy movement.

In 1987 the Lawyers' Committee also established its "Lawyer-to-Lawyer Network." By 1996, this network "mobilize[d] more than 1,000 lawyers, judges, law professors, bar associations and other legal groups around the world to protest human rights violations against lawyers . . ." <sup>151</sup> In the first instance this network works by launching letter-writing campaigns to offending governments in support of harassed and/or detained lawyers. In the Kenyan case, the Lawyers' Committee helped mobilize not only individual lawyers and judges in the U.S. to support Kenya's movement, but they also succeeded in mobilizing the American Bar Association and the New York State Bar Association to condemn the Moi regime's attacks on human rights and democracy activists in Kenya. <sup>152</sup>

Like Amnesty and the RFK Center, the Lawyers' Committee also actively sought to influence U.S. policy such that it better promoted human rights in both its foreign and domestic policies. To facilitate this end, in 1989, the Lawyers' Committee began publishing critiques of the U.S. State Department reports on human rights. Up until this time, State Department reports tended to be considerably biased in their coverage of human rights abuses in nations that were of strategic importance to the U.S. Especially during the Cold War years, the State Department was reluctant to be too critical of U.S.-friendly regimes, such as Kenya's, in strategic areas of the

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<sup>151</sup> Lawyers Committee for Human Rights, *Lawyers Committee for Human Rights*, New York: Lawyers Committee for Human Rights, 1996, p. 7.

<sup>152</sup> This is discussed in greater detail below.

developing world. As is discussed in greater detail below, Kenya was of strategic important to the United States because of its port on the Indian Ocean and its proximity to the Persian Gulf. Although it received very little publicity in either the Kenyan or U.S. press, in 1980 Kenya signed an agreement with the U.S. to allow the Rapid Deployment Force to use various military bases in Kenya, “if and when needed.”<sup>153</sup>

Of particular importance to the United States in Kenya was Kilindini Port in Mombasa, Kenya’s major port city on the Indian Ocean. In 1984, the United States completed a project that involved deepening the entrance to Kilindini in order to allow access by the U.S.’s largest naval ships and aircraft carriers. In addition, as part of this agreement, Kenya granted the U.S. runway and aircraft servicing facilities in Nairobi and Nanyuki, a town near Mount Kenya in central Kenya. By 1982, as a result of these growing military ties, Kenya became the second largest recipient of U.S. military aid in sub-Saharan Africa after Sudan; and, by 1984, the U.S. replaced Great Britain as the major supplier of Kenya’s defense needs.<sup>154</sup> In response to the Lawyers’ Committee’s critiques of State Department reports, however, there was a noticeable improvement in the quality of reporting on human rights abuses in Kenya beginning in 1990.<sup>155</sup>

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<sup>153</sup> Colin Legum, ed., *Africa Contemporary Record: Annual Survey and Documents 1981 - 1982*, New York: Africana Publishing Company.

<sup>154</sup> Ibid.

<sup>155</sup> It should be noted here, as is discussed in later chapters, that even after the end of the Cold War, Kenya has remained of strategic political importance to the United States. This has been especially so since the launching of the “War on Terrorism” in the post-September 11, 1991 period, because of

Finally, like Amnesty and the RFK Center, the Lawyers' Committee also sought to influence U.S. foreign policy through providing expert testimony to U.S. congressional committees. In fact, the Lawyers' Committee claims to be one of the first international human rights organizations to pressure congressional representatives in the U.S. to link foreign aid delivery to human rights.<sup>156</sup> In the Kenyan case, as we shall see below, members of the Lawyers' Committee were especially instrumental in mobilizing congressional representatives to take a proactive stance on conditioning foreign aid delivery to human rights improvements in Kenya, even when the Bush administration (1988 – 1992), at times, was reluctant to do so.<sup>157</sup>

#### Africa Watch:

A fourth, and final, international human rights organization that became intimately involved in Kenya's transnational human rights and democracy movement

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Kenya's port facilities, relative proximity to Persian Gulf oil interests and evidence of Al Qaeda cells along Kenya's coastal region.

<sup>156</sup> Lawyers Committee for Human Rights, *Lawyers Committee for Human Rights*, New York: Lawyers Committee for Human Rights, 1996.

<sup>157</sup> The reluctance of the Bush administration to link aid delivery to human and democratic rights reform in Kenya during this period (1988 – 1992) was, in part, linked to the Persian Gulf crisis of 1990-1991, and the U.S.'s plans to launch a major humanitarian intervention into Somalia, "Operation Provide Relief," in August of 1992. In both of these cases, and in the case of the Somalian intervention in particular, the U.S. needed to rely on the assistance of the Moi government in providing port access at Kilindini. Smith Hempstone, *Rogue Ambassador: An African Memoir*, Sewanee, TN: University of the South Press, 1997.

at this time was Africa Watch.<sup>158</sup> Founded in 1988 “to monitor and promote observance of internationally recognized human rights in Africa,”<sup>159</sup> by July of 1991, Africa Watch published a 431-page report on the human rights situation in Kenya. This report was the most extensive investigation into human rights abuse in Kenya produced by any nongovernmental or governmental organization to date. Not only did it present compelling evidence of violations perpetrated by the Moi regime, but it also provided an in-depth analysis of the causes of abuse, as well as specific policy recommendations for their redress.

It found that “[p]olitical manipulation of the judiciary is at the heart of Kenya’s human rights crisis,” and it specifically condemned the Kenya government’s use of British contract judges; Kenya’s Constitutional Amendment Act of 1988, which eliminated judicial tenure; the detention of political prisoners without charges, access to defense attorneys or public trials under the Preservation of Public Security Act; and the failure of the court system to take seriously or investigate allegations of torture in Kenya’s prisons.<sup>160</sup> Africa Watch also called on the international community to “pay heightened attention to all aspects of the human rights struggle in Kenya,” because, as they somberly concluded, “[n]ot only is international support crucial for [its human rights and democracy movement] to succeed, but it is essential if Kenya, as the commercial and communications capital for a large region, is to

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<sup>158</sup> Africa Watch is part of the larger human rights organization Human Right Watch, which, in addition to Africa Watch, is comprised of Americas Watch, Asia Watch, Helsinki Watch, Middle East Watch, and the Fund for Free Expression.

<sup>159</sup> Africa Watch, *Kenya: Taking Liberties*, New York: Human Rights Watch, 1991.

<sup>160</sup> *Ibid.*, p. ix.

point the way for its troubled neighbors.”<sup>161</sup> As we shall see in Chapters Five and Six, although only founded in 1988, Africa Watch was to become one of the most effective international human rights organizations in promoting human rights protections in Kenya.<sup>162</sup>

#### Political Opportunity Structures: Increased State Vulnerability:

In addition to the growing repressiveness/closure of the Moi regime, and the emergence of new international allies, a third major shift in political opportunity structure that catalyzed Kenya’s human rights and democracy movement was the increased vulnerability<sup>163</sup> of the Moi regime due to three international political events: (1) the collapse of single-party states in Eastern and Central Europe beginning in 1989; (2) the subsequent wave of national constitutional conferences that swept the African continent beginning in early 1990; and (3) the break up of the former Soviet Union, and consequent post-Cold War international political

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<sup>161</sup> Ibid., p. xiii.

<sup>162</sup> Although not examined in this study, through the 1990s, Africa Watch became one of the most effective international human rights organizations promoting human rights protections not only in Kenya, but in the greater sub-Saharan region as well.

<sup>163</sup> As discussed in Chapter Two and above, the concept of “state vulnerability” is borrowed from Keck and Sikkink’s work. Keck and Sikkink, *Activists Beyond Border: Advocacy Networks in International Politics*, p. 208. Although Keck and Sikkink’s definition of the concept applies only to the international level, I argue that it also contains an important domestic dimension, and operationalize it at both international and domestic levels. Thus, for the purposes of this study, “state vulnerability” is defined as the degree of state sensitivity to international and/or domestic pressure, and it is operationalized both materially and normatively at these levels. At the international level, material sensitivity is measured in terms of aid, trade and other potential economic dependencies; and, normative sensitivity is measured in terms of the state’s prior normative commitments and “desire to maintain good standing in valued international groups.” Ibid. Domestically, this concept is measured in terms of the relative improvements or decline in a country’s economy, and normatively, in terms of its general legitimacy among its citizenry.

realignments, also beginning in early 1990. As is examined below, movement leaders immediately capitalized on each of these events by framing them in such a way as to undermine regime legitimacy and emphasize the potential of sustained collective action in achieving movement goals.

For example, a leading member of Kenya's movement, and one of Kenya's most influential leaders within the NCCK, Reverend Timothy Njoya, drew explicit parallels between events transpiring in Eastern Europe and the political situation in Kenya in his New Year's Sermon of January 1, 1990.<sup>164</sup> He framed his criticisms in terms of the proven illegitimacy of single-party states in both regions, and called for the immediate introduction of multiparty politics in Kenya as a fundamental human and democratic right, as well as a means for ensuring the protection of all other fundamental rights. The following day, Kenya's most widely read newspaper, *The Daily Nation*, devoted more space to Njoya's sermon than to Kenya's vice president's adamant defense of single-party rule.<sup>165</sup> Soon afterward this, Kenya's Catholic bishops also issued and publicized another pastoral letter urging regime liberalization and multiparty politics. From this point forward, all central movement demands focused on the introduction of multiparty politics as fundamental to the protection of human and democratic rights in Kenya.

In addition to the wave of political openings in Eastern and Central Europe, sub-Saharan Africa's first national constitutional conference was convened in Benin,

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<sup>164</sup> Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"*, p. 192.

<sup>165</sup> Colin Legum, ed., *Africa Contemporary Record: Annual Survey and Documents 1990- 1992*, B315. See also: *The Daily Nation*, January 2, 1990.



West Africa in February of 1990. The success of this conference was also immediately mobilized by Kenya's human rights and democracy movement, as well as movements throughout the continent, as evidence of the efficacy of collective action in bringing down single-party regimes and in formalizing rights protections in comprehensively reformed national constitutions. As Pearl Robinson notes in her insightful analysis of the national conference phenomenon that began to sweep the continent

[t]he lessons of Benin's National Conference were not lost [on other African states]. Between March 1990 and August 1991, the rulers of Gabon, Congo, Mali, Togo, Niger and Zaire faced the demands of pro-democracy forces and convened national conferences. During this same period, opposition groups in the Central African Republic (CAR), Cameroon, Madagascar, Burkina Faso, Mauritania and Chad began mobilizing campaigns to press their demands for national conferences.<sup>166</sup>

Almost immediately following the success of the Benin conference, movement leaders in Kenya began framing movement demands in terms of "comprehensive constitutional reforms" through a "national constitutional conference" as a necessary corollary to the introduction of multiparty politics. In so doing, movement leaders engaged in both belief amplification and motivational framing to emphasize the necessity of "standing up" for one's beliefs, despite repressive regime responses, and the long-term efficacy of sustained collective action in promoting regime change.<sup>167</sup>

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<sup>166</sup> Pearl T. Robinson, "Democratization: Understanding the Relationship between Regime Change and the Culture of Politics," *African Studies Review*, vol. 37, no. 1, April 1994, p. 56. See also Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, Cambridge: Cambridge University Press, 1997, pp. 165-197.

<sup>167</sup> Movement leaders in Kenya immediately framed the success of the Benin conference as evidence of the potential of sustained collective action against single-party regimes. By July of 1990, the

For example, in the February issue of *Finance*, a popular professional journal in Kenya, prominent movement leader and secretary general of the NCKK, Bishop Henry Okullu, stated: “People are fed up all over the world with dictator regimes, and the recent signs of the times are nothing but an indication that everyone is now ready to stand on his or her own in life or death to win back self-respect and freedom.”<sup>168</sup> The February 1990 issue of the *Nairobi Law Monthly* also focused exclusively on Kenya’s Constitution and was entitled “The Surest Foundation of Nationhood: A Constitution.”<sup>169</sup> It featured articles on constitutional rights recognized under Kenya’s Bill of Rights and juxtaposed these with an analysis of constitutional amendments introduced by the Kenyatta and Moi regimes, which ultimately negated these rights. In so doing, the editors’ not-so-subtle purpose was to highlight the necessity of comprehensive constitutional reform in Kenya. Movement leaders Gibson Kamau Kuria and Paul Muite, who had become increasingly visible in the movement’s leadership over the preceding year, were key contributors to this issue.

In response, the Moi regime permanently banned the journal *Finance*, confiscated the February issue of the *Monthly*, and also threatened it with a permanent ban. In addition, the day after the *Monthly* hit the newsstands, Special

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secretary general of the NCKK and movement leader, Bishop Henry Okullu, also issued a strongly worded statement that the Moi government immediately convene a constitutional assembly in order that there might be a “more binding social contract between the people and their governors.” See *TheDaily Nation* articles: June 20, 1990 and July 16, 1990. See also *Xinhua Press*, “Kenyan Bishop Calls for Resignation of Kenyan Government,” July 16, 1990.

<sup>168</sup> *Finance*, “Church and Politics in Kenya: What Went Wrong? Why the Strife?” February 1990, Nairobi, Kenya. Cited in Okullu, *Quest for Justice: An Autobiography of Bishop John Henry Okullu*, 1997.

<sup>169</sup> *Nairobi Law Monthly*, no. 21, February 1990.

Branch officers attempted to take its editor, Gitobu Imanyara, into custody from his central Nairobi office. As they tried to force him into their waiting vehicle, however, a large and growing crowd of Kenyans began shouting their support for him and demanding his release. Surprised, and clearly intimidated by the growing crowd, the officers ultimately did release Imanyara, with the warning that he should cease his “seditious activities.” Imanyara then immediately seized this opportunity to issue a press statement condemning the police actions as a violation of his fundamental constitutional rights and give further publicity to the need for constitutional reform by stating: “Those responsible for destruction of our Constitution will one day answer for their crimes. I refuse to be intimidated by the threat of the ban of the *Nairobi Law Monthly*, detention, or further imprisonment following trumped-up charges, or a manipulated trial.”<sup>170</sup>

Imanyara also immediately alerted the growing network of international human rights organizations supporting Kenya’s movement by telephone and fax. His strategy worked. Despite the fact that Kenya’s major papers up until this time had been reluctant to print material directly critical of the regime,<sup>171</sup> all of Kenya’s major papers, with the exception of *The Kenyan Times*, the KANU newspaper, published Imanyara’s statements. When letters and cables from abroad also began pouring into Kenya in support of Imanyara and the *Monthly*, Imanyara’s arrest and the banning of the journal were prevented—at least for the time being.

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<sup>170</sup> William Horne, “Can this Man be Banned?” *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

<sup>171</sup> This was not unrelated to the fact that outspoken journalists were often harassed and detained by the regime, and their newspapers issued with exorbitant fines, as is discussed below.

The movement's next major round of confrontation with the regime began a couple months later, during the first week of May 1990. At this time, in an unprecedented act, two former cabinet ministers, Kenneth Matiba and Charles Rubia, issued a joint press statement affirming their solidarity with Kenya's reform movement and calling for constitutional reform and multiparty politics in Kenya. As they insisted in their statement: "Twenty-seven years of experiment [with one party rule] are enough. Only those with vested interests can turn a blind eye to the obvious need for change..."<sup>172</sup> Engaging in frame transformation,<sup>173</sup> they argued: "We believe our single-party system is the major single contributory factor and almost solely the root cause of the political, economic and social woes we now face."<sup>174</sup>

The immediate response of the Moi regime was to condemn Matiba and Rubia as "traitors" bent on "fostering tribalism" in Kenya. This was the typical response of the regime to mounting criticism by Kenya's movement. By framing movement activities as "subversive," "self-interested" and designed to promote "tribal warfare," "bloodshed" and "chaos" in Kenya, the regime attempted to undermine movement legitimacy and instill fear of its activities in Kenyans. Interestingly, in so doing, the regime revived former colonial arguments against

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<sup>172</sup> Peter Biles, "Moi Fights Back Against Critics of One-Party State," *The Guardian*, London: Guardian Newspapers Limited, May 7, 1990.

<sup>173</sup> As discussed in Chapter Two, *frame transformation* is defined as the process of "redefining activities, events . . . that are already meaningful from the standpoint of some primary framework, in terms of another framework, such that they are now seen by the participants to be something quite else." Snow, Rochford, Worden and Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation," p. 474.

<sup>174</sup> Peter Biles, "Moi Fights Back Against Critics of One-Party State," *The Guardian*, London: Guardian Newspapers Limited, May 7, 1990.

allowing independent and democratic rule in Kenya, in that they claimed that Kenya and Kenyans were not yet “ready” --meaning sufficiently politically sophisticated and experienced-- for multiparty politics. Like their colonial predecessors, the Moi regime implied that Kenya *might* (at some future, but indeterminate, time) be ready for multiparty politics, but given its current state of political development, it could only bring bloodshed.

By coincidence, the day before Matiba and Rubia issued their statement, the new United States Ambassador to Kenya, Smith Hempstone, who was also to become an important ally for Kenya’s movement, suggested at a public meeting in Nairobi that “there was a growing feeling in Congress that future development aid should be directed towards countries that ‘nourished democratic institutions, defended human rights and practised multi-party politics.’”<sup>175</sup> His remarks reflected the impact of two important political events on U.S. congressional representatives: (1) the growing efficacy of international human rights organizations in providing compelling evidence of human rights abuse in U.S.-supported regimes throughout the world; and (2) the political opportunity presented by post-Cold War international political realignments to link U.S. foreign aid to more principled human rights concerns.

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<sup>175</sup> Smith Hempstone, *Rogue Ambassador: An African Memoir*, Sewanee, TN: University of the South Press, 1997, p. 91.

Legal Mobilization Strategies: Promoting Free Speech, Association and Assembly:

In early June 1990, Matiba and Rubia, following the legal mobilization strategies advised by their lawyers and movement leaders,<sup>176</sup> applied for a state license to hold a public meeting at Kamukunji grounds<sup>177</sup> a month later, on July 7, 1990. The stated aim of the meeting was to allow Kenyans to come together to openly discuss their views on multiparty politics. Although movement leaders were well aware that their license request would be denied by the regime, their strategy was to “follow the letter of Kenyan law” in order to further expose the regime’s contradictions to growing national and international audiences. Whereas the regime emphatically stated that it “cherishe[d] . . . [the] freedom[s] of conscience and speech enshrined in the constitution,” its actions clearly indicated otherwise.<sup>178</sup>

As expected, the movement’s request was denied and, over the following weekend, President Moi ordered an end to all discussion on multiparty politics. The following week, in an increasingly common strategy to suppress movement activities, the regime reinforced its earlier verbal threats with violence. Fifteen individuals armed with guns, axes and *pangas*<sup>179</sup> attacked Matiba’s home in the middle of the night, and although Matiba was not at home, and thus was not harmed, his wife’s

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<sup>176</sup> Specifically, movement leaders Gibson Kuria and Paul Muite.

<sup>177</sup> As noted above, Kamukunji grounds are located just outside of Nairobi. They held symbolic importance to Kenyans and to Kenya’s human rights and democracy movements, as it was here that anti-colonial demonstrations were held during the 1940s and 1950s. As discussed in Chapter Three, all “public” meetings, that is, meetings of more than ten people, required state licensing under Kenya’s Preservation of Public Security Act.

<sup>178</sup> “Kenyan Party Statement on Calls for Constitutional Referendum,” BBC Summary of World Broadcasts, London: The British Broadcasting Corporation, May 7, 1990.

<sup>179</sup> A *panga* is a type of machete, typically used in harvesting vegetables.

skull was fractured and his daughter and a watchman seriously injured.<sup>180</sup> Despite the regime's denials, the attack was widely perceived as an intimidation tactic to end Matiba's involvement with the movement.<sup>181</sup> Because of his years of experience and prominence in Kenyan politics, and his extensive grassroots base, Matiba's decision to join in solidarity with Kenya's emergent movement constituted yet another level of political threat to the regime.

In response to the regime's refusal to issue movement leaders a license to convene a public meeting, human rights lawyers Paul Muite and Gibson Kamau Kuria, together with other members of the LSK, called a press conference to draw national and international attention, once again, to the regime's continued violation of Kenyans' fundamental human and democratic rights, despite its rhetoric to the contrary. At this time, and for the first time in Kenya's history, a petition was signed by a majority of members of the LSK and presented to the Kenyan government. It demanded the introduction of multiparty politics "to keep the government on its toes and to keep it awake to the rights, freedoms and aspirations of the people."<sup>182</sup> The press conference ultimately was forcibly disrupted by plainclothes policemen, who not only confiscated the notebooks, film and cameras of journalists in attendance, but also arrested the editor of Kenya's largest newspaper, *The Nation*, "for security

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<sup>180</sup> "Kenya Attack on Family Seen as 'Intimidation' of Moi Critic," *The Times*, London: Times Newspapers Limited, June 16, 1990.

<sup>181</sup> As Matiba states: "Threats have been made on us, some by very highly placed officials. I do not want to make any insinuations, but it is very hard for me and my family not to associate our stand in public affairs with this attack." Cited in *ibid*.

<sup>182</sup> Didrikke Schanche, "Campaign for Multiparty System Challenges President Moi," Associated Press, July 1, 1990.

reasons.”<sup>183</sup> The deputy editor of Kenya’s second largest newspaper, *The Standard*, was also threatened with arrest, should he dare to attend future press conferences convened by the movement.<sup>184</sup>

In response to this harassment, Kenya’s Catholic Bishops issued another pastoral letter condemning the regime’s actions. Also employing legal mobilization strategies, they stated that the regime’s actions were “a direct infringement of freedom of speech enshrined in our Constitution.”<sup>185</sup> Domestically based movement leaders again activated Kenya’s growing international support network, and international human rights groups based abroad, in turn, issued strongly-worded condemnations of the regime’s actions, making clear that they were in fundamental violation of Kenya’s obligations under the International Covenant on Civil and Political Rights.

Despite increasingly strong-armed tactics by the regime to silence the movement, later that month (June 1990), the *Nairobi Law Monthly* published another special edition entitled “The Historic Debate: Law, Democracy and Multi-Party Politics in Kenya.”<sup>186</sup> In a deliberate effort to engage in rights consciousness-raising and undermine regime legitimacy, this issue juxtaposed sections of Kenya’s

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<sup>183</sup> Sharon Behn, “Police Break up Kenyan News Conference,” United Press International, June 21, 1990.

<sup>184</sup> “Journalists and Newspaper Editor Held,” BBC Summary of World Broadcasts, London: The British Broadcasting Corporation, June 23, 1990.

<sup>185</sup> Ibid.

<sup>186</sup> “The Historic Debate: Law, Democracy and Multi-Party Politics in Kenya.” *Nairobi Law Monthly*, June 1990.



Constitution, and specifically section 80(1), which protects Kenyans' freedoms of speech, assembly and association, with Constitutional Amendment 2A, which states that "there shall be in Kenya only one political party, the KANU. . ." <sup>187</sup> The issue featured articles by prominent movement leaders on the question of single-party versus multiparty politics, including an article by Matiba and Rubia with explicit critiques of Kenya's single-party regime. The journal also published excerpts from recent speeches by President Moi and other senior KANU politicians on the subject, which served to deeply embarrass the regime and diminish its legitimacy in the eyes of a growing number of Kenyans. <sup>188</sup>

The first publishing run of this issue produced 7000 copies, all of which sold out within three hours of hitting the newsstands in Kenya. Imanyara then began a second publishing. <sup>189</sup> By this time, however, the Moi regime banned the issue as seditious, and once again threatened to arrest Imanyara and ban the journal. Although the government also attempted to confiscate all remaining issues, and arrest street vendors selling it, the *Monthly* offered free legal fees to those arrested and encouraged vendors to stand up for their freedoms of speech by continuing to sell the journal. Once again, Imanyara was able to alert the movement's foreign-based

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<sup>187</sup> Ibid.

<sup>188</sup> Because the journal's printers in Nairobi had been increasingly harassed, this edition of the *Monthly* was the first to be published using MacIntosh Desktop software. This technology allowed the editors of the *Monthly* to print the journal out of their offices. Examples of harassment of printers included not only the destruction of printing equipment in midnight raids on presses, but printers themselves were also increasingly subject to regime threats as the popularity of the *Monthly* grew.

<sup>189</sup> William Horne, "Can this Man be Banned?" *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

support network, and editorials protesting his harassment appeared in such major U.S. newspapers as *The New York Times*, *The Washington Post*, and *The Chicago Tribune*. With this international attention, and cables and letters of support again pouring into Kenya, Imanyara, once again, was able to avoid detention.

*Saba Saba Day, July 7, 1990:*

Despite growing international and domestic pressure on the regime to introduce human and democratic reforms, as the scheduled date for the July 7<sup>th</sup> meeting at Kamukunji grounds grew closer, the Moi regime's efforts to suppress movement activities grew increasingly aggressive.<sup>190</sup> Although movement leaders had been denied a license to convene their meeting, many activists insisted they would show up at Kamukunji grounds regardless. In order to prevent the bloodshed promised by the regime, on July 4<sup>th</sup>, Matiba and Rubia, together with Kuria and Muite, issued a press statement in which they reaffirmed their commitment to human and democratic rights, but urged Kenyans not to go to Kamukunji. Just hours after this announcement, however, Matiba and Rubia were arrested—without charge and without a trial date—under Kenya's Preservation of Public Security Act. The following day, eight more movement leaders and activists were also arrested, including human rights lawyers Gitobu Imanyara, John Khaminwa and Mohamed Ibrahim, as well as the son of former KPU leader Oginga Odinga, Raila Odinga, and

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<sup>190</sup> For example, Kenya's chief of police, Philip Kilonzo, announced that the police would continue to "make arrests without warrants and break up news conferences deemed illegal." "Kenyan Police Chief Approves Arrests without Warrants," United Press International, June 23, 1990. He justified these actions by insisting "[w]e do not need to wait around, wasting time waiting for a warrant of arrest while these people go on with their illegal meetings." Ibid.

Matiba's assistants, George Mwangi and Joseph Mbacha. Most of these arrests took place in the late evening hours, thus preventing the movement from effectively activating domestic and international support networks.

Despite these increasingly desperate regime efforts to prevent the meeting at Kamukunji from taking place, tens of thousands of Kenyans began gathering at the grounds early Saturday morning, July 7<sup>th</sup> –a day that was to go down in Kenyan history as “*Saba Saba*” Day. The growing crowds chanted multiparty slogans and held high two-finger salutes, a political symbol mobilized by the movement to indicate support for multiparty politics in Kenya. As Kiraitu Murungi, a movement activist and human rights lawyer who addressed the crowd as it began gathering, told reporters: “You see what is happening. People want change . . . They were not afraid to come even though [many of] their leaders are detained.”<sup>191</sup> He explained that, in fact, the regime's strategy of arresting many of the movement's top leaders ultimately backfired because it only “spurred more people to attend the meeting in defiance.”<sup>192</sup> Internationally acclaimed Kenyan author Ngugi wa Thiongo, from his position in exile as a literature professor at Harvard University in the United States, claimed that, with *Saba Saba*, Kenya had entered into an entirely new phase of its political history.

Suddenly, the culture of silence and fear, which I've been writing about for the decade since I came out of detention,<sup>193</sup> is not there any more. We are seeing a classic case of the people versus the state. They are out

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<sup>191</sup> Neil Fleming, “Kenyan Troops Battle Opposition Demonstrators,” United Press International, July 7, 1990.

<sup>192</sup> Ibid.

<sup>193</sup> That is, 1978, when the new Moi regime liberated all political detainees of the Kenyatta years. See Chapter Three for a discussion of this.

on the streets expressing their hatred of this regime, and it is a hatred which cuts across every region and every social class.<sup>194</sup>

As he further explained, “[o]ur democratic demands were always portrayed as subversive. . . but there is at last consensus for just such demands.”<sup>195</sup> As a Kenyan political analyst was later to conclude, *Saba Saba* demonstrated “the potency” of collective action to Kenyans throughout the country and “plant[ed] ‘mass action’ into the repertoire of Kenyan political tools forever.”<sup>196</sup>

The regime responded to *Saba Saba* as it promised --with tear gas and bullets. Although the government admitted to only twenty deaths, movement leaders insisted that the number was well over a hundred, with hundreds more seriously injured. *The Daily Nation*, Kenya’s most widely read newspaper, reported that 1056 people had been arrested and charged with “riot-related” offences in the wake of the demonstrations.<sup>197</sup> Although the state-owned Kenya Broadcasting Corporation (KBC) issued a news blackout throughout the country on the demonstrations, over the next three days, protests emerged in many towns throughout Kenya, including in Central, Western and Rift Valley provinces. In Nakuru, an important urban center in

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<sup>194</sup> Victoria Brittain, “Riots Open New Phase, Says Dissident: There Can Be No Turning Back Now,” *The Guardian*, London: Guardian Newspapers Limited, July 11, 1990.

<sup>195</sup> Ibid.

<sup>196</sup> “Democracy: Why Kenyans Have Given Up the Struggle,” *The Daily Nation*, Nairobi: The Nation. Reported by the Global News Wire, Financial Times Information, July 16, 2000.

<sup>197</sup> *The Daily Nation*, July 11, 1990. Cited in Africa Watch, *Kenya: Taking Liberties*, p. 65.

Rift Valley Province, for example, it was reported that “[h]undreds of people were arrested on charges of ‘disturbing the peace’ and ‘rioting.’”<sup>198</sup>

In response to this heavy-handed reaction by the regime, movement leaders again condemned the regime’s abuse of Kenyans’ fundamental human and democratic rights, and alerted their international network. The International Bar Association, whose annual meeting was scheduled to be held in Nairobi two months later, insisted it would change the location of the meeting if movement activists were not immediately released and human and democratic rights reform instituted. In addition, the president of the New York State Bar Association, who was also a member of the Lawyers Committee for Human Rights lawyers-to-lawyers network, contacted U.S. Secretary of State James Baker III and asked him to raise the issue of human rights abuse with President Moi.<sup>199</sup>

In response, the U.S. State Department issued a statement affirming that “[w]e believe very strongly in the principle of public expression of dissent and the right of peaceful assembly, and that these rights, both principal tents of the Universal Declaration of Human Rights, should be integral parts of all political systems.”<sup>200</sup> Moreover, the U.S. Ambassador to Kenya, Smith Hempstone, again reiterated his warning that the U.S. Congress would likely withhold its package of approximately

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<sup>198</sup> Africa Watch, *Kenya: Taking Liberties*, p. 65.

<sup>199</sup> William Gifford, “Human-Rights Symbol; Kenyan Publisher Stands Up to His Government,” *Legal Times*, American Lawyer Newspapers Group Inc., August 27, 1990.

<sup>200</sup> Jim Lobe, “U.S. ‘Distressed’ by Political Arrests,” IPS-Inter Press Service/Global Information Network, July 5, 1990.

\$60 million dollars in aid (\$50 million in civilian aid, plus \$10 million in military aid) unless democratic and human rights reforms were introduced in Kenya.<sup>201</sup>

Nordic countries also joined with the United States in condemning the regime's actions.<sup>202</sup> On July 11, 1990, a delegation representing the Nordic countries of Denmark, Finland, Iceland, Norway and Sweden met with Kenya's Permanent Secretary in the Foreign Ministry, Bethuel Kiplagat, and asked for the "release all the detainees who had advocated multi-party democracy and human rights in Kenya."<sup>203</sup> Like the United States, they also insisted that the "repression of democratic rights could influence their development assistance to Kenya if the present political situation continues."<sup>204</sup>

By the end of July 1990, as a consequence of mounting domestic and international pressure, the Moi regime agreed to release Imanyara, but no others, on the equivalent of \$10,000 (U.S.) bail, and his trial date was set for two months later. As soon as he was released, Imanyara went back to work on the *Monthly* and managed to produce two issues, both of which were published in September 1990. The first, published in early September, featured a cover story on Bishop Alexander Muge, an outspoken movement leader who was killed under mysterious circumstances in a car accident the previous month. Bishop Muge had earned the

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<sup>201</sup> Christopher Walker, "U.S. Diplomat Warns that Pounds 33m Kenya Aid at Risk," *The Times*, London: Times Newspapers Limited, July 17, 1990.

<sup>202</sup> "Kenya: More Donors Threaten to Freeze Aid Over Detentions," IPS-Inter Press Service/Global Information Network, July 13, 1990.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

wrath of the regime as early as April 1987 when he responded to regime attacks on his criticism of Kenya's newly introduced queuing system with the words: "I shall not protest against the violation of human rights in South Africa if I am not allowed to protest the violation of human rights in my own country."<sup>205</sup> Other articles in this issue also included such provocative titles as "Detention Without Trial Is Abhorrent" and "Disregard for Human Rights Has Brought the Current Crisis."<sup>206</sup>

Given the national and international attention Imanyara received with his banned June issue of the *Monthly*, the number of September issues sold on Kenyan newsstands skyrocketed to 15,000 copies, not including 800 additional copies sold as subscriptions.<sup>207</sup> As another prominent human rights lawyer, and Imanyara's defense lawyer against sedition charges, Pherozee Nowrojee, explained: "It shows that the rule of law is not [only] a concern of a thousand lawyers but finds a greater response in a general public readership."<sup>208</sup> In fact, as the international press was to later report: "The Kenyan press has followed the *Law Monthly's* lead in recent months, casting aside much of its self-censorship in favor of vigorous reporting on official corruption and the multiparty debate."<sup>209</sup> As two other movement activists concur: "We have already gained something substantial, freedom of expression . . .

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<sup>205</sup> Cited in Widner, *The Rise of the Party-State in Kenya: From Harambee! to Nyayo!*, p. 191.

<sup>206</sup> *Nairobi Law Monthly*, September 1991.

<sup>207</sup> William Horne, "Can this Man be Banned?" *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

Government officials have recently been subject to criticism in the press that would have been unheard of just three months ago.”<sup>210</sup>

When twenty Kenyan lawyers, the international press and numerous movement activists showed up for Imanyara’s sedition trial in mid-September 1990, the pro-government judge unexpectedly dropped all sedition charges against him, and instead charged him (again) with the crime of stealing a client’s funds --a charge that was first brought against him in 1983, and for which he had already served a three-year prison term, despite producing convincing evidence of his innocence. For this crime, he was fined and released. As Imanyara explains: “They don't want to ban us outright because of the international outcry it would cause. . . .They would rather say, ‘He is a common thief. How can you support him?’”<sup>211</sup>

#### The Saitoti Commission:

Two weeks later, Imanyara produced a second special issue of the *Monthly* that featured excerpts of Kenyans’ submissions made to the newly formed “KANU Review Committee,” also known as the Saitoti Commission.<sup>212</sup> This Committee was established by the Moi regime in response to the round of confrontations with the movement that began in May 1990, and its mandate was to “tour the countryside” and collect Kenyans’ views on the queuing system, the seventy percent rule, single-

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> The Committee was headed by Kenya’s vice president, George Saitoti, and staffed by Moi’s closest associates.



party politics and processes of nomination and expulsion of KANU party members.<sup>213</sup>

Although movement leaders heralded this regime concession as a major win for the movement, they also urged cautious optimism in assuming that citizens' criticisms would be taken seriously by the regime. Still, movement activists worked closely with rural communities in Kenya, encouraging citizens to candidly attend Committee meetings convened in their areas and candidly report their views to the Committee. In response, much to the surprise of regime representatives, and many movement leaders alike, Kenyans did show up *en masse* to be heard and were remarkably frank in their statements. The next concern of movement leaders, then, was to ensure that these critiques would actually be recorded in the Committee's final report. Thus, as Imanyara explains, his goal was to "preempt any attempt by the government to hoodwink people by claiming these suggestions were never received."<sup>214</sup>

Once again, the regime's response was to ban the issue and, once again, Imanyara's response was to issue a national press release and alert the movement's international support network. Almost all of Kenya's morning papers published his statements:

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<sup>213</sup> Kivutha Kibwana, "Issues of Constitutional Reforms in Africa: The Example of Kenya," Kivutha Kibwana, ed., *Constitutional Law and Politics in Africa: A Case Study of Kenya*, Nairobi: Claripress Limited, 1998, p. 30. This chapter was first published as a feature article in the June 1991 issue of the *Nairobi Law Monthly*, however.

<sup>214</sup> William Horne, "Can this Man be Banned?" *The American Lawyer*, American Lawyer Newspapers Group, Inc., November 1990.

Freedom of conscience, expression, and therefore of the press are central to democratic society. And when any of them is cramped, our humanity is that much restricted and democracy destroyed. . . . On that ideal *The Nairobi Law Monthly* was founded. On that ideal it has grown. And it is because of its pursuit of that ideal that it has been killed. . . . But no one, however powerful, can crush an ideal. That is our hope and our strength . . .

Despite national and international pressure, this time the regime refused to reconsider its order to ban the journal, however. So, with the support of a majority within the LSK, Imanyara, in an unprecedented move, took the state to court. Just over a week later, on October 8, 1990, and much to their surprise, Imanyara and his colleagues won the first legal challenge to a government banning order in post-independence Kenya. Although this was considered a tremendous win for the movement, as Imanyara later explained, the decision was due more to a stroke of luck than movement strategy. Regime prosecutors had expected the case to be heard by Judge Dugdale, the notorious pro-government British contract judge.<sup>215</sup> By some mistake, however, it went to one of the few justices in Kenya who maintained a reputation for upholding constitutional rights, Judge Frank Shields. With the sedition ban lifted, not only could additional copies of the late September issue of the *Monthly* be printed, but it also was no longer a crime of sedition to be in possession of the journal, and it was widely distributed.

Despite this important win for the movement, the regime not only continued its targeted repression of movement leaders, but it also began to step up its efforts. Later in October, three well-known movement activists, Koigi wa Wamwere, Mirugi

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<sup>215</sup> See Chapter Three for a discussion of British contract judges, and Judge Dugdale in particular.

Kariuki and Rumba Kinuthia, in addition to five others, were charged with treason and placed under indefinite detention. Although Imanyara was not arrested, he was placed under 24-hour surveillance by Kenya's secret police unit, the Criminal Investigations Department (CID).

#### Formation of the National Democratic Party (NDP):

Following this wave of arrests, movement activities were relatively quiet for the next several months, until February of 1991. At this time, political veteran, and former KPU leader, Oginga Odinga, who had been active in Kenya's human rights and democracy movement from its earlier stages, but especially so since his son's July 1990 arrest,<sup>216</sup> took the regime by surprise by calling a press conference and announcing the formation of an opposition party, the National Democratic Party (NDP). Also engaging in legal mobilization of Kenya's constitutional rights, Odinga claimed that, while Section 2A of Kenya's Constitution mandates a one party state, the Bill of Rights, which guarantees freedom of association, reigns supreme in the Constitution. In addition, in an effort to demonstrate his commitment to rule of law, and exploit regime contradictions, Odinga announced he would seek registration of his new party with the Kenyan Registrar of Societies within 28 days "as required by Kenyan law."

A week later, the February issue of the *Nairobi Law Monthly* published the manifesto of the NDP, which stated its primary objective as "the restoration of

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<sup>216</sup> Raila Odinga was one of the movement leaders arrested just prior to *Saba Saba* day, July 7, 1990.

democracy and justice in Kenya.”<sup>217</sup> As soon as this issue hit the newsstands, once again, the regime declared the issue seditious and began confiscating copies. Three days later, Imanyara was also, again, arrested on charges of sedition and incarcerated at Kamiti Maximum Security Prison. Three months later, after protests from international human rights groups, the U.S. State Department, as well as domestic movement leaders, however, Imanyara was finally released. As had become typical, Kenya’s Attorney General simply stated that all charges against Imanyara had been dropped, with no further explanation.

In the meantime, March of 1991 marked two significant events for Kenya’s human rights and democracy movement. First, Odinga followed through with the legal mobilization strategy of attempting to register his newly formed party, the NDP, with the state. When Kenya’s Registrar of Societies refused the registration, as was expected, Odinga again mobilized Kenyan law by holding a press conference and stating that he had the right under Kenya law to appeal the Registrar’s denial and that he would do so on the grounds of his constitutionally entrenched right to free association. Although this appeal was also denied, Odinga’s actions were significant in focusing the Kenyan publics’ and international attention, once again, on regime violations and its contradictions in claiming that Kenya was a “one party democracy” that respected human and democratic rights.

The second important March event for the movement was the election by overwhelming majorities of two of the movement’s most visible and outspoken

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<sup>217</sup> *Nairobi Law Monthly*, February 1991.

leaders at the time, Paul Muite and Willy Mutunga, as president and vice president, respectively, of the LSK.<sup>218</sup> These wins were significant in giving the movement's leadership an even higher profile in the local and international press, as well as in helping mobilize the vast majority of LSK members to support movement activities.

#### The LSK and Movement Leadership:

In his acceptance speech, newly elected LSK president and movement leader, Paul Muite, immediately endorsed Odinga's appeals and called for registration his National Democratic Party (NDP). In addition, he also called for the end to single-party rule, the repeal of Kenya's Public Security Act,<sup>219</sup> the release of all political detainees, and the regime's protection Kenyans' fundamental constitutional rights, in particular the rights of association and assembly. These demands made headlines in both the national and international press, and in so doing, incurred the wrath of the regime. In response to accusations by President Moi that LSK was full of "criminals," "thieves," and "foreign-supported subversives," who were bent on causing chaos and violence in Kenya, Muite, engaging in attributional framing, emphatically stated that "the greatest danger to public security in Kenya is the government itself, and not us, the lawyers, when we speak out, it is not the clergy when they speak out . . . or indeed any other Kenyans."<sup>220</sup> As Muite continued, "[b]y

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<sup>218</sup> Muite received 300 votes to his pro-government opponent's (Alex Kariuki's) 80.

<sup>219</sup> As mentioned above, this Act legalized preventive detention without trial in Kenya.

<sup>220</sup> Horace Awori, "Kenya: Lawyers and Government Seem Set for Collision Course," IPS-Inter Press Service/Global Information Network, March 12, 1991.

[the government] faithfully subscribing to the rule of law, democracy and respect for human rights, threats to public security can be a thing of the past.”<sup>221</sup>

A week later, four pro-government lawyers filed a motion with Kenya’s High Court that Muite be restrained from acting or speaking on behalf of the LSK because he had “overstep[ed] the bounds of his office” through his “political” statements.<sup>222</sup> In response, Judge Dugdale, the notoriously pro-government Civil Duty Judge, issued a restraining order that barred Muite from “presiding over or participating in the business of the Law Society of Kenya as its chairman.”<sup>223</sup> When Muite continued to speak out in defense of human and democratic rights, the same four attorneys again took him and, this time, his entire council, to court. In this case, another pro-government judge, Justice Joseph Mango, issued an eighteen-page ruling that stated “the involvement of the Society in partisan politics and its actions, which portrayed it as an opposition party, was against the objectives of the Law Society....[and] such actions. . . amounted to inciting the public to defy the law and create contempt for the lawmakers.”<sup>224</sup> Although the lawyers filing the complaint wanted Muite and his council members “detained in prison for such a term as may be deemed fit by the

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<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> *Kenya Television Network*, Nairobi, March 15, 1991.

<sup>224</sup> “Kenya Further Restraints on Law Society Chairman,” Kenya Broadcasting Corporation, Nairobi, April 30, 1991.

High Court,” the court simply forbade them from speaking “politically” on behalf of the Society.<sup>225</sup>

When this court action also failed to prevent Muite and his council from speaking out on human and democratic rights, the group of four again went to court to file a contempt of court action against them. When this case was finally heard several months later, the High Court concurred and each were fined Kshs. 10,000 (approximately \$500 U.S.) for disobeying earlier court orders.<sup>226</sup> In response, Muite and his council filed an application with the High Court seeking a stay of execution orders. Engaging in legal mobilizing strategies, and using rights framing, they asserted that the contempt case was unconstitutional and demanded that the court enforce their “fundamental constitutional right to free speech.”<sup>227</sup> The defendants also argued that the earlier court order was impossible to follow because the court had failed to define what constituted “political” speech.

By the end of October 1991, however, the High Court, under the leadership of Justice John Mwera, dismissed the stay of execution with costs and, in another ambiguous ruling, stated that “the defendants should follow the court orders whether they were clear to them or not and added that ‘this is the law of the land.’”<sup>228</sup>

Although this episode reveals the extent to which the regime and its supporters could

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<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> “Kenya Law Society Chairman and Others Fined for Making ‘Political Statements,’” Kenya Broadcasting Corporation, Nairobi, October 23, 1991.

mobilize Kenya's judiciary on its behalf, it also demonstrates the extent to which, by mid to late-1991, movement leaders refused to be intimidated by judicial decisions that were in clear violation of constitutional and international human rights laws. In addition, it also demonstrates the ways in which movement leaders strategically mobilized constitutional and international law, through Kenya's courts, to expose the failings of the judiciary in protection fundamental rights.

#### Freedom of Association and Dominant Religious Organizations:

At the same time that the LSK's new leadership was battling judicial rulings designed to silence them (April through October 1991), Kenya's human rights and democracy movement continued to gain momentum, visibility and new participants in its challenges to the regime. Because movement demonstrations continued to be violently dispersed by police under the Preservation of Public Security Act, in April of 1991, Reverend Timothy Njoya announced that the churches would begin to play a much more active role in organizing peaceful gatherings under its own auspices. Under Kenyan law, religious organizations were the only social groups in Kenya allowed to convene meetings without filing for a state license. Together with Bishop Okullu and Paul Muite, and under the auspices of Kenya's Justice and Peace Commission, therefore, Njoya organized a series of "conventions" to be convened at the precinct level throughout Kenya.

The aim of these conventions was "to define and pursue a people's alternative to the present system" through public dialogue on the rights of citizenship and, specifically, citizens' right "to choose a system of government which has their active



consent and derives its legitimacy from them.”<sup>229</sup> Reaching out to its international supporters, Muite also stated that a central objective of the conventions would be to ensure that all proposals were in conformity with the U.N. Declaration of Human Rights and the International Covenant on Civil and Political Rights. The strategy was unexpectedly successful, and Justice and Peace Conventions were convened, without regime interference, throughout Kenya at the end of June 1991.

This protection of the churches from the regime in organizing rights awareness meetings turned out to be short-lived, however. As the Justice and Peace Commission began planning a second round of conventions to be held at the end of July 1991, with a central meeting planned for All Saints’ Cathedral in Nairobi, to be preceded by a procession through the streets of Nairobi, the Moi regime declared the meetings illegal. Kenya’s Anglican Archbishop Manasses Kuria reported that state security agents, on orders from the president, visited him and other church leaders demanding that the procession and meeting in central Nairobi, in particular, be cancelled. Over Kenya’s public radio, President Moi announced that “the . . . peace procession was a sinister plot, which [was] hatched by some lawyers who had hijacked a section of the church to further their cause of destabilising the government

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In response, Archbishop Kuria announced that, although the Nairobi procession would be cancelled, and the All Saints’ meeting moved from central

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<sup>229</sup> “Kenyan Church Council, Law Society to Convene Justice and Peace Convention,” *Agence France Presse*, June 1991.

<sup>230</sup> “Kenya Church Peace Procession Called Off After Moi Declares It Illegal,” *The BBC Summary of World Broadcasts*, London: The British Broadcasting Corporation, July 29, 1991.

Nairobi to a Nairobi suburb, all NCCCK-affiliated churches in Kenya would go ahead with their meetings in throughout Kenya. Kuria then proceeded to deliver the sermon he had drafted for All Saints' Cathedral at a church in a heavily populated Nairobi suburb, where, in completely unambiguous terms, he accused the Moi regime of being at the root of all human and democratic rights violations in Kenya.

#### The Founding of FORD:<sup>231</sup>

As the Moi regime began directly threatening the NCCCK and Catholic Church leadership in Kenya, in its increasingly desperate effort to shut down Kenya's growing movement, the movement's next strategy was to declare the formation of the Forum for the Restoration of Democracy (FORD) as one of its lead organizations. The "official" leader of the organization was announced as Oginga Odinga, but, in order to circumvent registration requirements of Kenya's Societies Act this time around, it was also stated that "FORD is not a political party, association or club. It is a group of nine people. . . [who] are united in a common bond to fight for the restoration of democracy and human rights in Kenya."<sup>232</sup> Members of FORD were promoted as being "united against the suppression of the freedom of expression, freedom of press, freedom of conscience, freedom of movement and freedom of

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<sup>231</sup> "FORD" stands for the Forum for the Restoration of Democracy.

<sup>232</sup> Horace Awori, "Kenya: Struggle for Democracy Continues," IPS-Inter Press Service/Global Information Network, August 3, 1991. As noted in Chapter Three, Kenya's Societies Act defines a "society" as "any club, company, or association of ten or more people," and all societies were required by this Act to be registered by the state. Maina Kiai and the Kenya Human Rights Commission (KHRC), "Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya," in *Constitutional Law and Politics in Africa: A Case Study of Kenya*, Kivutha Kibwana, ed, Nairobi: Claripress Limited, 1998, p. 155.

assembly and association.”<sup>233</sup> In addition to Odinga, other members of FORD that were publicly announced at this time included former members of parliament Masinde Muliro, Joseph Martin Shikuku and George Nthenge; former KANU official, Ahmed Salim Bamahriz; and Kenneth Matiba’s<sup>234</sup> former aid, Philip Gachoka.

Together this group stated that their main objective was to convene a national constitutional convention that would “re-establish the fundamental political and civil freedoms and rights guaranteed in Kenya’s independence Constitution,” but that had been “tampered with or emasculated” since independence.<sup>235</sup> Their main political strategies included: (1) traveling throughout the Kenyan countryside to engage in human and democratic rights consciousness-raising; (2) organizing FORD “cells” throughout the country, which would consist of no more than nine official members, in order to circumvent state licensing requirements; (3) convening press conferences and street demonstrations in Kenya’s major urban centers; and, together with international human rights groups, (4) lobbying international donors to make aid delivery to Kenya contingent on human and democratic rights reforms.

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<sup>233</sup> Ibid.

<sup>234</sup> Matiba himself was still in prison, following his arrest just prior to the *Saba Saba* day demonstrations in July 1990.

<sup>235</sup> Ibid.

As was expected, the Moi regime immediately declared FORD an illegal organization and threatened that “anybody associated with it risks prosecution.”<sup>236</sup> In response, movement lawyers immediately challenged this action in an open letter to Attorney General Amos Wako. Engaging in legal mobilization, the letter demanded to know on what legal basis FORD was being declared illegal, given that the organization respected the legal registration parameters of Kenya’s Societies Act, and given constitutionally entrenched guarantees of free speech, association and assembly. Although the Attorney General’s office gave no official response, shortly thereafter Odinga and four others associated with FORD were arrested and charged with belonging to an illegal organization. In response, the movement issued another open letter to Kenya’s Attorney General stating: “We are now challenging the Attorney General, Amos Wako, to declare to the nation *and to the world* whether his office supports the contention that FORD is illegal, and if so, on what basis?”<sup>237</sup>

When there was still no response from the regime, movement leaders announced they would convene a public meeting at Kamukunji grounds a month later, on October 5<sup>th</sup>, 1991. The stated purpose of the meeting was to “put our agenda to the people and accelerate the process of establishing democracy” in Kenya.<sup>238</sup>

This time, when the regime refused to grant a license for the meeting, movement

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<sup>236</sup> “Moi Orders Crackdown on Pro-Democracy Campaigners,” Agence France Presse, August 23, 1991.

<sup>237</sup> “Kenyan Opposition Group Challenges Moi Over Crackdown,” Agence France Presse, August 28, 1991. Italics emphasis is my own to demonstrate the importance of international audiences to domestic movement leaders.

<sup>238</sup> “Kenyan Dissidents Plan Rally Amid Fears of Crackdown,” Agence France Presse, September 4, 1991.

lawyers filed suit against the state. Again framing their demands in terms of their constitutional rights, movement leaders stated in their press release: “We have no alternative but to seek redress against this injustice on the part of the government by instituting action in the High Court for the enforcement of our constitutional right and freedom of assembly.”<sup>239</sup>

As was expected, judicial gatekeeper, Civil Duty Judge Dugdale, refused to hear the case. But, after repeated demands, and mobilization of international networks, movement leaders were finally able to schedule a court date. The day before the case was to be heard, however, President Moi announced in no uncertain terms that the October 5<sup>th</sup> meeting was banned, regardless of what the courts decided, and threatened grave consequences for anyone who dared attend. In response, movement leaders finally withdrew their suit, but issued the following press statement: “This action by the government, apart from undermining the very concept of an independent judiciary, whose judgment and orders would bind all, including government officials, makes a mockery of the government statement that it believes in the rule of law and respects human rights.”<sup>240</sup>

In addition, movement leaders called on Kenyans to assert their constitutional rights, despite government threats, and urged civil disobedience. As the statement continued, “[w]hen a government abuses the law by behaving as if the law is for the sole purpose of perpetuating itself in power at all costs, the people have the right and

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<sup>239</sup> “Kenya: Opposition File Suite Against Government,” IPS-Inter Press Service/Global Information Network, September 19, 1991.

<sup>240</sup> “Multi-Party Advocates Urge Civil Disobedience,” IPS-Inter Press Service/Global Information Network, October 3, 1991.

duty to disobey that law.”<sup>241</sup> They concluded their statement by again reaffirming Kenyans’ constitutional rights: “Our constitution is the supreme law. It recognizes and guarantees our right to assemble and free speech.”<sup>242</sup>

As the proposed demonstration date of October 5 drew closer, as was the case with *Saba Saba* in July 1990, regime rhetoric became more threatening. At a public meeting in Nanyuki town in central Kenya, Moi announced that “dissidents” had pushed his government too far, and that he would “crush like rats” anyone who attended the October 5<sup>th</sup> meeting.<sup>243</sup> “It’s now total war,” he stated emphatically.<sup>244</sup> On the Friday before the scheduled Saturday meeting, the regime arrested more than 300 people in Nairobi in an effort to demonstrate its seriousness in cracking down on “enemies of the regime.”<sup>245</sup> Streets leading into Kamukunji grounds were also cordoned off, and security force reinforcements moved into the city. With growing threats of violence from the regime, movement leaders ultimately urged Kenyans to stay home, but also promised that they would soon announce the date of another public demonstration, which would be held “with or without” state permission.<sup>246</sup>

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<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Didrikke Schanche, “Warfare Intensifies In Advance Of Proposed Democracy Rally,” Associated Press, October 2, 1991.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> David Chazan, “Kenyan Opposition Calls Off Demo, But Nairobi Under Tight Security,” Agence France Presse, October 4, 1991.

This time movement activists heeded the advice of movement leaders and there was minimal activity at Kamukunji grounds that Saturday. The following Wednesday, October 9<sup>th</sup>, however, movement leaders made good on their promise and announced that a public demonstration would be held, with or without a state license, on Saturday, November 16<sup>th</sup>. Again framing their demands in terms of constitutional rights, movement leaders stated that the “Public Order Act cannot supersede the clear provisions of the Constitution which is the supreme law of the land.”<sup>247</sup> Strategically, movement leaders timed their announcement one week prior to a fifty-nation Commonwealth meeting in Zimbabwe, and the demonstration itself one week prior to a meeting of all Kenya’s major donors in Paris.

### **Kenya’s Democratic Opening: December 1991**

Recognizing the need to mobilize greater international support for the planned November 16<sup>th</sup> *Kamukunji*,<sup>248</sup> movement leaders sent letters to the heads of state and governments of each of the fifty nations slated to attend the Commonwealth meeting, as well as to each of Kenya’s major donors. In their letter, they urged leaders to put political and economic pressure on the Moi regime to respect Kenyans’ human and constitutional rights. They also identified themselves as leaders of

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<sup>247</sup> “Kenya: Multi-Party Advocates Plan Another Meeting Next Month,” IPS-Inter Press Service/Global Information Network, October 9, 1991.

<sup>248</sup> Although “*Kamukunji*,” as noted above, refers to a meeting grounds outside of Nairobi made famous for anti-colonial demonstrations in the 1940s and 1950s, and is where Kenya’s human rights and democracy movement held its first mass rally on July 7, 1990 (*Saba Saba* day), it became a commonly used term for a movement rally, in general, whether held at *Kamukunji* grounds or not. The November 16, 1991 “*Kamukunji*” was held at *Kamukunji* grounds, however.

Kenya's human rights and democracy movement and stated their commitment to principles of non-violent political change, democracy and human rights.

In response, the Moi regime made clear that the planned November 16<sup>th</sup> demonstration was also illegal and that government "security forces would take drastic action within their power against anybody found at the rally venue."<sup>249</sup> Shortly thereafter, in another intimidation tactic, the government arrested FORD leader George Nthenge, along with three others,<sup>250</sup> for convening a meeting without securing a government license. Immediately, movement leaders held a press conference, addressing both national and international audiences, demanding the release or court appearance of those detained. They continued that "[t]his is the only way the government can show the country *and the world at large* that it is not engaged in terrorizing law abiding citizens purely on the basis of their political stand."<sup>251</sup>

It is significant to note that movement leaders were careful to emphasize the international dimension of their audience in their press releases, to remind both the government and their supporters of their international allies. In addition to the heads of state of Commonwealth nations and Kenya's major donors, movement leaders also solicited the leadership of the Organization of African Unity, the U.S. Congress and

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<sup>249</sup> Luke Odhiambo, "Moi Bans Opposition Rally, Opposition Vows To Go Ahead," Agence France Presse, November 1, 1991.

<sup>250</sup> These three were: Arnold Muli Ndumbu, of the University of Nairobi; his wife, Jeddidah Muli; and a brother-in-law of Nthenge's, Onesmus Nziok. "Kenya: Government Arrests Campaigner for Democracy," IPS- Inter Press Service/Global Information Network, November 4, 1991.

<sup>251</sup> Ibid. Emphasis is again mine to underscore the importance of an international audience to Kenya's human rights and democracy movement.



Britain's House of Commons in their effort to generate greater international support for, and protection of, Kenya's domestic movement.<sup>252</sup>

As the November 16<sup>th</sup> demonstration date grew closer, and regime threats more violent, movement leaders, in an open letter to the government stated: "You have sworn to uphold, protect and defend the Constitution of the Republic of Kenya. Let no blood be spilled. Let no one be hurt. Let no property be destroyed."<sup>253</sup> In addition, leaders urged Kenyans to carry tree branches and white flags to Kamukunji as a symbol of their commitment to non-violent political change. Similar to what transpired immediately prior to *Saba Saba* in July 1990, and the aborted October 5<sup>th</sup> rally, five movement leaders were taken into custody by Kenyan security forces on the Thursday evening prior to the Saturday demonstration. Those arrested included Oginga Odinga; his associate, Luke Obok; former COTU leader, Dennis Akuku; editor of the *Nairobi Law Monthly*, Gitobu Imanyara; and George Nthenge, who had just been released on bail from his earlier arrest.

This time, the United States Embassy immediately condemned the arrests as violations of international human rights obligations. The statement released by the Embassy in Nairobi to the local and international press read:

The embassy strongly condemns this blatant interference in the civil and human rights of these individuals. . . We believe the right of people peacefully to assemble to exercise their right of free speech is so fundamental to the democratic process that it can properly be abridged only in the most

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<sup>252</sup> "Kenyan Opposition Calls for Calm at Banned Rally," Agence France Presse, November 10, 1991.

<sup>253</sup> Ibid.

extreme circumstances. . . This embassy has expressed its indignation to the Kenyan government and has urged the immediate release of those arrested.<sup>254</sup>

In addition to those arrested, many other movement leaders, including LSK leader Paul Muite, went into hiding to escape arrest. From hiding, Muite issued a press release by fax appealing to those “in the pro-democracy movement who may not be netted in the present crackdown to continue with the rally at Kamukunji tomorrow.”<sup>255</sup> Shortly thereafter, another press statement was released by a group calling itself “Friends of FORD” urging Kenya’s police to refrain from injuring unarmed citizens at the rally and, in so doing, appealed to both national and international law. Excerpts from their statement read:

It is a crime to intimidate, oppress, torture, injure or in any way harm unarmed citizens while exercising their rights of freedom of expression and association. . . There is a legally binding obligation on all personnel in the armed forces and police to be guided by the United Nations Human Rights Convention and the Geneva Convention, of which Kenya is a signatory. . . These are over-riding legal standards that oblige armed and security personnel not to commit inhuman acts against their people. . . Those responsible for injuring any Kenyan citizens, whether in giving or carrying out orders, will be tried for such crimes in democratic Kenya.<sup>256</sup>

Movement leaders also appealed directly to Kenya’s Constitution, stating that the demonstration would go on “under Section 80 of the Constitution which provides for and guarantees to every individual in Kenya without discrimination the freedom of

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<sup>254</sup> “Former Vice President, Others Arrested in Kenya,” United Press International, November 15, 1991.

<sup>255</sup> Ibid.

<sup>256</sup> “Kenyan Citizens Vow to Defy Government Ban on Rally,” IPS-Inter Press Service/Global Information Network, November 15, 1991.

assembly,” regardless of regime intimidation tactics.<sup>257</sup> As FORD leader Masinde Muliro added, “[e]ven if all of us are arrested today, the rally at Kamukunji will go on. We have people who will take over our places and continue.”<sup>258</sup>

With these fighting words, thousands of Kenyans began gathering at Kamukunji grounds on Saturday morning, November 16<sup>th</sup>. They chanted pro-democracy slogans and waved tree branches and white flags as symbols of their commitment to peaceful change in Kenya. In response, Kenya’s armed forces, as during the *Saba Saba* demonstrations, met peaceful activists with tear gas and batons. As the Associated Press reported, “[t]roops beat demonstrators, fired several shots into the air and lobbed canisters of tear gas to break up thousands of generally peaceful demonstrators.”<sup>259</sup> United States and German diplomatic observers, who attempted to go to Kamukunji, were turned away, and a group of movement leaders, who emerged from hiding to attend the rally, were arrested on their way. These included lawyers Paul Muite, James Orengo and Japheth Shamalla, and former parliamentarians Martin Shikuku, Masinde Muliro and Philip Gachoka.<sup>260</sup> Local and international newspapers also reported that “[p]olice . . . detained and harassed more than a dozen foreign and local journalists.”<sup>261</sup> This time, the governments of

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<sup>257</sup> “Moi Reiterates Ban on Rally: Opposition Vows To Go Ahead,” Agence France Presse, November 13, 1991.

<sup>258</sup> “Kenyan Citizens Vow to Defy Government Ban on Rally,” IPS-Inter Press Service/Global Information Network, November 15, 1991.

<sup>259</sup> Ibid.

<sup>260</sup> Didrikke Schanche, “Police Beat Demonstrators To Prevent Pro-Democracy Rally,” Associated Press, November 16, 1991.

<sup>261</sup> Ibid.

Germany and Great Britain joined the U.S. and Nordic countries in strongly condemning the regime's arrests and violence. In addition, the current holder of the rotating European Community presidency, the Netherlands, called on Kenya to release those arrested and "press ahead with further political reforms to reflect global trends toward multiparty democracy and respect for human rights."<sup>262</sup>

In an effort to divert national attention away from the political trials of imprisoned movement leaders, the Moi regime immediately flew leaders to their home regions in Kenya's countryside to have them tried by local courts there. But, as movement leaders were later to point out, the regime's strategy backfired in that this only served to mobilize rural communities in support of the activists. Huge local crowds showed up for court hearings of movement leaders throughout Kenya's countryside the following week. On Tuesday, November 19th, for example, when movement leaders Martin Shikuku and Japheth Shamalla were brought to trial in Kakamega town in western Kenya, thousands of Kenyans reportedly gathered in the streets outside the courthouse to protest their arrest and demand protection of their human and democratic rights.

Due to growing national and international pressure, by the following Thursday, all movement leaders, except Paul Muite, had been released on bail, with court dates set within the next month. Immediately upon their release, movement leaders announced they would soon establish dates for further public demonstrations

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<sup>262</sup> Robert M. Press, "Major Aid Donors Target Kenya For Violations of Human Rights," *Christian Science Monitor*, Boston: The Christian Science Publishing Society, November 27, 1991.

to continue to press for human and democratic rights in Kenya.<sup>263</sup> Movement representatives also issued a press release specifically directed to Kenya's major donors, who were slated to attend a donors' meeting in Paris the following Monday. In their statement, leaders challenged donors to "link [Kenyan] aid to a promise of a national convention [and] a transition to multiparty democracy."<sup>264</sup> At stake was approximately two billion U.S. dollars in aid to be dispersed over the next two years. In response, for the first time in donor history, Kenya's major donors refused to renew Kenya's aid allocations, unless the Moi regime produced evidence of human and democratic rights reform within six months. In reference to donor demands for substantive human and democratic rights reforms, as a U.S. official attending the Paris Club meeting stated: "This is not business as usual."<sup>265</sup>

The day after the Paris Club meeting closed, the Kenyan government dropped charges against four of Kenya's human rights and democracy leaders --Oginga Odinga, his aide Luke Obok, and human rights lawyers James Orengo and Paul Muite. President Moi also called a meeting of KANU's governing council for the following Monday, December 2.<sup>266</sup> Following this meeting, the substance of which was not publicly disclosed, Moi then agreed to meet with U.S. Ambassador Smith

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<sup>263</sup> "Kenyan Opposition Calls for National Conference," Agence France Presse, November 22, 1991.

<sup>264</sup> Victoria Brittain, "Aid Donors Meet to Assess Moi's Tattered Credibility: Britain Joins Countries Condemning Corruption and Repression in Kenya," *The Guardian*, London: Guardian Newspapers Limited, November 25, 1991.

<sup>265</sup> Robert M. Press, "Major Aid Donors Target Kenya For Violations of Human Rights," *Christian Science Monitor*, Boston: The Christian Science Publishing Society, November 27, 1991.

<sup>266</sup> "Government Drops Charges Against Four Opposition Leaders," Agence France Presse, November 27, 1991.

Hempstone and the U.S. Deputy Assistant Secretary of State for African Affairs, Robert Houdek. Houdek had arrived in Nairobi several days earlier and, in his meeting with Moi, explained that he had been “instructed to urge [President Moi] to announce publicly and without delay that Kenya would hold fresh elections in which non-KANU candidates could participate.”<sup>267</sup>

In response, Moi insisted that he would not be dictated to by foreign powers, and that the U.S. should stop supporting regime dissidents in Kenya. When Houdek replied that the U.S. supported principles and not individuals, the conversation apparently ended in a stalemate, with Moi making no concessions.<sup>268</sup> Thus, when Moi announced to a crowded stadium of approximately 3600 KANU delegates gathered in Nairobi for the annual delegates conference the following day that he planned to repeal Section 2(A) of Kenya’s constitution, most international, as well as national, observers were stunned. Two days later, Kenya’s parliament repealed Section 2A and introduced Constitutional Amendment Act No. 2 of 1991, which formally legalized opposition politics. Within less than a week, this amendment was passed and Kenya’s first multiparty elections in more than two and a half decades were held a year later, in December 1992.<sup>269</sup>

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<sup>267</sup> Hempstone, *Rogue Ambassador: An African Memoir*, p. 257.

<sup>268</sup> Ibid.

<sup>269</sup> Throup and Hornsby note that “[t]he proposal was rushed through parliament in six days (rather than the usual fourteen)...so that President Moi could discuss the decision in his Independence Day *Uhuru* Day speech on December 12th.” Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, pp. 87-88.

**Conclusion:**

The central argument of this chapter is that this democratic opening in Kenya's historically authoritarian regime was a direct consequence of sustained challenges to the regime by Kenya's emergent and transnational human rights and democracy movement. This thesis challenges dominant explanations in the political science literature. Building on theoretical insights from social movements and legal mobilization theories, the chapter has demonstrated why and how this emergent transnational social movement, comprised entirely of nonstate actors, was able not only to force a democratic opening in Kenya's resistant authoritarian regime, but also to change the foreign policy content of a powerful international state, the United States, such that it ultimately became an important supporter of Kenya's human rights and democracy movement.

To understand why and how this transnational movement was able to achieve these ends, this chapter has argued for the analytical value of three theoretical concepts found in contemporary social movements theory: *mobilizing structures*, *political opportunity structures*, and *framing processes*. Specifically, it has examined the way in which three fundamental shifts in national and international political opportunity structures --the increased closure of the Moi regime, the emergence of powerful new movement allies, and increased regime vulnerability—were strategically framed by movement leaders to mobilize three mobilizing structures that became central to Kenya's transnational human rights and democracy movement: (1) Kenya's professional legal association, the Law Society of Kenya (LSK); (2) dominant church organizations, the National Council of Churches of Kenya (NCCCK)

and Kenya's Roman Catholic Church; and (3) foreign-based international human rights organizations.

Finally, in order to explain the political impact of Kenya's emergent movement, this chapter has argued for the relevance of insights found in legal mobilization theory. Specifically, the chapter has examined the way in which movement leaders mobilized Kenyan constitutional and international human rights law to: (1) create a common agenda and sense of shared identity among diverse domestic and foreign-based movement actors; (2) mobilize international allies to support and protect domestic movement actors; (3) place political pressure on donor states to make aid delivery contingent on human and democratic rights reforms; and, ultimately, (4) force Kenya's resistant authoritarian regime to introduce competitive multiparty elections, after nearly thirty years of single-party authoritarian rule.



## Chapter Five

### **Movement Development and Countermovement Responses: Multipartyism, Majimboism and Political Violence, 1991 – 1992**

[O]nce the soft-liners have prevailed over the hard-liners, [and] begun to extend guarantees for individuals and some rights of contestation. . . a generalized mobilization [of civil society] is likely to occur. . . [But] this popular upsurge is always ephemeral. Selective repression, manipulation, and cooptation by those still in control of the state apparatus, the fatigue induced by frequent demonstrations and “street theater,” the internal conflicts that are bound to emerge over choices about procedures and substantive policies, a sense of ethical disillusionment with the “realistic” compromises imposed by pact-making and/or by the emergence of oligarchic leadership within its component groups are all factors leading toward the dissolution of the upsurge.

-- Guillermo O'Donnell and Philippe C. Schmitter<sup>1</sup>

#### **Introduction:**

A fundamental assumption of democratic transitions theory is that although civil society actors may play a role in democratic transitions *after* regime “soft-liners have prevailed over the hard-liners” and a political opening has occurred, this mobilization is “always ephemeral.”<sup>2</sup> Specifically, this theory argues that once regime hard-liners concede “founding elections,”<sup>3</sup> civil society actors recede into the background and political parties assume “center stage in the political drama.”<sup>4</sup> In the Kenyan case, however, its human rights and democracy movement continued to be the

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<sup>1</sup> Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore: The Johns Hopkins University Press, 1986, 3<sup>rd</sup> ed., 1991, pp. 48, 55, 56.

<sup>2</sup> Ibid., 55.

<sup>3</sup> O'Donnell and Schmitter define “founding elections” as “when, for the first time after an authoritarian regime, elected positions of national significance are disputed under reasonably competitive conditions.” Ibid., p. 57.

<sup>4</sup> Ibid.

central political actor in advancing reforms not only leading up to and after Kenya's founding elections in December 1992, but also through Kenya's next two electoral cycles, January 1993 – December 1997 and January 1998 – December 2002, when the case study ends.

The chapter below focuses on movement development and political impact during the one-year period from December 1991, when President Moi first announced founding elections, through December 1992, when these elections were held. The following chapter, Chapter Six, "The Politics of Constitutional Reform and Kenya's Second Multiparty Elections (1993 – 1997), focuses on the period from these elections to Kenya's second multiparty elections in December 1997, and the study's final empirical chapter, Chapter Seven, "Developing Democracy and the Defeat of KANU: Constitution-Making, Pact-Making and Institution-Building (1998 – 2002)," focuses on the period from these elections to Kenya's December 2002 elections, when the Moi-KANU regime was finally defeated by a coalition of opposition political parties,<sup>5</sup> whose emergence and success was largely facilitated by Kenya's human rights and democracy movement.

Two central political puzzles are addressed in the following two chapters. The first focuses on the continued development and centrality of Kenya's human rights and democracy movement in promoting democratic reforms through Kenya's first two multiparty elections, contrary to the assumptions of democratic transitions theory. Despite the fact that the Moi-KANU regime was able to secure victories in both these

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<sup>5</sup> The National Rainbow Coalition, or NARC.

elections, Kenya's movement remained the central political actor in expanding human and democratic rights reforms further than most analysts anticipated, or could have predicted. Specific state level reforms during this period (1992 – 1997) that the chapters trace to Kenya's human rights and democracy movement include: the release of Kenya's remaining political prisoners; progressive electoral law reforms; the repeal or significant amendment of some of Kenya's most repressive constitutional and statutory laws --the Societies Act, the Public Order Act, the Chiefs' Authority Act, the Outlying Districts Act and the Special Districts (Administration) Act, the Preservation of Public Security Act, the Public Collections Act, the Police Act, and major portions of Kenya's penal code;<sup>6</sup> the enactment of new legislation providing greater institutional safeguards for freedoms of speech, press, assembly and association; and the establishment of Kenya's first National Commission on Human Rights. In addition, the movement also won significant state concessions regarding the process by which Kenya's Constitution would ultimately be reformed. Although some of these reforms remained partial and unevenly enforced during this period, they constituted a distinct and dramatic shift in state policies and practices toward greater democratic openness from the pre-1992 era.

Perhaps even more impressive than these reforms at the state level during this period, however, were the extraordinary changes that Kenya's human rights and democracy movement catalyzed at the level of civil society. Dominant social movement organizations comprising Kenya's human rights and democracy movement

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<sup>6</sup> All of these laws are discussed in detail in Chapter Three.

established Kenya's first independent (nongovernmental) election monitoring program; instituted national rights awareness/ civic education programs; recorded and publicized regime abuses of human and democratic rights leading up to, during and following both the 1992 and 1997 elections; established paralegal training programs in urban and rural areas; provided legal aid to victims of abuse; supported public interest litigation; produced draft legislation promoting rights protections; engaged in parliamentary lobbying; organized three constitutional assemblies; produced a draft Constitution that largely set the agenda for constitutional reform over the next decade; and, ultimately, transformed dominant conceptions of human and democratic rights in Kenya, and the role of state institutions in protecting them. As a consequence, during these years, Kenyan citizens, to an historically unprecedented extent, practiced political speech, formed and joined opposition political parties and organizations, campaigned and voted in multiparty elections, engaged in civil disobedience, and demanded state accountability through the courts, the parliament and the streets.

The second major puzzle addressed in these chapters focuses on the limitations of Kenya's movement during this period. Despite the impressive advances in democratization summarized above, not only did the Moi-KANU regime manage to secure re-election in both the 1992 and 1997 elections, but these elections were also compromised by the most serious political violence Kenya had witnessed in its post-independence period. Leading up to, during and immediately following Kenya's first multiparty elections in December of 1992, it is estimated approximately 1500 Kenyans were killed and at least 300,000 displaced, primarily in parts of Rift Valley and

Western provinces.<sup>7</sup> Violence leading up to the 1997 elections was on a smaller scale, but still serious, with an estimated 200 Kenyans killed and more than forty-thousand displaced,<sup>8</sup> --this time predominantly in Coast Province, but also in parts of Rift Province.<sup>9</sup>

Three competing explanations have emerged to explain this violence. The first, advanced primarily by the Moi-KANU regime and its supporters, is that the violence was the inevitable result of the introduction of multiparty politics into Kenya's multi-ethnic society. The regime's consistent argument in resisting the introduction of multiparty politics was that the country was not yet "ready" for political pluralism, and that latent ethnic tensions and would inevitably manifest themselves violently. A second explanation, advocated by representatives of Kenya's human rights and democracy movement, is that the violence was, in fact, state-sponsored and a deliberate electoral strategy used by the regime to ensure KANU victories in the 1992 and 1997 elections. A third explanation, put forth by Kenyan scholar Stephen Ndegwa, is that the violence was the consequence of two competing conceptions of democracy

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<sup>7</sup> Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, New York: Human Rights Watch, November 1993, p.1.

<sup>8</sup> The numbers killed and displaced in the political violence leading up to Kenya's 1997 elections vary considerably. The numbers cited here come from two sources: (1) Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, Nairobi: KHRC, 1998 and (2) Frank Holmquist and Michael Ford, "Kenya Politics: Toward a Second Transition?" *Africa Today*, vol. 45, no. 2, 1998, p. 229.

<sup>9</sup> See also *The Daily Nation* reports between August 17, 1997 – September 8, 1997, Nairobi: The Daily Nation News Group.

that were “reactivated” by Kenya’s democratic opening in 1991.<sup>10</sup> He argues that the first conception, promoted by leaders of Kenya’s reform movement, embraced a majoritarian form of democracy, which, if enacted, would politically marginalize or exclude Kenya’s minority ethnic communities –including President Moi’s Kalenjin community and its closest supporters, members of the Maasai, Turkana, Samburu, Mijikenda and Kamba tribes – the contemporary ruling coalition of KANU. The second conception, advanced by regime leaders, in response to the growing strength of Kenya’s reform movement, embraced institutional features more characteristic of consensus democracy.<sup>11</sup> Thus, the violence resulted from a clash between these two competing, and from the perspectives of the two groups, irreconcilable, conceptions of democracy, and fear among Kenya’s ethnic minorities of being permanently excluded from political and economic power in a new multiparty state.<sup>12</sup>

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<sup>10</sup> More accurately, Ndegwa’s central concern is two competing conceptions of citizenship: (1) “liberal citizenship,” whose proponents advocate a majoritarian form of democracy, and (2) “civic republican citizenship,” whose proponents advocate institutional mechanisms more characteristic of consociational or consensus forms of democracy. Ndegwa argues that the “liberal” conception of citizenship is promoted by Kenya’s larger ethnic groups and privileges the national political community over local/ethnic communities. The “civic republican” conception, on the other hand, is advocated by Kenya’s smaller ethnic groups and privileges ethnic communities over Kenya’s national political community. Ndegwa’s central argument is that the “liberal majoritarian” vision of democracy, “and its presumption of autonomous individual actors, is at odds with the reality of individuals fulfilling republican obligations to their subnational communities.” The result has been political violence and a “protracted” transition to democracy, unless and until this tension is resolved. Stephen N. Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” *American Political Science Review*, vol. 91, no. 3, September 1997, pp. 599 – 616. See especially, *ibid.*, p. 613.

<sup>11</sup> Majoritarian and consensus models of democracy are discussed in Chapter Three.

<sup>12</sup> Stephen N. Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 611.

In addressing these two puzzles, three main arguments are advanced. The first is that Kenya's human rights and democracy movement continued to play a central role in promoting democratizing reforms in Kenya during this period largely because of the development of new movement mobilizing structures in the form of formal social movement organizations (SMOs).<sup>13</sup> These SMOs created an enduring organizational structure for movement development, which allowed it to sustain successful collective action efforts much longer than democratic transitions theorists could anticipate or predict. The emergence, survival and success of these organizations, in turn, were the consequence of favorable political opportunity structures and effective framing and legal mobilization strategies.<sup>14</sup> Two changes in national and international political opportunity structures were particularly important: (1) the regime's political opening in December of 1991, which lowered state barriers to independent organization, and (2) the provision of material, technical and moral

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<sup>13</sup> Social movement theorists Jackie Smith, Ron Pagnucco and Charles Chatfield define social movement organizations (SMOs) as "those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation." They further explain that SMOs "vary in their degree of *formalization*, or formally defined roles, rules and criterion of membership, and *centralization*, or the degree of concentration of decision-making power." Jackie Smith, Ron Pagnucco, and Charles Chatfield, "Social Movements in World Politics: A Theoretical Framework," in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Jackie Smith, Charles Chatfield and Ron Pagnucco, eds., Syracuse: Syracuse University Press, 1997, pp. 60 – 61. In an early work, Mayer Zald and Roberta Garner argue that social movement organizations differ from other types of organizations in two ways: (1) "they have goals aimed at changing the society and its members; they wish to restructure society or individuals . . ." and (2) "they are characterized by an incentive structure in which purposive incentives predominate. While some short-run material incentive may be used, the dominant incentives offered are purposive . . ." Mayer N. Zald and Roberta Ash Garner, "Social Movement Organizations: Growth, Decay, and Change," p. 123.

<sup>14</sup> Each of these concepts is defined and discussed in Chapters Two and Four.

support to these organizations by foreign-based human rights organizations, private foundations and aid agencies of donor states.

By then continuing to frame movement demands in terms of constitutionally and internationally recognized human and democratic rights, and “mobilizing” these laws to legitimate their demands, SMO leaders were able to: (1) sustain a common reform agenda and sense of shared identity among diverse national and international actors; (2) expose contradictions between regime rhetoric and practice to promote reforms and ensure their implementation, or, at the very least, ensure that violations were highly publicized; (3) increase general awareness among Kenyans of their constitutionally and internationally recognized rights, and the role of state institutions in protecting them; (4) facilitate democratic institution-building at state and societal levels to promote rights protections; and (5) ultimately force the resistant Moi-KANU regime to concede deeper democratic reforms than it otherwise would have.

In addressing the second puzzle, the chapters argue that Kenya’s political violence, and the Moi regime’s ultimate victories in 1992 and 1997, were primarily the result of two variables: (1) successful framing strategies by *countermovement*<sup>15</sup> leaders and (2) Kenya’s majoritarian electoral system. This argument both complements and challenges each of the three perspectives thus far advanced to explain Kenya’s political violence. It acknowledges that the violence was, indeed, closely linked to movement demands for multiparty politics in Kenya, but contends that it was not at all

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<sup>15</sup> “Countermovements” are defined by social movement theorists simply as those movements that “make contrary claims simultaneously to those of the original movement.” David S. Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *American Journal of Sociology*, v. 101, no. 6, May 1996, p. 1631.



inevitable. Instead, was a consequence of strategic framing by leaders of a regime-supported countermovement that emerged in response to the growing threat presented by Kenya's reform movement. Countermovement framing was less shaped by a commitment to a vision of consensus democracy than by institutional incentives embedded in Kenya's majoritarian electoral system. In fact, as is seen below, the constitutional proposals put forth by leaders of Kenya's reform movement largely *embraced* consensus institutions.

Employing framing strategies discussed in the study's theoretical chapter, Chapter Two, which, in turn, were shaped by Kenya's majoritarian electoral system, however, countermovement leaders successfully framed Kenya's reform movement as fundamentally "anti-KANU" and "anti-Moi," and, thus, by implication in Kenya's ethno-political context, "anti-Kalenjin" and its ruling ethnic minority coalition. From this assumption, in countermovement logic and framing, it then followed that the reform movement's agenda was nothing more than a thinly veiled attempt by Kenya's larger ethnic groups, specifically the Kikuyu and Luo, to seize political and economic power, just as they did after independence, to the exclusion of Kenya's ethnic minorities. If one examines the first draft of the movement's *Proposal for a Model Constitution*, however, the vast majority of its proposals (seven out of ten of the institutional features outlined by Lijphart) embraced institutional features characteristic of *consensus*, and not majoritarian, democracy.<sup>16</sup>

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<sup>16</sup> Law Society of Kenya, Kenya Human Rights Commission, and International Commission of Jurists (Kenya Section), *Kenya Tuitakayo: Proposal for a Model Constitution*, Nairobi: Law Society of Kenya, Kenya Human Rights Commission, and International Commission of Jurists (Kenya Section), November 1994. See Chapter Three for Lijphart's comparison of institutional features characteristic of

Given Kenya's existing majoritarian electoral system, however, regime elites did fear electoral defeat in multiparty elections, despite the fact that regime gerrymandering and malapportionment highly favored the state party, KANU, and inflated its support in key constituencies. Thus, in response to escalating movement demands for multipartyism in the last quarter of 1991, regime elites launched a countermovement through which they insisted that the only way smaller ethnic groups could protect themselves (politically and economically) in a multiparty system was to demand the implementation of *majimboism*, or "regionalism" – harkening back to constitutional debates and political divisions leading up to Kenya's independence in 1963.

As is argued below, however, in countermovement framing, *majimboism* of the early 1990s came to mean something very different from *majimboism* of the early 1960s. At independence it was recognized that *majimbos*, or regions, would be multiethnic -- although one group might dominate in certain areas; existing property rights were to be strictly enforced, and there was to be no forcible movement of peoples. In its contemporary reincarnation, however, *majimboism* was framed as a demand to enforce *pre-colonial* property rights in order to establish, or *re-establish*, in countermovement framing, ethnically *homogenous* homelands.

In the context of Rift Valley Province, where the majority of Kenya's violence was witnessed, this meant the forcible expulsion of those "nonindigenous" groups,

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majoritarian versus consensus models of democracy. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven: Yale University Press, 1999, pp. 2 – 4.

primarily Kikuyus and Luos, many of whom had been forcibly moved to the province by British colonialists, or who had purchased land in the immediate post-independence period. Since Rift Valley Province, through extensive gerrymandering and malapportionment by the Moi regime, was allocated the largest number of parliamentary seats of any province in Kenya, this transformation of land ownership had significant political implications for both the 1992 and 1997 elections.<sup>17</sup> As electoral systems theorists have argued, and as the Kenyan case clearly illustrates, majoritarian, single-member district systems create institutional incentives for groups of similar segments to cluster together in order to gain political influence.<sup>18</sup> Responding to these institutional incentives, and engaging in effective framing strategies, regime elites succeeded in encouraging parochial voting and group polarization, which, in the Kenyan case, ultimately resulted in political violence in electorally strategic parts of the country.

Each chapter then concludes with brief analyses of the 1992 and 1997 elections, respectively. The central finding that emerges from these analyses is that, despite clear evidence of the Moi regime's use of electoral fraud, intimidation and

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<sup>17</sup> Whereas the average number of seats per province was 23.5 for the 1992 elections, Rift Valley was allocated 44 seats in these elections.

<sup>18</sup> See, for example, W. Arthur Lewis, *Politics in West Africa*, Westport, CT: Greenwood Press, 2<sup>nd</sup> ed. 1981, c1965, pp. 64 – 74, and Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven: Yale University Press, 1984, pp. 156 – 168. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 143 – 170.

political violence in both of these elections,<sup>19</sup> an important, but largely neglected, factor in explaining KANU's ultimate "victories" was Kenya's majoritarian electoral system.<sup>20</sup> As electoral system theorists point out, not only do majoritarian systems with single-member districts, like Kenya's, tend to overrepresent large parties, like KANU, but especially in political contexts where the national electoral commission is not independent from the regime, as was also the case in Kenya, the regime is at liberty to draw district boundaries in ways that can even more seriously exaggerate regime support. In the 1992 elections, this resulted in the incumbent Moi-KANU regime winning 53 percent of the seats in parliament with approximately 27 percent of

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<sup>19</sup> Although, largely as a consequence of greater institutionalization of SMOs' voter education and election monitoring programs, the 1997 elections were considerably more free and fair than the 1992 elections, as is documented in Chapter Six.

<sup>20</sup> As is discussed in greater detail below, however, important exceptions are the work of Stephen Ndegwa, Roddy Fox and Rok Ajulu. Stephen N. Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya," *Africa Today*, vol. 45, no. 2, 1998, p. 205. See also: Roddy Fox, "Bleak Future for Multi-Party Elections in Kenya," *The Journal of Modern African Studies*, vol. 34, no. 4, 1996; Rok Ajulu, "Kenya: The Survival of the Old Order," in by John Daniel, Roger Southall, and Morris Szeftel, eds., *Voting for Democracy: Watershed Elections in Contemporary Anglophone Africa*, Brookfield, VT: Ashgate, 1999.

the popular vote.<sup>21</sup> In the 1997 elections, the regime again won a majority of parliamentary seats with approximately 39 percent of the vote.<sup>22</sup>

In addition to these general distorting effects of majoritarian electoral systems on parliamentary representation, presidential systems, like Kenya's, can also importantly contribute to disproportional legislative outcomes. As electoral systems theorists argue, this is especially the case "when the presidential election is decided by plurality instead of majority-runoff (where small parties may want to try their luck in the first round) and when the legislative elections are held at the same time or shortly after the presidential elections"<sup>23</sup> –both of which were conditions that held in Kenya. As Lijphart argues, "[b]ecause the presidency is the biggest political prize to be won

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<sup>21</sup> Institute for Education in Democracy (IED), *National Elections Data Book: Kenya 1963 – 1997*, Nairobi: IED, July 1997, p. 187. The exact vote share that KANU earned in these elections is disputed. For example, Nohlen, Krennerich and Thibaut report that KANU received 25.5% of the vote. Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, p. 486. An earlier (1993) report by Kenya's National Election Monitoring Unit (NEMU) reported that KANU received 31% of the vote. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, Kenya: NEMU, 1993, pp. 115. Since NEMU's work was ultimately taken over by IED during the 1993 – 1997 electoral cycle, I use IED's report in this analysis. As Table 5.2 at the end of this chapter documents, once Kenya's twelve nominated seats were allocated exclusively to KANU, this brought KANU's control of parliamentary seats up to 56 percent.

<sup>22</sup> As Chapter Six discusses, KANU's parliamentary majority was reduced by more than five percentage points once nominated seats were allocated according to the newly reformed appointment formula. As noted above, the IPPG reform package, enacted in November 1997, required that nominated seats be distributed according to parties' proportional strength in parliament. In the December 1997 elections, however, KANU increased its vote share by approximately seven percentage points. This is explained, in part, by relatively lower voter (just greater than 50%) turnout in areas where the opposition was strong, and relatively high turnout (70% or greater) where the regime was strong, in addition to continued problems with electoral malapportionment and gerrymandered districts.

<sup>23</sup> As Lijphart argues, "[p]residential systems can have an indirect but strong effect on the effective number of parliamentary parties." Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 155. Moreover, this effect "is especially strong when the presidential election is decided by plurality instead of majority-runoff (where small parties may want to try their luck in the first round) and when the legislative elections are held at the same time or shortly after the presidential elections. Ibid.

and because only the largest parties have a chance to win it, these large parties have a considerable advantage over smaller parties that tends to carry over into legislative elections.”<sup>24</sup> In the Kenyan case, this effect was perhaps especially exaggerated not only because of its plurality presidential and parliamentary elections were held concurrently, but also because of the degree of political (and economic) power concentrated in the president’s office.

Moreover, a regime-supported constitutional amendment, the Constitution of Kenya (Amendment) Bill of August 1992, introduced two new laws that virtually sealed the Moi-KANU regime’s re-election in 1992. The first of these required that presidential candidates win a minimum of 25 percent of the vote in five of Kenya’s eight provinces, in addition to receiving a plurality of the national vote. This law became known as the “25 percent rule” and its historical precedent was Nigeria.<sup>25</sup> Similar to the Nigerian case, the regime justified this law as a means of ensuring that winning presidential candidates had broad-based national support. Although over the long term the law had this general effect,<sup>26</sup> as opposition parties and movement leaders

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<sup>24</sup> Ibid, p. 155.

<sup>25</sup> This law was first introduced in Nigeria’s 1979 Constitution as an institutional incentive to encourage the development of “a small number of parties . . . each with broad multiethnic support.” Donald L. Horowitz, “Chapter Fifteen: Structural Techniques to Reduce Ethnic Conflict,” *Ethnic Groups in Conflict*, Berkeley: University of California Press, 1985, p. 636. As Horowitz explains, “[t]o be elected president [under Nigeria’s new electoral law], a candidate was required to win a plurality of votes nationwide plus at least 25 percent of the vote in no fewer than two-thirds of [Nigeria’s] nineteen states. Since no one or two ethnic groups (even in combination) had voters distributed widely enough to meet this stringent requirement, the expectation was that it would produce a party system with a small number of parties, perhaps just two, each with broad multiethnic support.” Ibid. Due to countervailing institutional and societal forces in Nigeria, there was still a proliferation of political parties; however, the 25 percent rule did encourage parties to seek support outside of their core region, as was ultimately also the case in Kenya.

<sup>26</sup> This is discussed in chapters Six and Seven.

argued, in the short term, it was a carefully calculated regime strategy to ensure its re-election. Since KANU was the only political party with a national presence and elections were only four months away,<sup>27</sup> it would be virtually impossible for any political party except KANU to fulfill the law's requirements, unless opposition parties quickly agreed to run a single presidential candidate.

This possibility was basically precluded by the second law included in the constitutional amendment which required Kenya's elected president to form a cabinet solely from his or her own party. By thus eliminating the possibility of coalition government, the Moi-KANU regime made it virtually impossible for emergent opposition parties to field a single presidential candidate to defeat regime. As the chapters below demonstrate, had there been institutional incentives for coalition government or executive power sharing in Kenya at this time, as consensus theorists of democracy advocate, and as the results of Kenya's 1992, 1997 and 2002 elections support,<sup>28</sup> the incumbent Moi-KANU regime would very likely have been defeated much sooner than it ultimately was. As Chapter Seven documents, it was not until Kenya's human rights and democracy movement finally succeeded in repealing the prohibition on coalition government and facilitating a power sharing agreement among

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<sup>27</sup> This constitutional amendment was enacted in August 1992 and elections were held in December.

<sup>28</sup> As tables 5.1 and 6.1 at the end of chapters Five and Six, respectively, demonstrate, a coalition between even the top two opposition contenders for the presidency in either of these races would likely have resulted in a defeat for the Moi-KANU regime. Moreover, as electoral systems theorists argue, and as Kenya's December 2002 elections demonstrate, the effects of this anticipated "capture" of Kenya's extremely powerful presidency likely also influenced KANU wins in both the 1992 and 1997 parliamentary races. For a summary of presidential and parliamentary election results in 2002, see tables 7.1 and 7.2 at the end of Chapter Seven.

opposition party leaders, that the KANU regime was finally defeated in Kenya's third multiparty elections in 2002.

Following a theoretical discussion of movement development, the chapter below is divided into three main sections. The first, as mentioned above, focuses on movement development and impact in the one-year period from December 1991, when President Moi first announced founding elections, through December 1992 when Kenya's first multiparty elections in twenty-six years were convened. The second section focuses on countermovement responses leading up to and during these elections. Finally, the third section focuses specifically on the 1992 elections and the role of Kenya's majoritarian electoral system in ensuring the Moi-KANU regime victories in both presidential and parliamentary elections. The following chapter, Chapter Six, largely follows this same, general organizational framework, except that it examines movement development and impact in the period leading up to and during Kenya's second multiparty elections in December of 1997.

### **Movement Development: Theoretical Overview:**

A central argument advanced in the next three chapters is that the social movement concepts of *political opportunity structures*, *mobilizing structures* and *framing processes* are as valuable to explaining transnational movement development as they are to explaining movement emergence. An important difference between emergent and more mature movements, as social movements theorists argue, however, is that once a movement emerges, depending on its level of success and its particular



goals, it often becomes an important influence on political opportunity structures themselves.<sup>29</sup> So, for example, in the Kenyan case, whereas three dimensions of domestic and international political opportunity catalyzed movement emergence --that is, (1) relatively closed state institutions, (2) the emergence of new movement allies and (3) increased state vulnerability,<sup>30</sup> once the movement successfully “emerged,” it then became an important force in opening up these state institutions, influencing its domestic and foreign-based allies and impacting state vulnerability.

To understand the impact of changing political opportunity structures on continued movement development, contemporary social movement theorists argue that close attention must be paid both to the movement’s changing *organizational structure* and its specific *framing strategies*. The critical organizational question in early stages of movement emergence, as was discussed in Chapter Four, is whether or not sufficient mobilizing structures are available to emergent activists for the movement to “take off.” After this, social movements theorists argue that the organizational characteristics of the groups claiming to represent the movement become much more important. As McAdam, McCarthy and Zald explain:

While movements often develop within established institutions or informal associational networks, it is rare that they remain embedded in these *nonmovement* settings. For the movement to survive, insurgents must be able to create a more enduring organizational structure to sustain collective action. Efforts to do so usually entail the

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<sup>29</sup> Doug McAdam, John D. McCarthy, Mayer N. Zald, “Introduction,” in Doug McAdam, John D. McCarthy, Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, New York: Cambridge University Press, 1996.

<sup>30</sup> This is the topic of Chapter Four.

creation of . . . formal social movements organizations (SMOs). Following the emergent phase of the movement, then, it is these SMOs and their efforts to shape the broader political environment, which influence the overall pace and outcome of the struggle.<sup>31</sup>

The Kenyan case clearly supports McAdam, McCarthy and Zald's thesis. As was seen in Chapter Four, the primary mobilizing structures critical to the movement's initial emergence were: (1) Kenya's professional legal association, the Law Society of Kenya (LSK), (2) dominant church organizations, specifically the National Council of Churches of Kenya (NCCK) and Kenya's Roman Catholic Church, and (3) foreign-based international human rights organizations. As political opportunity structures began to change at both domestic and international levels, as the result the movement's impact, formal social movement organizations (SMOs) began to emerge domestically. As the chapters below document, these SMOs created a relatively durable organizational structure for Kenya's human rights and democracy, which sustained its development and political impact long after democratic transitions theory predicts.

Specifically, at the national level, the Moi-KANU regime's political opening in December 1991 facilitated the emergence of these SMOs by lowering domestic institutional barriers to organizational emergence. At the international level, foreign-based human rights organizations, private foundations and donor states provided material, technical and moral support to SMOs, which was also critical to their

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<sup>31</sup> McAdam, McCarthy, Zald, "Introduction," in McAdam, McCarthy, Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, p. 13.

emergence, survival and effectiveness. Finally, as this group of formal SMOs became increasingly institutionalized, as is documented in chapters Six and Seven, they also became increasingly effective in challenging the Moi-KANU regime's legitimacy – through strategic framing efforts and legal mobilization strategies. In so doing, regime vulnerability to these challenges grew and, ultimately, it was forced to concede deeper democratic reforms than it otherwise would have.

The primary difference between early and later stages of movement framing, as social movements theorists argue, is that as movements become increasingly developed, framing processes are more likely to be: (1) “shaped by conscious, strategic decisions on the part of SMOs,” and (2) subject to intense “framing contests” between collective actors representing the movement, the state, and any countermovements that might emerge.<sup>32</sup> Thus, unlike civil society approaches, which tend to focus almost exclusively on “civil” associations, and tend not to examine conflicts within or between these organizations, or democratic transitions theories, which assume that civil society mobilization will dissipate once founding elections are announced, social movement theories anticipate the emergence of “countermovements”<sup>33</sup> in response to the emergence of any social movement that becomes a significant socio-political force.

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<sup>32</sup> Ibid., pp. 18 –19.

<sup>33</sup> As mentioned above, “countermovements” are defined by social movement theorists simply as those movements that “make contrary claims simultaneously to those of the original movement.” Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” p. 1631.

As McAdam, McCarthy and Zald explain, “the broader *environmental* context in which framing takes place differs dramatically between the early and later stages of collective action.”<sup>34</sup> Whereas in the earlier stages of movement emergence state authorities and other potentially threatened societal actors may be unconcerned by movement demands, as the movement gains greater support and publicity, their reaction will be radically different –depending on the extent to which they feel threatened. Thus, social movements theory predicts that “later framing efforts can be expected to devolve into intense ‘framing contests’ between actors representing the movement, the state, and any countermovements that develop.”<sup>35</sup>

Evidence of this dynamic has already been observed in Chapter Four. As more and more social and political groups aligned themselves with Kenya’s human rights and democracy movement, not only did framing contests become much more intense, but state reactions also became increasingly violent. In the chapters that follow, we also clearly see that as movement demands for free and fair multiparty elections and comprehensive constitutional reforms escalated, “framing contests” between the movement and an emergent regime-supported countermovement also became increasingly conflictual and, ultimately, violent. As is documented below, this violence peaked leading up to and immediately after Kenya’s 1992 elections, and it emerged again just prior and after the 1997 elections.

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<sup>34</sup> McAdam, McCarthy, Zald, “Introduction,” in McAdam, McCarthy, Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framing*, pp. 18 – 19.

<sup>35</sup> *Ibid.*, p. 17.

The chapters below argue that two variables are important to explaining this political violence: (1) framing strategies employed by countermovement leaders and (2) Kenya's majoritarian electoral system. Specifically, chapters Five and Six document how leaders of a regime-supported countermovement were able to achieve the four key "tasks" of framing that social movements theorists have argued largely determine social movement success.<sup>36</sup> In addition, the chapters demonstrate why and how Kenya's majoritarian electoral system provided institutional incentives for countermovement leaders to frame their demands in ways that contributed to ethnic group polarization, parochial voting and, ultimately, large-scale electoral violence in Kenya. Predictably, as the chapters document, this violence was concentrated in electoral constituencies that were strategically important to the incumbent Moi-KANU regime's re-election in both the 1992 and 1997 general elections.

Although Kenya's majoritarian electoral system remained intact for the general elections of December 2002, as Chapter Seven documents, the reform movement's success in securing greater freedoms of speech and information, especially to Kenya's rural areas, ultimately undermined the success of the countermovement's framing strategies. This, in addition to the reform movement's advocacy of comprehensive constitutional reforms that included dominant features of consensus democracy, as

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<sup>36</sup> As discussed in chapters Two and Four, these four tasks are: (1) "diagnostic framing," or identifying some aspect of social and political life as problematic and/or unjust; (2) "attributional framing," or attributing responsibility for this injustice to some identifiable individual, or set of individuals; (3) "prognostic framing," or proposing a solution and specifying what needs to be done; and (4) "motivational framing," or persuading others of the efficacy of collective action in rectifying this injustice. This list draws from David A. Snow and Robert D. Benford, "Ideology, Frame Resonance, and Participant Mobilization," *International Social Movement Research*, v.1, pp. 197-217; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

well as its successes in democratic institution-building at state and societal levels, contributed to these elections being Kenya's freest, fairest and most peaceful in its post-independence history. Under these conditions, as the chapter documents, the Moi-KANU regime was finally, and resoundingly, defeated by a coalition of opposition political parties, whose emergence and success was largely facilitated by Kenya's human rights and democracy movement.

**Movement Development and Impact: December 1991 – December 1992:**

During the one year period spanning from December 1991, when the Moi regime first announced that multiparty elections would be held, to December of 1992, when these elections were convened, seven social movement organizations (SMOs) played particularly important roles in ensuring that Kenya's human rights and democracy movement continued as the central political actor in promoting human and democratic rights reform in Kenya, contrary to assumptions of dominant theories in political science. These organizations were: (1) the Rescue Political Prisoners group (RPP); (2) the Kenya Human Rights Commission (KHRC); (3) the International Commission of Jurists, Kenya Section (ICJ-Kenya); (4) the International Federation of Women Lawyers, Kenya Chapter (FIDA-Kenya); (5) Kituo cha Sheria (Kituo); (6) the Legal Education Aid Programme (LEAP) and (7) the National Electoral Monitoring Unit (NEMU).

As is discussed below, many of these SMOs, although not all, were headed by members of Kenya's professional legal association, the Law Society of Kenya (LSK),

working in close association with Kenya's dominant church organizations, specifically the National Council of Churches of Kenya (NCCCK) and Kenya's Roman Catholic Church.<sup>37</sup> In addition, most were provided with material, technical and moral support by foreign-based human rights organizations, private foundations and donor states. These SMOs had different, although at times overlapping, tasks and memberships, and they became the primary organizational force of Kenya's human rights and movement during this period.

Although some of these organizations existed prior to Kenya's political opening in December 1991, it was not until this time that these groups "took off" as effective SMOs of Kenya's human rights and democracy movement. As discussed above, this was largely due to two key changes in national and international political opportunity structures: (1) the regime's political opening in December of 1991, which lowered institutional barriers to organizational formation, and (2) the growing availability of material, technical and moral support by foreign-based human rights organizations, private foundations and aid organizations of donor states.<sup>38</sup> The emergence, development and political impact of these seven organizations are examined below.

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<sup>37</sup> As noted in Chapter Four, the NCCCK is an umbrella organization conjoining most protestant church organizations in Kenya. Protestants comprise approximately 45 percent of Kenya's population, and Catholics approximately 33 percent. Thus, together these two groups constitute approximately 78 percent of Kenyans. <http://www.cia.gov/cia/publications/factbook/geos/ke.html>

<sup>38</sup> These changes in national and international political opportunity structures, as discussed above, were in turn the consequence of the movement's role in opening up the regime and forcing a change in the funding agendas of foundations and donor state aid organizations.

Rescue Political Prisoners (RPP):

One of the first formal SMOs affiliated with Kenya's human rights and democracy movement to emerge following the announcement of founding elections in Kenya was the Rescue Political Prisoners group (RPP). According to RPP chairperson Muthoni Kamau, the RPP was founded "out of frustration that crucial human rights and political rights concerns like political prisoners were not being addressed . . . by emerging opposition political parties" in Kenya.<sup>39</sup> As Kamau explains, once Kenya's political system was opened up in December 1991, emergent opposition politicians "rushed to form opposition parties and completely sidelined the issue of political prisoners. They refused to make this an issue on their political platforms. Instead, they insisted that they must focus on taking political power first, and human and democratic rights reforms would come later."<sup>40</sup>

For these reasons, leaders of the RPP organized their first public demonstration to focus domestic and international attention on the problem of Kenya's political prisoners at the end of February 1992,<sup>41</sup> approximately two months after Kenya's December 3, 1991 political opening.<sup>42</sup> The demonstration mobilized the mothers of political prisoners in Kenya, who, together with the founders of RPP, staged a hunger

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<sup>39</sup> Interview with Muthoni Kamau, Chairperson, Rescue Political Prisoners (RPP), Nairobi, Monday, 17 May 1999.

<sup>40</sup> Interview with Muthoni Kamau, Chairperson, Rescue Political Prisoners (RPP), Nairobi, Monday, 17 May 1999.

<sup>41</sup> This demonstration began on Friday, February 28, 1992.

<sup>42</sup> Chris Mburu, former news editor of the *Nairobi Law Monthly*, explains that although opposition party leaders "talked" about political prisoners, they were reluctant to actually *do* anything to promote the cause of political prisoners, until the RPP launched their demonstrations.



strike at “Freedom Corner,” an area in *Uhuru* Park in central Nairobi.<sup>43</sup> The RPP established a shelter with water and other supplies for the mothers, as well as displayed 52 candle bags, symbolizing Kenya’s 52 remaining political prisoners. A poster was also publicly displayed explaining their protest and demands.

With the assistance of RPP leaders, the mothers engaged in legal mobilization strategies that had thus far had proved so successful to the movement, and framed their demands in terms of their son’s constitutionally and internationally recognized human and democratic rights. Specifically, the mothers insisted that, because their sons had been detained for their advocacy of multiparty politics, and because multipartyism was, as of December 3, 1991, legally protected under Kenya’s constitution, the state no longer had legal grounds for their further detainment. Moreover, they insisted, the rights to freedoms of speech and association, which their sons were exercising at the time of their arrest, were fundamental *human* rights, legally recognized by the ICCPR, which Kenya had also ratified. Finally, the mothers also submitted a petition stating their legal arguments and demands to Kenya’s Attorney General at the time, Amos Wako.<sup>44</sup>

Initially, the RPP’s strategy was successful beyond their wildest expectations. Immediately, crowds of Kenyans began gathering in support of the mothers, and the

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<sup>43</sup> This corner of the park became known as “Freedom Corner” after Wangari Maathai, leader of Kenya’s Greenbelt Movement and Nobel Peace Prize laureate (2005), organized and led a demonstration that prevented the Moi-KANU regime from constructing a large skyscraper in the park, Nairobi’s only large public green space. The fence that cordoned off the construction site, in place since 1989, was removed only weeks before RPP founders and the mothers began their strike. *Uhuru* is the Kiswahili word for “freedom.”

<sup>44</sup> See Alexandra Tibbett’s insightful analysis of this demonstration. Alexandra Tibbetts, “Mamas Fighting for Freedom in Kenya,” *Africa Today*, 4<sup>th</sup> Quarter, 1994.

story made headlines in both local and international presses for days running. By the third day of the strike, several hundred Kenyans had joined in solidarity with the mothers. Soon after this, the leaders of Kenya's two dominant political parties at the time, the Forum for the Restoration of Democracy (FORD) and the Democratic Party (DP),<sup>45</sup> also expressed solidarity with the mothers, and threatened to organize a general national strike if all Kenya's political prisoners were not released.

By the strike's fourth day, however, Kenyan riot police began violently dispersing the crowds that had gathered, using batons, tear gas, and shooting live bullets into the air. The regime later justified its actions by stating that the mothers' strike had been "co-opted" by opposition parties in order to convene "unlicensed meetings" and "illegal demonstrations."<sup>46</sup> Later that evening, the police returned and arrested all of the mothers, who remained after the crowds had been dispersed. They were held overnight at Muthangari police station in Nairobi, and then sent back to their homes in Kenya's rural countryside the following morning.<sup>47</sup>

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<sup>45</sup> As was discussed in Chapter Four, FORD was initially founded as an SMO of Kenya's human rights and democracy movement in August of 1991. It brought together a coalition of nine prominent political leaders in Kenya representing diverse tribal groups "to fight for the restoration of democracy and human rights in Kenya." Thus, when FORD transformed itself into a political party on December 6, 1991, three days after Moi's December 3<sup>rd</sup> announcement that multipartyism would be allowed in Kenya, this multi-ethnic coalition represented a serious electoral threat to the regime. This threat began to dissipate, however, when, on January 17, 1992, one of Kenya's former vice-presidents and a Kikuyu, Mwai Kibaki, announced the formation of a second opposition party, the Democratic Party (DP).

<sup>46</sup> As is discussed in greater detail in Chapter Six, despite the fact that Section 2(A) of the Constitution had been repealed, and opposition parties allowed to mobilize, Kenya's Public Order Act still required that all public meetings of more than ten people be licensed by the District Commissioner (DC) of the district within which the meeting or gathering was to be held. As during the Kenyatta years, when the Kenyatta regime sought to shut down Kenya's emergent opposition party, the Kenya People's Union (KPU), the Moi regime also used this law to hinder opposition party mobilization.

<sup>47</sup> Tibbetts, "Mamas Fighting for Freedom in Kenya."

The following day, sympathy strikes and demonstrations in support of the mothers and their sons broke out throughout Nairobi. Demonstrators demanded not only the release of Kenya's political prisoners, but also that their rights, and those of the striking mothers, to mobilize and freely express their political opinions be protected by the state.<sup>48</sup> Two days later, again with the support and assistance of the RPP, the mothers returned to Nairobi to continue their public demonstrations. This time, since "Freedom Corner" remained cordoned off by police, the mothers established themselves at All Saints Cathedral, signaling the support of Kenya's powerful NCKK for their cause.

For the next month, the RPP helped organize and support an open outdoor political forum at All Saints Cathedral where ordinary Kenyan citizens, for the first time in their post-independence history, were given access to a microphone and audience to voice their own stories of injustice under the Moi regime, and demand protection of their fundamental human and democratic rights. In response, it is estimated that thousands of Kenyans participated in the forum, either as speakers or audience members, to express their solidarity for the freeing of political prisoners and to demand state protection of their political rights to free speech, association and assembly.<sup>49</sup>

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<sup>48</sup> *The Daily Nation*, Kenya's most widely distributed newspaper, reported that hawkers at the Gikoma Market and bus workers at the Machakos bus terminal in Nairobi "Boycotted their work protesting against the harassment of the mothers of political prisoners who had been fasting at Uhuru Park's Freedom Corner." "City in Chaos," *The Daily Nation*, 5 March 1992, p. 1. Cited in *ibid.*, p. 32.

<sup>49</sup> *Ibid.*, p. 43. See also *The Daily Nation* articles March 4<sup>th</sup> and 5<sup>th</sup>, 1992.

During this time, the mothers remained camped inside All Saints, and continued to engage in legal mobilization strategies, with RPP support, to pressure the Moi-KANU regime to release their sons and to respect their own rights of free speech and association. For example, on March 31<sup>st</sup>, the RPP helped the mothers draft another petition, this time addressed to President Moi, clearly stating the unconstitutionality of the continued detainment of their sons, the regime's violation of international human rights law and demanding their sons' release.<sup>50</sup> In solidarity with RPP members, the mothers also regularly attended Kenya's High Court on days they expected their son's cases to be heard and engaged in further protests to publicize and critique court rulings.

The day that the High Court dismissed an application brought forward by perhaps the most well-known political prisoner at the time, former MP Koigi wa Wamwere,<sup>51</sup> for example, members of the RPP literally locked arms in solidarity with the mothers, using a heavy chain, and led a huge public procession through central Nairobi from the High Court back to All Saints Cathedral. Leading the procession was Wangari Maathai, founder of Kenya's Greenbelt movement, human rights and democracy activist since the early stages of movement emergence, and recent Nobel Peace Prize winner.<sup>52</sup> To cheering crowds who had gathered in support of the mothers, she declared: "The judges could not free our sons because they, too, are not

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<sup>50</sup> Ultimately, the mothers were prevented by the police from reaching State House, however.

<sup>51</sup> As discussed in Chapter Four, Koigi wa Wamwere was charged with treason and detained in October 1990 for advocating multiparty politics.

<sup>52</sup> See footnote 43 above.

free.”<sup>53</sup> She further urged Kenyans to “continue fighting for their rights and never surrender them again . . .”<sup>54</sup>

On April 1, 1992, almost a month after the RPP first established its public forum at All Saints, Kenyan riot police again began violently dispersing the crowds that had gathered to express their support and to demands rights protection. Although the mothers were able to take refuge in the Cathedral, the police, heavily armed, occupied the cathedral grounds for the next three days and prevented any Kenyans from gathering. From this point forward, although the mothers were allowed to keep refuge inside the church, the police ensured that no crowds gathered outside.

A week later, on April 8, 1992, again with the assistance of the RPP, the mothers launched a new campaign to raise awareness of the state’s violation of their sons’ fundamental human and democratic rights. The RPP put together leaflets juxtaposing the formal rights of Kenyans under Kenyan constitutional law and the conditions under which Kenya’s current political prisoners had been arrested and were being held by the state. Just prior to the Easter holiday, the mothers, together with RPP members, distributed approximately 6000 of the leaflets at Nairobi bus terminals<sup>55</sup> in the hope that “the information would be passed on to people in the rural areas by travelers going home for the Easter holiday.”<sup>56</sup> The mothers, supported by the

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<sup>53</sup> “Political Prisoners’ Mothers Resume Hunger Strike,” *BBC Summary of World Broadcasts*, Nairobi: BBC, March 10, 1992.

<sup>54</sup> *Ibid.*

<sup>55</sup> “Mothers Distribute Leaflets to Travelers,” *The Daily Nation*, Nairobi: The Daily Nation Newsgroup, April 18, 1992, p. 4. Cited in Tibbitts, “Mamas Fighting for Freedom in Kenya,” p 34.

<sup>56</sup> *Ibid.*

RPP, continued to pressure the government and generate publicity for their cause until, finally, three months later, on June 18, 1992, President Moi agreed to meet with them.<sup>57</sup> Shortly after this meeting, most of Kenya's political detainees were released, and by early January of 1993, all but one of the 52 detainees had been freed.<sup>58</sup>

This series of demonstrations in support of political prisoners and fundamental rights in Kenya was instructive to the RPP, and other SMOs comprising Kenya's human rights and democracy movement, in at least two important respects. First, the violent dispersal of Kenyans, ostensibly under Kenya's Public Order and Preservation of Public Security Acts, who had gathered to support the mothers and exercise their own rights to free speech, association and assembly, drove home the importance of reforming existing repressive constitutional and statutory laws in Kenya, if fundamental human and democratic rights were to be protected, and free and fair multiparty elections made possible. Second, movement leaders saw that by strategically framing and staging their protests, and mobilizing Kenyan constitutional and human rights law,<sup>59</sup> they could not only win important concessions from the

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<sup>57</sup> "Three of the Fasting Mothers Met Here with President Daniel arap Moi and Agreed to End their Four-Month Strike After the President Promised to Look into Their Grievances," *BBC Summary of World Broadcasts*, Nairobi: Kenya Television Network, June 18, 1992.

<sup>58</sup> A significant subset of mothers, whose sons had not yet been released, remained camped in All Saints Cathedral from June 1992 to January 1993, when all but one of the prisoners was released. Interview with Muthoni Kamau, Chairperson, Rescue Political Prisoners (RPP), Nairobi, Monday, 17 May 1999.

<sup>59</sup> That is, insisting that since Section 2A had been repealed and multiparty politics allowed in Kenya, the government had no legal grounds for continuing to detain the political prisoners.

state,<sup>60</sup> but they could also influence the political priorities and platforms of Kenya's emerging opposition parties.

Kenya Human Rights Commission (KHRC):

In April of 1992, a second formal SMO that was to become central to the continued development and effectiveness of Kenya's human rights movement, the Kenya Human Rights Commission (KHRC), was founded. It was initially established in Washington D.C. by a group of Kenyan lawyers and a journalist, all of whom were studying, working and living in exile in the United States. Shortly after this, in May 1992, the KHRC set up a local office in Nairobi. Three of the KHRC's five founders, Makau wa Mutua, Maina Kai and Kiraitu Murungi, studied and received advanced degrees in law from Harvard Law School.<sup>61</sup> Makau wa Mutua then went on to work with the Lawyers' Committee for Human Rights in New York City<sup>62</sup> and Maina Kai began working at Transafrica in Washington D.C.<sup>63</sup> A fourth founder, Peter Kareithi,

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<sup>60</sup> In this case, concessions were in the form of political prisoners being released. *The Daily Nation* reports that "President [Moi] said the decision [to release political prisoners] was taken after giving serious thought to the petitions from the families of the suspects asking him to look into the case." Cited in Tibbetts, "Mamas Fighting for Freedom in Kenya," p. 41.

<sup>61</sup> Harvard Law School established its "Human Rights Program" (HRP) in 1985 "to give impetus and direction to international human rights work at Harvard Law School . . . [It] brings into the Law School the worldwide problems of the powerless and abused, [and] forges cooperative links with a range of human rights organizations in this country and abroad." (<http://www.law.harvard.edu/programs/hrp/>) The director and one of the founders of the program, Professor Henry Steiner, took a special interest in Kenya's human rights movement and actively reached out to provide support to Kenyan attorneys active in the movement.

<sup>62</sup> As is discussed in Chapter Four, this is an international human rights organization based in New York City with close links to Kenya's human rights and democracy movement.

<sup>63</sup> Transafrica is a nongovernmental human rights organization founded in 1977. Its primary focus has been "educating the general public – particularly African Americans – on the economic, political and

was a journalist studying in the U.S., and the fifth founder, Willy Mutunga, was a long time human rights activist in Kenya and former chair of the LSK.<sup>64</sup>

Mutunga affirms that the emergence of the KHRC was made possible by Kenya's political opening in December 1991, which, for the first time in Kenya's post-independence history, "created an atmosphere in which human rights monitoring groups could safely operate."<sup>65</sup> Central objectives of the KHRC at this time included: monitoring and publicizing human rights abuses; promoting human rights protection through petitions, media campaigns and activism; promoting awareness of human rights, and their violation, by publishing quarterly reports;<sup>66</sup> undertaking human rights litigation on behalf of victimized Kenyans; analyzing current and proposed legislation to ensure that human rights were protected under Kenyan law; and organizing educational outreach campaigns to promote greater awareness of human rights among Kenyans.<sup>67</sup>

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moral ramifications of U.S. foreign policy as it affects Africa and the Diaspora in the Caribbean and Latin America." (<http://www.transafricaforum.org/index.html>)

<sup>64</sup> Interview with Willy Mutunga, Nairobi, Friday, 15 May 1998. See Chapter Four for a discussion of Mutunga's role in the emergence of Kenya's human rights and democracy movement.

<sup>65</sup> Interview with Willy Mutunga, Nairobi, Friday, 15 May 1998.

<sup>66</sup> These reports were then distributed both nationally and internationally.

<sup>67</sup> Conversations with Willy Mutunga. Nairobi, summers of 1998 and 1999, as well as observation of the KHRC's work during these periods. See also archival materials on the history of the KHRC.



The Coalition for a National Convention (CNC): RPP and KHRC

In June 1992, the RPP and KHRC together spearheaded what became known as the Coalition for National Convention, or CNC. The NCKK had organized two symposia in May and June of 1992 to “debate Kenya’s transition to multiparty politics and the conduct of free and fair elections scheduled for 1992.”<sup>68</sup> Attending these symposia were leaders of Kenya’s human rights and democracy movement and Kenya’s major opposition parties. The primary objective of the first symposium was to try to bring opposition political parties together in a broad national coalition to defeat KANU.<sup>69</sup> This was considered especially challenging given that, thus far, emergent opposition political parties in Kenya had mobilized, and factionalized, almost entirely along ethnic lines.

Meeting just prior to the second symposium on June 11<sup>th</sup> and 12<sup>th</sup>, members of the RPP and KHRC decided that, in addition to promoting inter-party cooperation, the symposium needed to take a stand on substantive constitutional reform, since repressive constitutional laws continued to thwart efforts to protect human and democratic rights in Kenya. Moreover, they argued, these laws would ultimately prevent the possibility of free and fair multiparty elections in Kenya.<sup>70</sup> Of particular concern were six laws, all of which had British colonial origins, and all of which are

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<sup>68</sup> Willy Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Nairobi, Kenya: SAREAT, 1999, p. 28.

<sup>69</sup> This was prior to the enactment of the regime’s prohibition on coalition government in August 1992.

<sup>70</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, pp. 18 – 31. Also, conversations with Willy Mutunga. Nairobi, spring and summers of 1998 and 1999.

discussed in detail in Chapter Three. They were: (1) the Societies Act; (2) the Public Order Act; (3) the Chiefs' Authority Act; (4) the Outlying Districts Act and the Special Districts (Administration) Act; (5) the Preservation of Public Security Act; and (6) the Public Collections Act.<sup>71</sup> In addition, there was also a strongly perceived need to institute more comprehensive constitutional reforms to decentralize executive power and re-insert constitutional checks on the executive through strengthening Kenya's legislative and ensuring independence of its judiciary.<sup>72</sup>

This initial effort to promote constitutional reform prior to the 1992 elections ultimately failed for several reasons, however. First, although there was a general consensus among movement leaders and activists regarding the need for constitutional reform, there was disagreement over both what the substance of these reforms should be, as well as the process by which reforms should be introduced. For example, groups such as the RPP and KHRC wanted a complete dissolution of the current government and the formation of a "transitional government," which would be governed by Kenya's independence Constitution until a new constitution could be drafted.<sup>73</sup> They also favored a process of grassroots educational outreach to educate Kenyans on the substance and process of constitutional reform, which would then culminate in a National Constitutional Convention (NCC), where all major political and civil society groups in Kenya would be represented. This Convention, in turn,

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<sup>71</sup> All of these laws and acts are discussed in detail in Chapter Three.

<sup>72</sup> Conversations with Willy Mutunga. Nairobi, summers of 1998 and 1999.

<sup>73</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 33. Also, conversations with Willy Mutunga. Nairobi, summers of 1998 and 1999.

they argued, should adopt Kenya's final constitutional draft, which should then be subject to a national referendum for approval by all Kenyans.<sup>74</sup>

Other groups, such as the leadership of the LSK, the NCCCK, Kenya's Catholic Church, as well as other emergent SMOs,<sup>75</sup> were more in favor of introducing a subset of reforms focused specifically on creating conditions for free and fair multiparty elections in Kenya, rather than comprehensive constitutional reform. Specifically, these groups favored repeal of all colonial era laws that undermined fundamental rights, and the creation of institutional safeguards to protect the independence of two state institutions in particular: (1) Kenya's national electoral commission, the ECK,<sup>76</sup> and (2) Kenya's public broadcasting corporation, the KBC.<sup>77</sup> Once multiparty elections were held under reasonably free and fair conditions, they argued that further more comprehensive constitutional reforms could then be negotiated with a new, more democratic parliament. Given that elections were convened six months later, in December 1992, however, none of these SMOs had adequate time to work out the specifics of their various proposals, or to build sufficiently strong coalitions to support them.

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<sup>74</sup> Ibid., pp. 33 – 39. Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," p. 612.

<sup>75</sup> In particular, the International Commission of Jurists -Kenya Section (ICJ-Kenya) and the International Federation of Women Attorneys, Kenya Chapter (FIDA-Kenya), both of which are discussed below.

<sup>76</sup> The Electoral Commission of Kenya. As is discussed in greater detail below, all members of Kenya's Electoral Commission were appointed solely by the president at this time.

<sup>77</sup> The Kenya Public Broadcasting Corporation. As is also discussed below, the KANU regime maintained a virtual monopoly over the KBC, which provided radio news for a majority of Kenya's population. For this reason, its influence over Kenyans, especially in Kenya's rural areas with little access to other sources of information, cannot be underestimated.

Second, although most international human rights organizations affiliated with Kenya's reform movement also perceived the need for constitutional reform, they, too, were in disagreement as to how comprehensive or minimal these reforms should be, as well as the process by which reforms should be introduced. Because of their failure to reach consensus on these issues, neither international nor domestic groups were able to effectively lobby donor agencies and states to support the cause of constitutional reform, as had been the case with demanding multiparty elections in Kenya. Most donors, in particular the United States, believed that supporting the convening of multiparty elections was enough to ensure the advancement of human and democratic rights in Kenya; thus, it was willing to support emergent SMOs focused on these activities, but unwilling to support a major constitutional reform effort at this time.

Finally, third, the success of Kenya's human rights and democracy movement in forcing the resistant Moi regime to repeal Section 2(A) of the Constitution, and the subsequent mobilization of opposition parties, led many Kenyans, and especially opposition party leaders, to believe that the Moi-KANU regime could easily be defeated in multiparty elections without major constitutional reforms. As Mutunga explains, once opposition parties were allowed to mobilize, their sole focus was to defeat the Moi-KANU regime, with little or no concern for the "constitutional, legal, administrative and the extra-judicial powers of the presidency," once, or if, Moi was defeated.<sup>78</sup> Since each of Kenya's three main opposition parties at the time<sup>79</sup>

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<sup>78</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1999*, p. 41.

optimistically assumed that they were within easy reach of presidential power, they were unconcerned with the inordinate power that continued to be concentrated in the office. Thus, in the end, a majority of emergent SMOs, most with the financial and technical support of international donors, began to focus their efforts more on ensuring conditions for free and fair elections, rather than organizing for major, or even more minor, constitutional reforms.

#### Promoting Free and Fair Elections in Kenya: ICJ-K and FIDA-K

Leading this effort to promote free and fair multiparty elections in Kenya were two additional SMOs that became central to the reform movement's continued development and impact over the next decade: the International Commission of Jurists - Kenya Section (ICJ-K) and the Federation of Women Attorneys – Kenya Chapter (FIDA-K). ICJ-K is comprised of both male and female lawyers and jurists in Kenya, whereas FIDA-K's membership is exclusively reserved for female attorneys. Unlike membership in the LSK, which is compulsory for all Kenyan lawyers, both ICJ-K and FIDA-K are volunteer organizations with specific mandates to promote and protect human and democratic rights in Kenya.

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<sup>79</sup> As mentioned above two main political parties, the Forum for the Restoration of Democracy (FORD) and the Democratic Party (DP) were formed shortly after President Moi repealed Section 2A of the Constitution in December 1991. In August of 1992, FORD formally split into two ethnically-based political parties: FORD-Kenya, led by Oginga Odinga, which drew its support primarily from the Luo in Nyanza Province and segments of the Luhya from Western and Rift Valley provinces; and FORD-Asili, led by Martin Shikuku, a Kikuyu, who drew his support primarily from the Kikuyu of southern Central Province and parts of the Rift Valley, as well as from among another sub-section of the Luhya in Western Province. "*Asili*" is a Kiswahili word meaning "original."

Although ICJ-K was established in 1959 as a local branch of the International Commission of Jurists based in Geneva,<sup>80</sup> for all intents and purposes, it did not become an active human rights and democracy organization until the emergence of Kenya's contemporary human rights and democracy movement in the early to mid-1980s, and then only minimally so. Its emergence as a human rights and democracy SMO stems from the efforts of a group of human rights attorneys in Kenya who tried to establish a Kenya chapter of Amnesty International, but were prevented from doing so by the Moi regime.<sup>81</sup> In order to circumvent Kenya's Societies Act, which required all new organizations to be approved by the regime's Registrar of Societies, these human rights and democracy advocates decided to "revitalize" ICJ-K instead, since it was already a state-registered organization.

With a grant from the Ford Foundation in 1985, ICJ then began sponsoring a series of seminars focused on human rights and democracy to raise rights awareness among Kenyans and recruit new members to their organization. The first of these seminars was held in November of 1988 and was focused on "Law and Society."<sup>82</sup>

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<sup>80</sup> Because Kenya was still under British colonial rule at this time, ICJ-K was actually an extension of the British section of the ICJ.

<sup>81</sup> Rob Watson, Frontier Consulting, "Understanding Our Rights: A Review of the Public Legal Education Work of Human Rights NGOs in Kenya," November 1996, p. 104. Unpublished report resulting from a study funded by the Ford Foundation. Frontier Consulting is "a London based international consulting agency which draws on a network of consultants and organizations to contribute to organizational effectiveness in the fields of human rights and development world-wide." Ibid. As is discussed in Chapters Three and Four, Kenya's Societies Act required that all new organizations have their organizational structure and objectives approved by the Kenyan government via the Registrar of Societies.

<sup>82</sup> See the publication of selected papers from this seminar: International Commission of Jurists (Kenya Section), *Law and Society*, Nairobi, Kenya: International Commission of Jurists (Kenya Section), November 24 – 26, 1988, Green Hills Hotel, Nyeri, Kenya.

This highly publicized seminar importantly contributed to the organization's revitalization and in the following year, 1989, it established its first permanent secretariat in Nairobi. With Kenya's political opening in December of 1991, ICJ-K became even more of an activist organization. Although its broad mandate was to "foster democratic governance, the rule of law and respect of all human rights" through its various programs and activities,<sup>83</sup> in this chapter, I focus specifically on its activities related to promoting free and fair elections in 1992.

FIDA-Kenya was founded much later than ICJ-K, following the Third United Nations Conference for Women, which was held in Nairobi in 1985. It is the local affiliate of the International Federation of Women Attorneys, which was originally founded in Mexico in 1944 as the Federacion Internacional de Abogadas to "promote the welfare of women and children."<sup>84</sup> Like ICJ-K, FIDA-K was also able to secure a grant from the FORD Foundation and, with this financial support, it established its first permanent secretariat in Nairobi in November of 1991.<sup>85</sup> Like ICJ-K, FIDA-K also became much more of an activist organization with Kenya's political opening in December of 1991, and by early 1992, it had begun to establish a series of educational outreach and rights advocacy programs for women and children in Kenya.<sup>86</sup> Finally,

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<sup>83</sup> ICJ-Kenya mission statement: <http://www.icj-kenya.org/section.asp?ID=1> ICJ's paralegal and educational outreach programs are discussed in Chapters Six and Seven.

<sup>84</sup> Human Rights Internet, *African Directory: Human Rights Organizations in Sub-Saharan Africa*, Ottawa, Canada: Human Rights Internet (HRI) and Utrecht, the Netherlands: Netherlands Institute of Human Rights (SIM), vol. 16, no. 1, 1996, p. 83.

<sup>85</sup> Interview with Anthony Macharia Mugo, Public Relations Director for FIDA-Kenya, Nairobi, Thursday, 14 May 1998.

<sup>86</sup> Ibid.

like ICK-K, FIDA-K also perceived that a priority for the organization, and the country, was to begin to establish institutions at the societal level that would facilitate the convening of free and fair elections.<sup>87</sup>

Thus, in May 1992, ICJ-Kenya and FIDA-Kenya joined forces and established Kenya's first independent (nongovernmental) "Election Monitoring Unit" to monitor and publicize human and democratic rights violations in the period leading up to and during Kenya's December 1992 multiparty elections. With funding provided primarily by the Canadian International Development Agency (CIDA),<sup>88</sup> the Danish International Development Aid Agency (DANIDA),<sup>89</sup> the Dutch government, and the United States Agency for International Development (U.S. AID),<sup>90</sup> ICJ-K and FIDA-K recruited and trained approximately 250 election monitors to assist them in reporting and publicizing electoral violations in the period between May and August of 1992.<sup>91</sup> In addition, election monitors were also trained in voter/civic education in order to empower Kenyans to recognize and report electoral violations.<sup>92</sup>

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<sup>87</sup> Ibid.

<sup>88</sup> CIDA is the main aid agency of the Canadian government.

<sup>89</sup> DANIDA is the main aid agency of the Danish government.

<sup>90</sup> U.S. AID is the main agency of the U.S. government. This information was confirmed through interviews with the Ms. Connie Ngondi-Houghton, Director, ICJ-K, Nairobi, Kenya, 28 May 1998 and Anthony Macharia Mugo, Public Relations Director, FIDA-K, 14 May, 1998.

<sup>91</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, Kenya: NEMU, 1993, pp. 115.

<sup>92</sup> Ibid., p. 115.



By August 1992, FIDA/ICJ had assigned “district liaison officers,” or DLOs, to all of Kenya’s administrative districts.<sup>93</sup> The responsibilities of DLOs included observing political events in their respective districts and assessing how these might impact the prospects for free and fair elections. Specifically, DLOs observed voter registration processes; inspected voting registers at district and divisional headquarters, as well as at chiefs’ centers;<sup>94</sup> observed candidate nomination and campaign processes; and issued regular reports to FIDA/ICJ on their findings.<sup>95</sup> Each district liaison officer was also eventually assigned a minimum of eleven “constituency election monitors,” or CEMs, to monitor campaign activities and conduct voter education at the constituency level.<sup>96</sup> CEMs’ responsibilities were similar to that of DLOs, except that their focus was the constituency level. Like DLOs, they were also required to issue regular reports on their observations, which were submitted both to their DLOs and FIDA/ICJ headquarters in Nairobi.<sup>97</sup> FIDA/ICJ then used these reports to focus future reform activities and issue press releases regarding electoral processes, and regime violations, in Kenya’s rural areas.

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<sup>93</sup> Ibid., pp. 114, 115.

<sup>94</sup> “Chiefs” are the local representatives of Kenya’s provincial administration and are state-appointees.

<sup>95</sup> Ibid.

<sup>96</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. 114, 115.

<sup>97</sup> Ibid.

Kenya's First National Election Monitoring Unit, NEMU:

In August of 1992, ICJ and FIDA jointly sponsored a seminar in Nairobi whose purpose was “to discuss . . . criteria for determining the minimal conditions necessary for free and fair elections.”<sup>98</sup> The seminar was attended by both reform movement and opposition party leaders, and it was at this conference that FIDA and ICJ officially joined forces with two other organizations, the National Ecumenical Civic Education Programme (NECEP) and the Professional Committee for Democratic Change (PCDC), to form Kenya's first domestically accredited election monitoring unit, the “National Election Monitoring Unit,” or NEMU.<sup>99</sup>

The NECEP was founded as an association of the NCCCK and Kenya's Catholic Bishops (KCB) at about the same time that FIDA and ICJ initially joined forces to form their Election Monitoring Unit (May 1992).<sup>100</sup> Its primary objective, like the civic education programs launched by FIDA and ICJ, was to educate Kenyans, especially in rural areas, about their voting rights, in an effort to prevent electoral fraud and increase the likelihood that abuses would be reported.<sup>101</sup> As was the case with the initial coalition forged between Kenya's professional legal association, the

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<sup>98</sup> NEMU, p. 12.

<sup>99</sup> Although ICJ/FIDA Election Monitoring Unit had also applied for accreditation as a domestic observer back in May 1992, in a deliberate delay tactic, Kenya's Electoral Commission refused to grant it accreditation. It was not until November 6, 1992, and then only under domestic and international pressure from Kenya's reform movement and donor states, that NEMU was finally accredited. With this accreditation, the three earlier accreditation requests by FIDA/ICJ, NECEP and PCDC were withdrawn. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 27.

<sup>100</sup> Ibid., p. 115.

<sup>101</sup> Ibid.

Law Society of Kenya (LSK), and dominant religious organizations in Kenya<sup>102</sup> in the early stages of movement emergence, this coalition between ICJ, FIDA and the NECEP brought together the legal expertise of the lawyers' associations with the extensive grassroots organizational networks and respected rural leadership of the NCKK and the KCB. As a consequence, voter/civic education programs were able to reach a broader-base of Kenyans than otherwise would have been possible.

The PCDC was formed shortly after the NECEP. It also embraced more general objectives of promoting human and democratic rights reform in Kenya, but like ICJ, FIDA and the NECEP, it believed that the first order of business was to focus on establishing conditions for free and fair multiparty elections in Kenya.<sup>103</sup> Members of the PCDC included some lawyers, but it was predominately comprised of representatives from Kenya's business community. Although individual businessmen and women had begun supporting Kenya's human rights and democracy movement as it gained momentum in the early 1990s, the formation of the PCDC, and its coalition with ICJ, FIDA and the NECEP, marked the first time that a critical mass from the business community joined forces and formed their own organization to support movement activities and objectives.

Building on the initial work of ICJ's and FIDA's Election Monitoring Unit, the primary objective of NEMU was to establish, and begin to institutionalize at the societal level, Kenya's first *permanent* independent (nongovernmental) election

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<sup>102</sup> Specifically, the NCKK and Kenya's Catholic Church.

<sup>103</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 115.

monitoring unit to monitor conditions leading up to, during and after all future multiparty elections in Kenya.<sup>104</sup> To achieve this end, NEMU had two main “medium term” objectives: (1) to establish, and begin to institutionalize, voter/civic education programs to raise citizen awareness of voting and democratic rights; and (2) to train professional monitors to observe and report on electoral conditions from the time voter registration commenced, through candidate nominations, campaigning, polling and vote counting.<sup>105</sup> The extent to which these objectives were achieved in Kenya’s 1992 elections is assessed below.

Kituo cha Sheria (Kituo):

NEMU was assisted by two additional SMOs in its effort to found Kenya’s first independent (nongovernmental) election monitoring unit: (1) Kituo cha Sheria (Kituo) and (2) the Legal Education Aid Programme of Kenya (LEAP).<sup>106</sup> Kituo cha Sheria means, literally, “assistance with law” in Kiswahili and was founded by a small group of Kenyan lawyers in 1973 to provide legal aid to Kenya’s urban and rural poor. It was run as strictly a volunteer organization at this time, with Kenyan lawyers and law students volunteering their time to assist Kenya’s poor. Over the next ten years

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<sup>104</sup> Ibid., pp. 27 – 29.

<sup>105</sup> Ibid.

<sup>106</sup> LEAP is discussed in the section below.

(1973 – 1983), the number of lawyers volunteering their services to Kituo grew, largely mirroring Africanization of Kenya’s legal profession.<sup>107</sup>

With the emergence of Kenya’s human rights and democracy movement in the early to mid-1980s, Kituo forged a partnership with Kenya’s professional legal association, the Law Society of Kenya (LSK) and its focus shifted from being merely a charitable organization providing legal aid, to an advocacy organization that actively promoted rights awareness among the communities it worked with.<sup>108</sup> At this time, it founded its “Taking the Law To The People” program at University of Nairobi’s law school in order to encourage young lawyers to use their skills to promote greater public awareness of rights, as well as to change public perceptions of lawyers as an elitist group, unconcerned with the everyday legal problems of Kenyans.<sup>109</sup> In so doing, it began to establish relationships with Kenya’s dominant church organizations. It was largely through these organizations, and through Kenya’s Catholic Church, in particular, that Kituo gained access to and began to establish long-term relationships with Kenya’s rural areas.<sup>110</sup> In the words of one participant, the program sought to “discredit the long-held belief that law belongs to a special and particular class of people, and the common man has no business getting involved in law and law-related

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<sup>107</sup> The Africanization of Kenya’s legal profession is discussed in Chapter Four.

<sup>108</sup> Watson, Frontier Consulting, “Understanding Our Rights: A Review of the Public Legal Education Work of Human Rights NGOs in Kenya,” p. 70.

<sup>109</sup> *The Advocate, Lawyers –Professional Ethics, Partisan Politics- Which Way?*, Nairobi: The Law Society of Kenya, vol. 2, no. 1, August 1992, p. 32.

<sup>110</sup> Interview with Jennifer Miano, Programme Officer, Kituo cha Sheria, Nairobi, Kenya, Friday, 22 May 1998.

issues until he is a client.”<sup>111</sup> This partnership with the LSK and association with Kenya’s Catholic Church also provided Kituo with access to greater material resources, and it was at this time that it employed its first full-time legal officer and support staff.<sup>112</sup>

By 1988, with a growing demand for legal aid, Kituo made the decision to solicit financial support from foreign-based organizations and donor states.<sup>113</sup> In so doing, like ICJ and FIDA, it was able to secure a grant from the Ford Foundation. This began a long-term relationship with the Ford Foundation that continued for at least the next seventeen years.<sup>114</sup> With Kenya’s political opening in December 1991, Kituo increasingly began to perceive its role in terms of promoting “social transformation” in Kenyan society, specifically in terms of “mobilizing and capacity building within marginalized communities, and support for community struggles concerning basic rights.”<sup>115</sup> Related to this general objective, with the commencement of voter registration in June 1992 for Kenya’s December 1992 elections, Kituo became

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<sup>111</sup> Alfred Ndambiri, University of Nairobi law student. Cited in *The Advocate, Lawyers –Professional Ethics, Partisan Politics- Which Way?*, Nairobi: LSK, vol. 2, no. 1, August 1992, p. 32.

<sup>112</sup> Watson, Frontier Consulting, “Understanding Our Rights: A Review of the Public Legal Education Work of Human Rights NGOs in Kenya,” p. 70.

<sup>113</sup> Until 1985, Kituo’s expenses were paid entirely by its volunteer members through voluntary contributions and fund-raisers. Once Kituo forged a relationship with the LSK in 1985, it gained access to some of the movement’s resources, which, at the time, came primarily from private contributions of Kenyans, as well as organizational contributions by the LSK, NCKK and Kenya’s Catholic Secretariat. Archival materials from Kituo, Nairobi, Kenya, May 1998.

<sup>114</sup> Watson, Frontier Consulting, “Understanding Our Rights: A Review of the Public Legal Education Work of Human Rights NGOs in Kenya,” pp. 70, 71. At the time of this writing, March 2005, Kituo continued to receive support from the Ford Foundation.

<sup>115</sup> *Ibid.*, p. 71. This perception was also confirmed through an interview with Jennifer Miano, Programme Officer, Kituo cha Sheria, Nairobi, Kenya, Friday, 22 May 1999.

one of the lead SMOs producing information on voting rights in booklet, poster, video and audio cassette form.<sup>116</sup>

With funding from U.S. AID, Kituo also launched its “Taking Elections To The People” program in October of 1992.<sup>117</sup> It was this funding that allowed Kituo to produce audio and video cassettes detailing election rights and processes. Audio cassettes were produced in both English and Kiswahili to enable greater access by rural voters,<sup>118</sup> and Kenya’s Catholic Secretariat and the NCKK largely facilitated distribution to provincial centers in Kenya. In addition, audio cassettes were also distributed to *matatu* owners, the major form of public transport in Kenya, and were played over their stereo systems as Kenyans travelled in both urban and up-country centers.<sup>119</sup> Ultimately, Kenya’s Electoral Commission itself ended up adopting election materials developed by Kituo in its effort, albeit limited, to promote voter education at this time; this, however, came only after sustained pressure from SMOs for it to do so.<sup>120</sup>

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<sup>116</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 25.

<sup>117</sup> *The Advocate, Multiparty Elections: Towards a Better Kenya?*, Nairobi: The Law Society of Kenya, vol. 2, no. 2, November 1992, p. 4.

<sup>118</sup> Few rural Kenyans are fluent in English. Most understand some Kiswahili, but, ultimately, if Kituo had the resources, rural Kenyans would have benefited most from tapes produced in Kenya’s major vernacular languages.

<sup>119</sup> *The Advocate, Multiparty Elections: Towards a Better Kenya?*, Nairobi: the Law Society of Kenya, vol. 2, no. 2, November 1992, p. 4.

<sup>120</sup> This is discussed in greater detail below.

Legal Education Aid Programme (LEAP):

The Legal Education Aid Programme of Kenya (LEAP) was founded with a similar mandate to Kituo's, but was not established until August 1990 –just after former activist in Kenya's human rights and democracy movement, Bishop Alexander Muge, was killed under mysterious circumstances in a car accident.<sup>121</sup> In response to Bishop Muge's death, LEAP was first established as a program of his former diocese in Eldoret, a major urban center in the western part of Rift Valley Province. Like Kituo, it was founded as an organization to provide legal education and assistance to politically and economically marginalized groups in Kenya, and was active in organizing legal education and training programs to create a greater awareness of Kenyan law among Kenya's poor. By early 1992, LEAP was able to secure funding to establish an office in Nairobi, and by August 1992, they, like Kituo and the constituent members of NEMU,<sup>122</sup> began to establish voter / civic education outreach programs.<sup>123</sup> Although less established than either Kituo or NEMU, LEAP was also an important contributor to Kenya's voting rights educational outreach program.

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<sup>121</sup> *The Advocate, Lawyers –Professional Ethics, Partisan Politics- Which Way?*, Nairobi: The Law Society of Kenya, vol. 2, no. 1, August 1992, p. 33. As discussed in Chapter Three, Bishop Muge was a leading activist in Kenya's human rights and democracy movement. He was killed under mysterious circumstances in a car accident, after having just received death threats for his outspokenness on human and democratic rights abuses in Kenya. Although no one was ultimately charged with foul play in his death, it was widely believed that high-ranking members of KANU were responsible.

<sup>122</sup> That is, FIDA, ICJ, PCDC and NECEP.

<sup>123</sup> *The Advocate, Lawyers –Professional Ethics, Partisan Politics- Which Way?*, Nairobi: The Law Society of Kenya, vol. 2, no. 1, August 1992, p. 33.



SMOs and the December 1992 Elections:

Although these SMOs made some progress in promoting voter and civic education programs at the societal level in Kenya during this period, their impact on the 1992 elections was ultimately limited. This was primarily due to the fact that they had relatively little time to produce and disseminate materials prior to the December 29<sup>th</sup> elections, and the fact that large parts of Rift Province, and parts of neighboring Western and Nyanza provinces, as is discussed below, were largely inaccessible due to on-going political violence. In some parts of Kenya, voter education materials became available only immediately prior to the elections.<sup>124</sup> Moreover, a major barrier faced by all SMOs affiliated with Kenya's reform movement was the high degree of illiteracy in Kenya's rural areas.<sup>125</sup> This obviously greatly limited the effectiveness of both booklet and some poster forms of educational outreach. Moreover, despite their efforts to try to use Kenya's publicly funded broadcasting system, the Kenya Broadcasting Corporation (KBC), as a means for reaching these Kenyans,<sup>126</sup> SMOs were consistently denied access by the regime-controlled KBC. As is discussed in greater detail below, the virtual news black out by the KBC on reform movement and

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<sup>124</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 26.

<sup>125</sup> Although the CIA Factbook (<http://www.fqs.org/docs/factbook/geos/ke.html>) reports that the literacy rate in Kenya is approximately 78 percent, most Kenyan scholars believe it is much lower than this, with most estimates around 45 percent. Of significance is Kenya's 1999 Census report, which finds that only "36% of the Kenya population aged 5 years and above were in school, while 18% had never been to school and 46% had left school" (<http://www.cbs.go.ke/census1999.html>).

<sup>126</sup> As mentioned above, in many rural areas of Kenya the KBC is literally the only source of outside information for communities, thus its impact cannot be underestimated. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, Kenya: NEMU, 1993.

opposition party activities was a major impediment to promoting free and fair elections in Kenya in 1992. Ultimately, through legal mobilization strategies, movement activists and organizations were able to secure more equal access to the KBC just prior to the elections, but this was too late to make a significant difference in electoral outcomes.

NEMU's second "medium-term" objective, to train professional monitors to observe and report on electoral conditions from the commencement of voter registration through vote counting, was considerably more successful than its educational outreach programs. First, regarding monitoring of voter registration, as mentioned above, this was a task initially undertaken by monitors trained by FIDA and ICJ, whose work was later supplemented by NEMU. Voter registration began on June 8, 1992 and, almost immediately, objections began to be raised by leaders of both Kenya's human rights and democracy movement and emergent opposition political parties. Of particular concern was the fact that reportedly "millions"<sup>127</sup> of young Kenyans, who had become eligible to vote since the 1988 elections, but who had not yet been issued the national identity cards necessary for voter registration, were at risk for being disenfranchised.<sup>128</sup> Movement and party leaders insisted that this was a deliberate regime strategy to disenfranchise Kenya's youth, given that most were predicted to vote for opposition parties.

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<sup>127</sup> Although exact numbers are not available, movement and opposition party estimates placed the number at around three million. Ibid., p. 43.

<sup>128</sup> In most cases there was a *minimum* of a two-month wait to acquire new IDs. Ibid.

The lack of impartiality and independence of Kenya's Electoral Commission also came under repeated attack during this period. The chair of the Commission, former Justice Zaccheaus Chesoni, had twice been dismissed from public service on charges of corruption and was known to have close ties to the regime. Moreover, President Moi had handpicked all members of the Commission, including Chesoni, with no formal checks on the appointment process. As the voter registration process began, and anomalies were reported to the Commission, it soon became clear that the Commission was simply either not willing, or not able, for whatever reason, to adequately respond to clear evidence of electoral violations. As a consequence, leaders of Kenya's reform movement, including leaders of the LSK, NCKK, the Catholic Secretariat, ICJ, FIDA, Kituo, KHRC, RPP, and LEAP, as well as opposition political parties, threatened to mobilize a boycott of voter registration unless identity cards were issued to youth, reported anomalies were addressed, the voter registration period extended, and reforms introduced to ensure greater independence of the Commission.

Ultimately, most SMOs, but not all,<sup>129</sup> called off their boycott by the beginning of July, however—just before the voter registration period was scheduled to end. This was due, in part, to the Moi-KANU regime conceding some important reforms to address movement demands. Specifically, identity cards were issued to many, although not all, of Kenya's eligible youth; the registration period was extended by

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<sup>129</sup> Notably, the RPP and KHRC maintained their position for an election boycott through the entire election period. They insisted that until comprehensive constitutional reforms were introduced, "free and fair" elections were impossible in Kenya. At this time, however, their voices were a minority within the larger movement. Interviews with RPP and KHRC members, Nairobi, Kenya, June 1999.

eighteen days to allow a greater number of Kenyans to register; and electoral reforms were implemented that, in theory, led to greater independence of Kenya's Electoral Commission.<sup>130</sup> Another important fact contributing to the end of the boycott, however, was the fact that SMOs were put under increasing pressure by donor organizations, in particular the United States, to allow elections to proceed as scheduled.<sup>131</sup>

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<sup>130</sup> As a consequence of pressure placed on the regime by Kenya's movement and opposition political parties, in August 1992, parliament enacted a constitutional amendment, the Election Laws (Amendment) Act of 1992, which, in theory, led to the Commission "enjoy[ing] the greatest independence and security ever enjoyed by any Electoral Commission since independence." National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 25. Previous to this amendment, the Electoral Commission was "constitutionally a department of the Attorney General's office and was also supervised by the relevant minister in charge of elections." *Ibid.* With Act No. 6 of the Elections Laws (Amendment) Act, 1992, however, the Electoral Commission was made independent of the Attorney General's office, and its members were given security of tenure. In addition, new positions of Director and Deputy Director of Elections were also created to oversee the conduct of the Electoral Commission, and thus also enhanced its independence. When the chair of Kenya's Electoral Commission, Zachaeus Chesoni, initially refused to appoint these officials claiming that the Commission itself "constituted the Director," engaging in legal mobilization strategies, the FIDA/ICJ Election Monitoring Unit threatened to take the Commission to court over the matter, and Chesoni "relented and appointed [a Director], albeit belatedly." *Ibid.*, p. 118. Although this concession was considered a great "win" by Kenya's reform movement, the fact that the president remained solely responsible for appointing *all* members of the Electoral Commission, and the fact that the Director and Deputy Director of Elections were direct appointees of the Electoral Commission Chair, who was himself a presidential appointee, makes the "independence" of the Electoral Commission questionable.

<sup>131</sup> There were nine main donors of NEMU: (1) the Canadian International Development Agency (CIDA); the United States Agency for International Development (USAID); (3) the Friedrich Ebert Foundation; (4) the Royal Netherlands Embassy; (5) the European Economic Community (ECC); (6) the Swedish International Development Agency (SIDA); (7) the Embassy of Switzerland; (8) the International Centre for Human Rights and Democratic Change (Canada); and (9) the British High Commission. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. vii, viii. See also Appendix I.

SMOs and Election Monitoring:

Regarding the monitoring of candidate nominations and the campaign period, these tasks were also undertaken by election monitors initially trained by FIDA-K and ICJ-K, whose work was later supplemented by monitors trained by NEMU.<sup>132</sup> Ultimately, eight political parties presented candidates for Kenya's 1992 parliamentary and presidential elections. These were: (1) the Kenyan African National Union (KANU), (2) the Forum for the Restoration of Democracy - Asili (FORD-A), (3) the Forum for the Restoration of Democracy – Kenya (FORD-K), (4) the Democratic Party (DP), (5) the Kenya National Congress (KNC), (6) the Kenya Social Congress (KSC), (7) the Kenya National Democratic Alliance (KENDA) and (8) the Party of Independent Candidates of Kenya (PICK). According to Chapter VII of Kenya's Constitution, political parties were to be allowed a *minimum* of twenty-one days to nominate party candidates from the time the Electoral Commission published notice that the nominating period had begun.<sup>133</sup>

In a not-so-subtle sleight-of-hand, Kenya's Attorney General, Amos Wako, purported to "correct" the language of this constitutional rule such that it read that

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<sup>132</sup> By early December 1992, NEMU had trained approximately 250 additional election monitors. By the time of elections three weeks later, however, approximately 5000 pollwatchers "were directly engaged and recruited under the supervision of the NEMU Secretariat." National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 116

<sup>133</sup> Chapter VII of *The Laws of Kenya* states: "The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution of rule *which shall not be less than twenty one (21) days* after the date of publication of such notice." See Chapter VII, Section 13 (3) (b) (i) of the National Assembly and Presidential Elections Act, *The Laws of Kenya*. Cited in National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. 22 - 23.

parties be allowed *no more* than twenty-one days after the publication of notice by the Electoral Commission. He argued, apparently at the behest of the regime, that the “earlier wording of ‘not less’ [than twenty-one days] was a mistake and that the appropriate wording should be ‘not more’ [than twenty-one days].”<sup>134</sup> As a consequence, the Electoral Commission initially gave parties only *eight* days to nominate their candidates, clearly disadvantaging all parties, except KANU, which already had a well-established national presence and party nomination procedures.<sup>135</sup> In response, engaging in legal mobilization tactics, movement and party leaders filed a court action against the Attorney General, which ultimately resulted in his actions being declared illegal. As a consequence, the original constitutional wording was reinstated and the Electoral Commission was forced to respect and enforce the minimum twenty-one day nomination period.

In addition to this initial obstacle placed before opposition parties in nominating candidates at the party level, NEMU’s monitors also reported numerous violations in the filing of nomination papers with returning officers. These included physically preventing candidates from filing their papers,<sup>136</sup> beating and harassing

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<sup>134</sup> Ibid., p. 23.

<sup>135</sup> Ibid.

<sup>136</sup> For example, in Turkana Central, a constituency in the northern part of Rift Valley Province, a DP candidate had his nomination papers physically taken away from him by an administrative policeman, as regular police watched without interfering. The nomination papers were then reportedly given to the occupants of a government Land Rover, which sped off with them. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 51. NEMU monitors not only reported the incident, but also recorded the name of the administrative police officer, as well as the registration numbers of the government vehicle. Despite efforts to charge the officer with an electoral offense, however, the case was prevented from reaching the courts and, instead, the officer was later promoted. Ibid.

opposition candidates,<sup>137</sup> setting up roadblocks, and even kidnapping of candidates or their agents.<sup>138</sup> Moreover, there was a clear pattern to infractions committed. NEMU found that “of all 188 candidates fielded by KANU, none was a victim of nomination violence,” whereas candidates from Kenya’s three main opposition parties (FORD-Asili, FORD-Kenya, and the DP) all were affected, “especially in many areas of the Rift Valley Province, which had constantly been described as a KANU *zone* . . .”<sup>139</sup>

In response to movement and opposition party leaders’ complaints over nomination rule violations, the Electoral Commission initially claimed that it “could do nothing about those candidates who had failed to get nominated due to acts of thuggery and gangsterism.”<sup>140</sup> Again using legal mobilization strategies, and publicizing the Commission’s constitutional mandate to supervise and ensure fairness in the nominating process, movement leaders eventually succeeded in pressuring the Electoral Commission to establish a complaints body and respond to its concerns. As a consequence, returning officers in many parts of the country where problems occurred were ultimately ordered, by the Electoral Commission, to receive and process

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<sup>137</sup> For example, NEMU reports that in Baringo North, a constituency in the central part of Rift Valley Province, agents of another DP candidate were “severely beaten” as they attempted to file their candidate’s nomination papers. Moreover, several days later, arsonists, who were never apprehended, burned the candidate’s home. Ibid.

<sup>138</sup> NEMU also reports the case of a FORD-A candidate who was physically abducted at a police roadblock. Ibid.

<sup>139</sup> Ibid., p. 52. “KANU *zones*” are discussed below.

<sup>140</sup> Ibid.

nomination papers of numerous candidates whose nominating rights had previously been violated.<sup>141</sup>

According to Kenya's electoral code, the country's "official" campaign period begins once nomination papers had been filed with returning officers and these are posted by the Electoral Commission. For Kenya's 1992 elections, however, the campaign period basically began in December 1991, with President Moi's announcement that multipartyism would be allowed in Kenya. It was in the campaign process that KANU, led by Moi and his closest associates, resorted to many of the same intimidation and harassment tactics used by KANU under Kenyatta in preventing mobilization of the Kenya People's Union (KPU), Kenya's opposition party from 1966 - 1969.<sup>142</sup> In so doing, leaders of KANU in 1992 mobilized many of the same former colonial laws revived by KANU in the late 1960s to thwart opposition party mobilization at that time.<sup>143</sup>

In addition to denying opposition parties licenses for rallies, disrupting their meetings and fund-raisers, and failing to provide adequate security to their candidates, as mentioned above, the regime also denied opposition parties access to Kenya's publicly funded state media corporation, the Kenya Broadcasting Corporation (KCB). As NEMU explains, "[t]he impact of this on the elections can only be properly understood when one considers the fact that the KBC radio service covers virtually the

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<sup>141</sup> Ibid., pp. 53 – 54.

<sup>142</sup> See Chapter Three for a detailed discussion of this.

<sup>143</sup> See "Introduction" above and footnote 5. These laws, and their impact on opposition mobilization, are discussed in greater detail in Chapter Six.



entire country. It is depended upon for news and general information by the majority of people, who have no access to TV and the print media; many of [whom] are illiterate . . .”<sup>144</sup> Thus, the power of KBC radio to influence the opinions of many Kenyans, who had little access to other news sources, cannot be underestimated.

In response to the virtual news black out by KBC, and in its effort to promote greater protections for free speech in Kenya, SMOs comprising Kenya’s human rights and democracy movement again engaged in legal mobilization strategies. First, they publicized Kenyan law governing the KBC to expose the illegality of the regime’s actions. Specifically, these groups demanded that the state use the KBC for the purpose that it was purportedly established: “to provide independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and in such other languages as the Corporation may decide.”<sup>145</sup>

Second, they began monitoring KBC broadcasts, recording the exact amount of time allocated to KANU election activities versus opposition parties, as well as the type of coverage provided (positive, negative, direct interviews, commentaries, etc.). They then widely publicized their findings, not only nationally,<sup>146</sup> but also

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<sup>144</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 60.

<sup>145</sup> Republic of Kenya, *Laws of Kenya*, The Kenya Broadcasting (Nationalization) Act No. 12 of 1964 cited in FIDA/ICJ Interim Election Monitoring Report, *The Daily Nation*, 11 November 1992, p. 12, which, in turn, is found in National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Appendix 18, p. 240.

<sup>146</sup> National dissemination of information was conducted primarily through various print media, including two of Kenya’s major newspapers, *The Daily Nation* and *The Standard*, as well as a handful of periodicals, including the *Nairobi Law Monthly*, *Society*, *Finance* and the *Weekly Review*, all of which provided much more equitable coverage of opposition party activities. In addition, however,

internationally. Their strategy was not only to raise awareness of the extent of KANU abuse of publicly funded media in Kenya, but also to alert Kenya's donors to the seriousness of the problem and lobby them to put pressure on the regime to change its ways. Finally, third, using the data they collected from KBC monitoring, SMOs also filed a lawsuit to force the KBC to be impartial, as was required by Kenyan law.

As was the case with numerous legal suits that threatened regime power, the case was ultimately thrown out of court on a technicality.<sup>147</sup> As legal mobilization theorist Michael McCann points out, however, even when suits are dismissed or lost, they can often still serve the purpose of drawing public attention not only to the problem itself, but also the failure of state institutions in addressing the problem.<sup>148</sup> The consequent effect can often be that of greater mobilization of individuals and groups in support of the cause, as they are made more aware of the extent of the problem. Although in the Kenyan case, this mobilization came too late to make a significant impact on the 1992 elections, ultimately the movement did succeed in forcing the regime to allow greater, and more impartial, media coverage to opposition

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some of this information was simply conveyed word-of-mouth through movement organizations, and their educational outreach programs. In this case, the SMOs' close association with the NCCK and Kenya's Catholic Church, and the access they provided to Kenya's rural areas, once again proved invaluable

<sup>147</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, p. 59.

<sup>148</sup> Michael McCann, "Social Movements and the Mobilization of Law," in Anne N. Costain and Andrew S. McFarland, eds., *Social Movements and American Political Institutions*, Lanham, MD: Rowman and Littlefield Publishers, Inc., 1998.

political parties.<sup>149</sup> As will be seen in Chapters Six, this experience and precedent was then built upon in the 1997 elections, with more promising, albeit still not entirely equitable, results.

In the areas of poll-watching and count certification, NEMU ultimately directly recruited and trained approximately 5000 Kenyans, who, in turn, were dispatched to “virtually all constituencies in the country . . .”<sup>150</sup> Moreover, it is estimated that Kenya’s Catholic Secretariat recruited and trained another 2500 poll-watchers, for a total of approximately 7500 trained observers on polling day.<sup>151</sup> Many of these poll-watchers were participants in Kenya’s human rights and democracy movement, although numerous others were recruited from rural communities that had not yet had much contact with movement activities. As a consequence of this significant presence of domestic monitors, most observers agreed that Kenya witnessed its most “free and fair” election day in its post-independence history.<sup>152</sup> This is not to say that most

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<sup>149</sup> It was only toward the beginning of December that opposition parties began to get access to KBC radio –three weeks prior to the December 29<sup>th</sup> elections.

<sup>150</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. 116 – 117.

<sup>151</sup> *Ibid.*

<sup>152</sup> It should be noted that international groups, and donor states, also played an important role in pressuring the Moi regime to convene reasonably fair elections. The embassies of donor countries, and in particular, the Canadian, German and United States embassies, directly negotiated with and pressured Chesoni and his Electoral Commission to follow recognized international standards. Several international human rights groups, including the International Human Rights Law Group, based in Washington D.C., also sent experts to examine the electoral environment prior to elections. Amnesty International, Human Rights Watch and the RFK Center for Human Rights also closely monitored Kenya’s electoral environment. Although some of their work is referred to in this chapter, most of their detailed reports were published after the elections and so are discussed in Chapter Six. The main international monitors of Kenya’s elections were: (1) the International Republican Institute (IRI), an affiliate of the Republican Party in the U.S., which supplied 54 monitors; (2) the Commonwealth monitoring team, which sent 38 monitors, the largest delegation set to any election it had thus far monitored; and (3) a number of small groups of observers from various countries and organizations,

agreed that the election *process* itself was free and fair. As NEMU and all other SMOs concluded, the election process itself was fundamentally flawed; most election violations occurred in the earlier stages of campaigning, voter registration and candidate nominations, however. On election day itself, given the impressive presence of domestic and international monitors, and the fact that the regime knew that international attention was focused on them, electoral infractions were kept to a minimum.

Finally, in addition to monitoring polling stations, NEMU-trained pollwatchers were also required to fill out detailed reports (standard checklists) on their observations.<sup>153</sup> This information, together with information submitted by other election monitors, was then used to compile an extensive analysis of Kenya's 1992 elections.<sup>154</sup> This analysis was made public and copies were sent to the Electoral Commission and the Office of the President. This marked the first time in Kenya's post-independence history that an independent (nongovernmental) domestic election monitoring association critiqued and publicized regime conduct during the election

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such as Sweden, Japan, the EC, Egypt, AFL-CIO, ICJ, in addition to four staff from the United Nations Electoral Assistance Unit, to coordinate the activities of the multiple external monitoring groups in Kenya. See Throup and Hornsby for a very insightful discussion of the role of international monitors in Kenya's 1992 elections: David W. Throup and Charles Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, Oxford: James Currey Ltd, 1998, pp. 266 – 275. Although these groups played an important role in promoting free and fair elections in Kenya, many were not sufficiently familiar with Kenyan politics or geography to monitor as effectively as domestic groups; moreover, many groups arrived just prior to elections, thus failing to witness the numerous regime abuses documented by domestic groups during the extended electoral process.

<sup>153</sup> National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, Kenya: NEMU, 1993.

<sup>154</sup> The Ford Foundation provided the funding for NEMU's preparation and writing of their final report. *Ibid*, p. viii.

process. Moreover, by compiling a detailed analysis of its findings, NEMU laid the foundations for institutionalizing its work and experience for future multiparty elections in Kenya, as is examined in Chapters Six and Seven.

### **Countermovement Mobilization, Majimboism and Political Violence:**

#### Countermovement Emergence and Demands:

Despite these advances in democratization, albeit incremental, during this same period, Kenya witnessed its worst episode of political violence in its post-independence history. Most of this violence was concentrated in Rift Valley Province, Kenya's largest province, stretching from the Sudanese and Ugandan borders in the north and west, and to the Tanzanian border in the south.<sup>155</sup> Rift Valley Province constitutes approximately 30 percent of Kenya's total land area and is comprised of fourteen districts: 1. Turkana; 2. West Pokot; 3. Samburu; 4. Trans Nzoia; 5. Elgeyo Marakwet; 6. Uasin Gishu; 7. Baringo; 8. Laikipia; 9. Nandi; 10. Kericho; 11. Nakuru; 12. Bomet; 13. Narok and 14. Kajiado.<sup>156</sup> Of these fourteen districts, seven were seriously impacted by the violence, all of which included important swing constituencies for KANU: (1) Trans Nzoia; (2) Uasin Gishu; (3) Nandi; (4) Kericho; (5) Nakuru; (6) Narok and (7) West Pokot. In addition, constituencies in neighboring

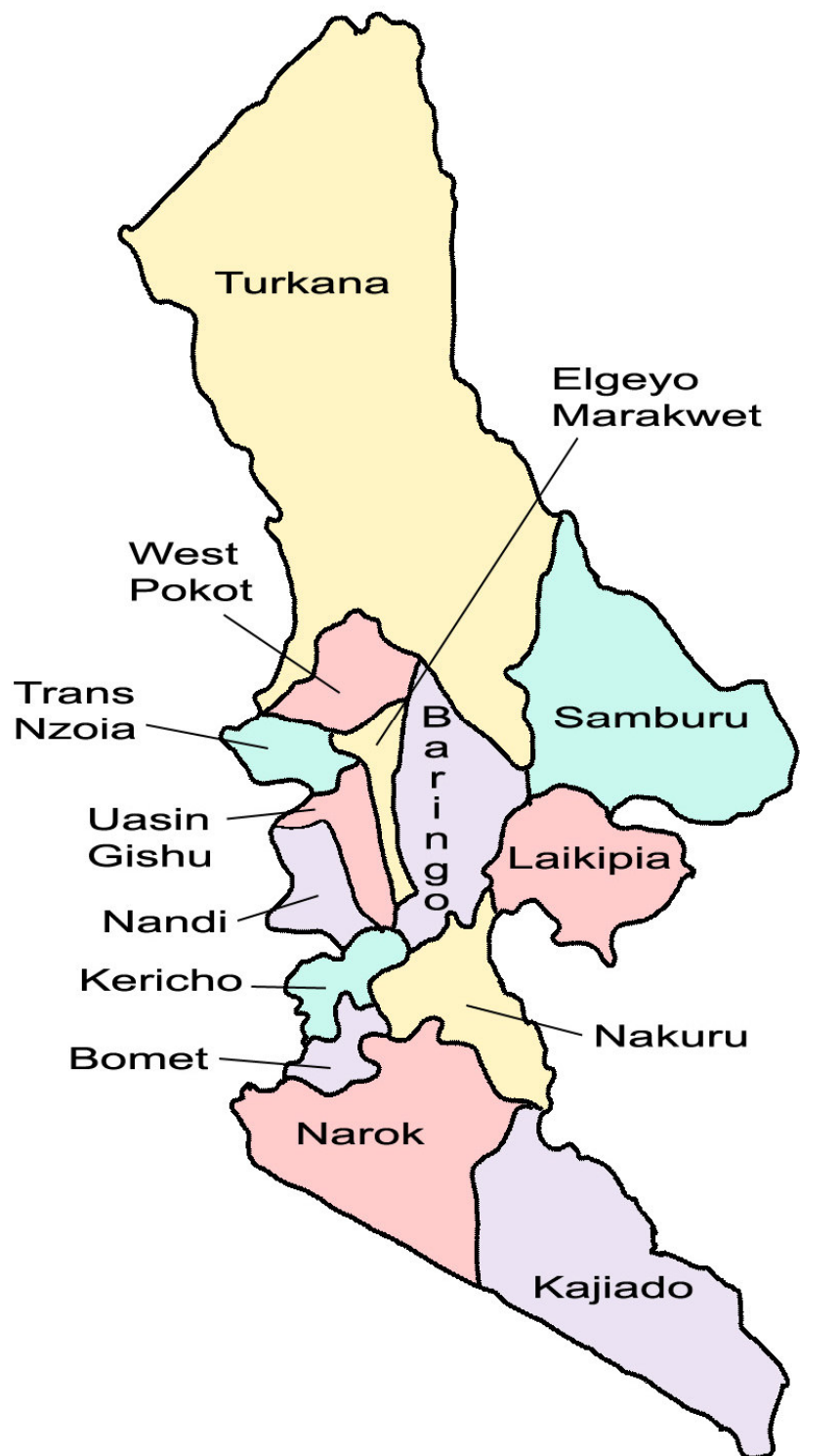
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<sup>155</sup> See Map 5.1.

<sup>156</sup> See Map 5.2.

**Map 5.1: Provincial Map of Kenya**

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[www.ke.undp.org/GEF-SGP](http://www.ke.undp.org/GEF-SGP)

**Map 5.2: District Map of Rift Valley Province**

parts of Western and Nyanza provinces, which were also important KANU swing districts, were also affected by the violence.

Much of Rift Valley Province is situated on a high volcanic plateau, and the rich volcanic soil and relatively cool climate has made the province one of Kenya's most fertile and agriculturally productive.<sup>157</sup> The province is considered the "traditional"/pre-colonial homeland of the Kalenjin, Maasai, Turkana and Samburu tribal groups. Together, these groups are often referred to by their acronym, KAMATUSA, and they formed the core of the Moi regime's ruling coalition. The largest of these tribes, the Kalenjin, President Moi's tribe, comprise approximately 12 percent of Kenya's total population, and they lay claim to the largest, and most fertile, part of Rift Valley.<sup>158</sup>

The Maasai, Samburu and Turkana tribes are much smaller<sup>159</sup> and, thus, their land claims are also smaller. The Maasai originally resided primarily in the southern part of Rift Province, and the Turkana and Samburu "homelands" coincide roughly with the contemporary districts of Turkana and Samburu.<sup>160</sup> These districts are Rift Valley's least fertile and the northern part of the province, especially, is mostly desert. Given the degree of soil fertility in most of the province, as well as its agreeable

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<sup>157</sup> As discussed in Chapter Three, Central Province, where most of Kenya's Kikuyu population lives is also an extremely fertile province.

<sup>158</sup> A recent ethnography for Kenya can be found at: <http://www.christusrex.org/www1/pater/ethno/Keny.html>. It is based on data from the late 1980s through 1990s,

<sup>159</sup> The Maasai comprise approximately 1.8 percent of the population, the Samburu approximately .5 percent, and the Turkana approximately 1.3 percent. Ibid.

<sup>160</sup> See Map 5.2.



climate, however, a large number of British colonialists settled in Rift Valley during the colonial period and the area became known as “the White Highlands” at this time<sup>161</sup> It was also at this time that a significant number of Kikuyu and Luo, as well as some Luhyas,<sup>162</sup> were forcibly moved to the province to work as laborers on large farms established by the British.

In the post-colonial period, and especially during Kenya’s first independent regime, the Kenyatta regime (1963 – 1978), numerous Kikuyu and Luo also purchased land and established farms in Rift Province. Although Kenya’s independence Constitution strictly protected the property rights of former British colonialists, many British ex-patriots chose to return to Britain at independence because they feared retaliatory violence and discrimination by Kenya’s newly independent regime. As a consequence, large former colonial farms in the Rift Valley were put up for sale at this time. Since few Kenyans had the money to buy this land, Kenyatta’s government, in an ironic, and profoundly unjust, twist of historical fate, purchased the land by borrowing money from the British government, thus beginning Kenya’s long history

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<sup>161</sup> Because much of Rift Province is a high altitude plateau, with elevations rising to 9000 feet, the climate is pleasantly cool, and much less humid than other parts of Kenya.

<sup>162</sup> The Kikuyu currently comprise approximately 22 percent of Kenya’s total population, the Luo approximately 13 percent, and the Luhya approximately 14 percent. <http://www.cai.gov/cia/publications/factbook/geos/ke.html#People> It should be noted, however, that at least sixteen different subtribes comprise the Luhya group, and they have never mobilized politically as a cohesive unit. For a discussion of the settlement of these groups in Rift Valley Province during Kenya’s colonial period see: Mutahi Ngunyi, “Resuscitating the *Majimbo* Project: The Politics of Deconstructing the Unitary State in Kenya, in Adebayo O. Olukoshi and Liisa Laakso, eds. *Challenges to the Nation-State in Africa*, Uppsala: Nordiska Afrikainstitutet with The Institute of Development Studies, University of Helsinki, 1995, pp. 190 – 194, and Gibson Kamau Kuria, “Majimboism, Ethnic Cleansing and Constitutionalism in Kenya,” *Thoughts on Democracy Series [Issue 1]*, Nairobi, Kenya: Kenya Human Rights Commission, p. 9.

of foreign indebtedness. Newly established Kenyan crediting agencies then made relatively low interest land loans available to Kenyans to purchase the land.

In part because the Kikuyu and Luo had greater access to wage labor during the colonial period,<sup>163</sup> and in part because of the ethnic patronage of the Kenyatta (Kikuyu) regime, a disproportionate amount of this land went to Kikuyus and, to a somewhat lesser extent, Luos.<sup>164</sup> “Land cooperatives” also emerged at this time. These were very large farms jointly purchased by members of multiple ethnic groups, including Kalenjin and Maasai, as well as Kikuyu, Luo, Luhya and others. The fact that Kikuyus and Luos were in a favored position to acquire land in Rift Province in the immediate post-independence period, gave rise to resentment among some Kalenjin and Maasai, in particular, who continued to regard the area as their “traditional” homeland. Until late 1991, this resentment never manifested itself violently, however.

On the evening of October 29, 1991, on Meteitei Farm, a land cooperative jointly owned by 310 Kalenjin and 280 non-Kalenjin (predominately Kikuyu, Luo, Luhya and Kisii) in Nandi District of Rift Valley Province, a dispute arose in which Kalenjin farmers claimed sole ownership of the land and, with the apparent assistance of local provincial administrators and KANU politicians, began violently evicting and

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<sup>163</sup> This is discussed in Chapter Three.

<sup>164</sup> As discussed in Chapter Three, the Kikuyu and Luo were the dominant tribes in the original KANU coalition at independence, Kenyatta’s party.

burning the homes of non-Kalenjins.<sup>165</sup> From Meteitei Farm, this violence spread quickly to other parts of Nandi District and from there, to neighboring Kericho and Kisumu districts. Within two months, the fighting had engulfed Kakamega District, which borders Nandi and Kisumu districts, and by February and March of 1992 it had circled back to Kericho and Nandi, with new violence emerging in West Pokot and Trans Nzoia districts, just north of Kakamega and Nandi. By April 1992, violence also broke out in Bungoma District, to the north and west of Nandi, and in Nakuru District, to the south and east of Nandi. This widespread violence continued throughout the remainder of 1992, escalating just prior to Kenya's December 29<sup>th</sup> elections, especially in Uasin Gishu District, near Rift Valley's major commercial center of Eldoret.<sup>166</sup>

Between October 29, 1991 and September 5, 1992, when a special parliamentary committee investigating the violence issued its final report, it was estimated that 779 Kenyans had been killed, 654 seriously injured and approximately 54,000 families displaced.<sup>167</sup> The parliamentary committee was formed in May 1992,

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<sup>165</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, Nairobi, Kenya: Government Printer, 1992, pp. 43 – 44. (This report is also known as the “Kiliku Report” – named after the chair of the committee, Joseph K. Kiliku, MP.) See also Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 612.

<sup>166</sup> This account of the violence is based on analyses produced by Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, September 1992 and Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, New York: Human Rights Watch, November 1993.

<sup>167</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 78.

despite the Moi regime's resistance,<sup>168</sup> and was comprised entirely of KANU members of Kenya's 1988 parliament. Despite its composition, the committee's final report included strong evidence that implicated senior cabinet ministers and high-ranking members of KANU. Most movement sources insisted that it underestimated the extent of the violence and the numbers killed, injured and displaced, however. Moreover, the committee's investigation concluded on September 5<sup>th</sup>, 1992, four months prior to Kenya's December 29<sup>th</sup> elections, when the violence escalated.<sup>169</sup> For example, in the Uasin Gishu attacks alone, which occurred in the beginning of December 1992, a local Catholic Church reported that approximately 15,000 Kenyans had taken refuge within its compound.<sup>170</sup> At the behest of local movement leaders and activists, Human Rights Watch also conducted an investigation into the violence and reported that, by the end of 1993, at least 1500 Kenyans had been killed and 300,000 displaced.<sup>171</sup> The

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<sup>168</sup> Speaker of Parliament, Jonathan Ng'eno, blocked discussion of the clashes four times in Parliament. It was only after several MPs threatened to organize a mass walkout that he finally relented and allowed the formation of a Select Committee. "The Clashes Report," *Weekly Review*, September 25, 1992, p. 3. Cited in Africa Watch, *Divide and Rule; State-Sponsored Ethnic Violence in Kenya*, p. 29.

<sup>169</sup> It should also be noted here that the parliament ultimately rejected the Select Parliamentary Committee's report. On October 14, 1992, a majority in parliament, including three members of the Select Parliamentary Committee, who had previously signed and endorsed the report, voted against it. National Election Monitoring Unit, *Courting Disaster*, Nairobi, Kenya: NEMU, April 29, 1993, p. 8. Cited in Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, p. 31.

<sup>170</sup> Africa Watch, *Divide and Rule; State-Sponsored Ethnic Violence in Kenya*, p. 26.

<sup>171</sup> *Ibid.*, p. 1. Human Rights Watch's investigative team visited Kenya during June and July of 1993, and their report was published in November of 1993.

violence subsided shortly after this, only to emerge again just prior to the 1997 elections.<sup>172</sup>

Drawing on evidence from the Kenyan case, as well as theoretical insights from social movements and electoral systems theories, it is argued here that two variables are important to explaining the political violence witnessed during this period: (1) successful framing strategies by *countermovement* leaders in Kenya, and (2) institutional incentives generated by Kenya's majoritarian electoral system. "Countermovements" are defined by social movement theorists simply as those movements that "make contrary claims simultaneously to those of the original movement."<sup>173</sup> Thus, unlike civil society approaches, which tend to focus exclusively on "civil" associations, and tend not to examine the emergence of "uncivil associations," and democratic transitions approaches, which predict that civil society forces will "dissolve" once founding elections are announced, social movements theory anticipates the emergence of countermovements in response to the emergence of any social movement that gains significant socio-political force, and provides theoretical resources for better understanding the sources of ensuing conflicts.

In the Kenyan case, the central demands of this regime-supported countermovement became known at a series of five mass rallies held over a six week period from September 8 to October 17, 1991, at the same time that Kenya's human

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<sup>172</sup> It should be noted that sporadic violence continued throughout this inter-election period. See Amnesty International, "Kenya," *Amnesty International Report(s) 1994 -1997*, New York: Amnesty International, 1994 – 1997.

<sup>173</sup> Meyer and Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity," *American Journal of Sociology*, v. 101, no. 6, May 1996, p. 1631.

rights and democracy movement was gaining significant national and international support.<sup>174</sup> These rallies were attended by senior cabinet ministers, senior KANU leaders, MPs and “major politicians of the relevant ethnic group in the host region.”<sup>175</sup> The first two rallies were held at Kapsabet and Kapkatet towns, both in heart of “Kalenjinland” in Rift Valley Province, and the following three were held in the home provinces of three dominant KANU politicians, all of whom were close associates of President Moi’s: (1) Narok, located in “Maasailand” (Rift Valley Province); (2) Machakos, in “Kambaland” (Eastern Province); and (3) Mombasa, multi-ethnic, but from the perspective of countermovement leaders, a “native” Mijikenda area (Coast Province).<sup>176</sup>

In response to reform movement demands for multipartyism and constitutional reform, countermovement leaders insisted that “the only constitutional reform needed is a small one: it is the introduction of *majimboism*”<sup>177</sup> --harkening back to the contentious constitutional debates between KANU and KADU at independence. In the words of Dr. Joseph arap Misoi, one of the featured speakers at the first countermovement rally on September 8, and the KANU MP for Eldoret South in Rift

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<sup>174</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 609. See also: Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 8.

<sup>175</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p.609. The Kiliku Report also names senior KANU officials present at each of these rallies. Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, 1992.

<sup>176</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p.609.

<sup>177</sup> This statement was made by William Ntimama, close associate of President Moi’s, senior cabinet minister, countermovement leader and member of the Maasai tribe. Cited in *ibid.*, p. 611.

Valley, the demand for *majimboism* was to “silence . . . multiparty advocates who [are] against the government or President Moi.”<sup>178</sup> Thus, in the framing of countermovement leaders, Kenya’s reform movement was fundamentally an “anti-KANU” and “anti-Moi” movement and, thus, by implication in Kenya’s ethno-political context, “anti-Kalenjin” and its ruling ethnic minority coalition. It then followed from this, in countermovement logic and framing, that the movement’s reform agenda was nothing more than a thinly veiled attempt by Kenya’s larger ethnic groups, specifically the Kikuyu and Luo, to seize political and economic power, to the exclusion of Kenya’s ethnic minorities. As demands for multipartyism began to escalate in the last quarter of 1991, therefore, countermovement leaders insisted that the only way smaller ethnic groups could protect themselves (politically and economically) was to demand the implementation of *majimboism*, or “regionalism.”

The way in which countermovement leaders framed *majimboism* in the early 1990s gave it a very different meaning from the *majimboism* of the early 1960s, however.<sup>179</sup> As was seen in Chapter Three, at Kenya’s independence, it was recognized that *majimbos*, or regions, would be multiethnic, although one or more tribes might predominate in certain regions; existing property rights were to be strictly enforced and there was to be no forcible movement of peoples. In its contemporary reincarnation, however, countermovement leaders framed *majimboism* as a demand to enforce *pre-colonial* “indigenous” land rights in order to re-establish ethnically

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<sup>178</sup> Cited in Kuria, “Majimboism, Ethnic Cleansing and Constitutionalism in Kenya,” p. 8.

<sup>179</sup> See Chapter Three for a discussion of this.

*homogenous* homelands. This meant the expulsion, by force if necessary, of those “non-indigenous” groups, the *madoadoa* (spots) or *kwekwe* (blemishes), primarily Kikuyu and Luos, who had settled there and “contaminated” these ancestral lands.<sup>180</sup>

For example, at the first countermovement rally, MP arap Misoi, a Kalenjin, declared: “Once we introduce *majimbo* in the Rift Valley, all outsiders will have to move and leave the same to our children.”<sup>181</sup> Other speakers at this and subsequent countermovement rallies also framed their discussions of *majimboism* in terms of expelling “outsiders” from their respective regions. At the end of the first rally, it was resolved that “action would be taken against multi-party proponents; that they [the countermovement] would fight using all means at their disposal to protect the government and the ruling party KANU; and that they would ‘ban’ [multi-party advocates] from setting foot in Rift Valley Province.”<sup>182</sup>

At the second rally, held on September 21, 1991 in Kapkatet, also in Rift Province, attending MPs and senior KANU politicians also resolved to “ban multi-party advocates from setting foot in Rift Valley Province” and they called, in particular, for the proscription of the Law Society of Kenya.<sup>183</sup> At the same rally, one

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<sup>180</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 610. See also: Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, 1992.

<sup>181</sup> Cited in Kuria, “Majimboism, Ethnic Cleansing and Constitutionalism in Kenya,” p. 8.

<sup>182</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 9. Africa Watch, *Divide and Rule; State-Sponsored Ethnic Violence in Kenya*, p. 14.

<sup>183</sup> *Ibid.* As is discussed in Chapter Four, the Law Society of Kenya (LSK) was one of the dominant reform movement leaders at the time.



of President Moi's closest associates and senior cabinet minister, Nicholas Biwott, warned that multiparty advocates would be "crushed" and that "KANU youth wingers would be ready to fight to the last person to protect the Moi government."<sup>184</sup> Another cabinet minister, Timothy Mibei, called for *wananchi*<sup>185</sup> to "crush government critics and later make reports to the police that they had finished them."<sup>186</sup> Assistant Minister Willy Kamuren declared that "the Kalenjin were read to protect the government using any weapons at their disposal,"<sup>187</sup> and MP Paul Chepkok backed up these statements by urging "wananchi to arm themselves with pangas, rungas, bows and arrows" to destroy multiparty advocates "on sight."<sup>188</sup>

With regard to how this impacted campaigning for both the 1992 and 1997 elections, certain electorally strategic areas of Rift Province were declared "KANU zones," and as Stephen Ndegwa reports, "[i]n those areas, advocates of multiparty democracy and opposition politicians were banned from campaigning, and nonnative residents were cautioned against voting for opposition politicians."<sup>189</sup> Since Rift Valley Province, through extensive gerrymandering and malapportionment by the Moi regime, was allocated the largest number of parliamentary seats of any province in

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<sup>184</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, pp. 9 – 10. Africa Watch, *Divide and Rule; State-Sponsored Ethnic Violence in Kenya*, p. 14.

<sup>185</sup> *Wanachi* is the Kiswahili word meaning "the people" or citizens.

<sup>186</sup> Minister Timothy Mibei, cited in Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 10.

<sup>187</sup> Assistant Minister Willy Kamuren, cited in *ibid.*

<sup>188</sup> Paul Chepkok, cited in *ibid.*

<sup>189</sup> Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," p. 610.

Kenya,<sup>190</sup> this transformation of landownership in the province had significant political implications for both the 1992 and 1997 elections, as is discussed in greater depth below.

Countermovement Framing:

In Chapters Two and Four it was argued that in order for movement framing strategies to be successful, they, in general, need to accomplish four main “tasks.” They need to: (1) identify some aspect(s) of social and political life as problematic and/or unjust, or “diagnostic framing”; (2) attribute responsibility for this injustice to some identifiable individual, or set of individuals, or “attributional framing”; (3) propose a solution/specifying what needs to be done, or “prognostic framing”; and (4) motivate or persuade others of the efficacy of collective action in rectifying this injustice, “motivational framing.”<sup>191</sup> This section demonstrates why and how Kenya’s countermovement leaders largely achieved these four key tasks in late 1991.

In countermovement framing, Kenya’s smaller ethnic groups, and specifically the Kalenjin, Maasai, Mijikenda, Turkana and Samburu, had been largely excluded from political and economic power during Kenya’s first post-independence regime (1963 – 1978) and, as a consequence, land rights and access to state resources,

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<sup>190</sup> Forty-four of 188 parliamentary seats were allocated to Rift Valley Province in the 1992 elections. Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, p. 80.

<sup>191</sup> This list draws from David A. Snow and Robert D. Benford, “Ideology, Frame Resonance, and Participant Mobilization,” *International Social Movement Research*, vol. 1, pp. 197-217; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; and Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

including development funds, educational opportunities, jobs, etc., which were “rightfully” theirs, had been “wrongly” denied (*diagnostic framing*). This, they argued, was because the Kikuyu and Luo, Kenya’s largest ethnic groups, dominated the Kenyatta regime and received disproportionate access to the “fruits of *uhuru* [independence],” and especially to land (*attributional framing*).

Although these political and economic inequalities had begun to be addressed by Kenya’s second independence regime, the Moi regime, with the advent of multiparty politics, and the presumption of ethnic voting, they argued that these gains would be lost and continuing inequalities exacerbated. Thus, the only way to prevent this from happening, countermovement leaders insisted, was to introduce a form of *majimboism* that would finally, and permanently, redistribute ancestral lands back to their “rightful” owners, and then devolve political and economic power to these newly established *majimbo*s (*prognostic framing*). Finally, countermovement leaders managed to persuade others of the efficacy of collective action in achieving this end through making appeals to ethnic nationalism, not only through organized mass rallies, but also via its monopoly of Kenya’s only national news service, the Kenya Broadcasting Corporation (KBC) (*motivational framing*).

For example, William ole Ntimama, a senior cabinet minister, close associate of President Moi’s, and convener of the countermovement’s third major rally in Maasailand, framed his support of *majimboism* in the following way: “so that the Maasai, who were pushed out by the white man from their ancestral lands in Rift Valley, and marginalized by President Kenyatta, who made sure that it was the

Kikuyus alone who replaced the white man in the rich agricultural lands of Rift Valley, do not face extermination and extinction.”<sup>192</sup> He further explained:

Most of the pastoralists<sup>193</sup> of Kenya [have been] left behind and marginalized [and] are now feeling that people are coming to occupy their land and eat all their resources and squander all their wealth while they look on helplessly. They feel it is time for their rights to be established.<sup>194</sup>

Thus, like leaders of Kenya’s reform movement, countermovement leaders also invoked the language of rights. In this case, however, “rights” were mobilized to justify the reclamation of ancestral lands from “outsiders,” who currently and “wrongfully,” from an historical perspective, occupied these lands. As Ntimama insisted: “If people feel oppressed and suppressed, they’ll wake up and fight for their rights.”<sup>195</sup>

Shariff Nassir, another senior cabinet minister, a Mijikenda, and convener of the countermovement’s fifth major rally in Mombasa, echoed these sentiments on October 17, 1991:

When I discovered that the residents of Coast Province only owned a third of the areas’ resources, I realized that we must opt for *majimbo*. I have realized that my people are getting phased out. We have been eclipsed . . . the coastal people are not being allowed to benefit from

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<sup>192</sup> *The Economic Review*, July 11- 17, 1994, “William ole Ntimama Interview,” p. 11. Cited in Kiraitu Murungi, “The Majimbo Debate,” in Kenya Human Rights Commission, *Ethnicity and Multipartyism*, Nairobi, Kenya: Kenya Human Rights Commission, February 1995, p. 18.

<sup>193</sup> Historically, the Maasai, Kalenjin, Turkana and Samburu were all pastoralists, whereas the Kikuyu and Luos were agriculturalists.

<sup>194</sup> *The Economic Review*, July 11- 17, 1994, “William ole Ntimama Interview,” p. 11. Cited in Murungi, “The Majimbo Debate,” p. 18.

<sup>195</sup> *Ibid.*

resources. Upcountry people<sup>196</sup> have grabbed every inch of the resources we have. *Majimbo* will ensure that people have an equal share of the national cake.<sup>197</sup>

Although no violence was witnessed in Coast Province during this period, this is where the majority of violence erupted just prior to the 1997 elections, as is discussed in Chapter Six.

Finally, another senior cabinet minister in the Moi regime, and major proponent of *majimbosim*, Peter Okondo, argued:

[*Majimboism*'s] tenets are that to safeguard democracy it is necessary to decentralize political power. The only units on which to devolve the power which are strong enough to wield effective checks and balances are ethnic groups if recognized as constituent states and empowered to do so . . . By harnessing the already existing groups as states with their current territorial areas as constituent units, effective protections can be provided against dictatorship in the land . . . Ethnicity is so pure, so natural and neutral that it is obviously a God-given attribute, waiting only to be correctly used for the national good.<sup>198</sup>

These calls for the establishment of ethnically homogenous *majimbos* were then further supported by financial inducements made available by senior KANU

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<sup>196</sup> Here Nassir refers primarily to Kikuyus and Luos, who indeed did acquire a disproportionate share of coastal lands under the Kenyatta regime, because of their greater access to wage labor during the colonial period, as well as ethnic patronage of the Kenyatta (Kikuyu) regime. As is discussed in Chapter Three, the Kikuyu and Luo were the major ethnic groups comprising the original KANU coalition at independence.

<sup>197</sup> Shariff Nassir, *The Sunday Nation*, July 24, 1994, p. 16. Cited in Murungi, "The Majimbo Debate," p. 17.

<sup>198</sup> Peter Okondo, "The Strength of Majimboism," *The Economic Review*, December 6 – 12, 1993, p. 11. Cited in Kuria, *Majimboism, Ethnic Cleansing and Constitutionalism in Kenya*, p. 7.

politicians to Kalenjin and Maasai “youth warriors.”<sup>199</sup> Specifically, the special parliamentary committee investigating the violence found that “the fighters were on hire and were paid sums ranging from Kshs. 500 [U.S. \$6.50] for safe return from the clash front, Kshs. 1000 to Kshs. 2000 [U.S. \$13.00 - \$26.00] for killing one persons or burning a grass thatched house and Kshs 10,000 [U.S. \$130.00] per permanent house burnt.”<sup>200</sup> In addition, the report also recorded license plate numbers of vehicles used to transport “warriors” to and from clash sites. In almost all cases, these vehicles were then traced to senior KANU politicians and/or local provincial administrators.<sup>201</sup>

Although there were some retaliatory attacks against Kalenjin and Maasai, all three major investigations into the causes and conditions of Kenya’s political violence in 1991 and 1992 reported that the vast majority of attacks were instigated by Kalenjin and Maasai “warriors” and were directed against Kikuyu, Luo, Luhya and Kisii groups.<sup>202</sup> As the Human Rights Watch investigation finds:

Reports emerging from the clash areas were remarkably similar. In most cases, hundreds of Kalenjin ‘warriors’ . . . would attack farms, targeting non-Kalenjin houses. The attackers were often identically dressed in an informal uniform of shorts and tee-shirts (sometimes red, sometimes black) and always with traditional [Kalenjin] bows and arrows as well as *pangas* (machetes). Sometimes, the warriors would

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<sup>199</sup> The Kiliku Report finds that the KANU-hired “warriors” ranged in age from 12 to 30 years. Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 81.

<sup>200</sup> *Ibid.*, p. 75.

<sup>201</sup> *Ibid.*, pp. 73 – 77.

<sup>202</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*; Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*; and National Council of Churches of Kenya, *The Cursed Arrow: A Report on Organized Violence against Democracy in Kenya*, Nairobi, Kenya: NCKK, April 1992.

have their faces marked in the traditional manner with clay. The warriors would loot, kill, and burn houses, leaving death and destruction in their wake.<sup>203</sup>

Moreover, all three reports also found that the warriors were often assisted by local provincial administrators, who were “either inactive, facilitated in creating an atmosphere pliable to the sparking of the clashes, or did not act as expected.”<sup>204</sup> In addition, evidence of regime complicity became apparent as witnesses reported that “on most occasions the ‘warriors’ apprehended by *wananchi* and handed over to the security personnel were always let free, only to return to the clash front . . .”<sup>205</sup>

In the face of growing evidence of regime complicity in the violence,<sup>206</sup> Kenya’s human rights and democracy movement, once again, mobilized Kenyan constitutional and international human rights law to expose and publicize regime abuses, as well as to mobilize national and international pressure to condemn the regime. As discussed above, with growing professionalism, an emergent group of domestically based SMOs carefully documented, published and publicized regime involvement in the violence. As was the case prior to Kenya’s political opening in December 1991, they framed their demands in terms of state protection of Kenyans’ human and democratic rights. In addition, they also mobilized their international

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<sup>203</sup> Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, p. 19.

<sup>204</sup> Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, p. 68.

<sup>205</sup> *Ibid.*, p. 72.

<sup>206</sup> In addition to evidence directly implicating the regime, as movement leaders argued, the regime failed to stop the violence, and did not apprehend and/or prosecute instigators.

support networks, which then condemned the Kenyan state's violation of its international legal obligations under international human rights law.

Specifically, Human Rights Watch cited Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which “guarantees every human being the inherent right to life and states that ‘[t]his rights shall be protected by law. No one shall be arbitrarily deprived of his life.’”<sup>207</sup> Engaging in legal mobilization tactics, Human Rights Watch stated emphatically that “Kenya has ratified [this] International Covenant and has a legal obligation to guarantee this right.”<sup>208</sup> Human Rights Watch also drew attention to the Kenyan state's violation of Article 26 of the ICCPR, which requires states party to “prosecute serious violations of physical integrity under international law.”<sup>209</sup>

As a consequence, donor states also condemned the violence, continued to withhold aid to Kenya, and sustained their financial and technical support of SMOs reporting on state abuses, engaging in civic and voter education outreach programs and monitoring electoral conditions. Although, as mentioned above, the violence continued throughout the 1992 election period, and immediately afterwards –primarily in communities that had voted for the opposition-- regime legitimacy, both nationally and internationally, continued to be undermined throughout this period, largely due to movement efforts to expose contradictions in regime rhetoric and practice.

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<sup>207</sup> Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, p. 43.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid, pp. 43 – 44.



Majoritarian Electoral Systems and Political Violence:

In addition to the successful framing strategies of countermovement leaders, a second variable that importantly contributed to Kenya's political violence leading up to and following the December 1992 elections was its majoritarian electoral system. Specifically, as is demonstrated below, the form that Kenya's countermovement took, and the claims its leaders made, were largely shaped by institutional incentives created by this electoral system. As was discussed in Chapter Three, the most typical form of majoritarian electoral system is the single-member district plurality system, which Kenya adopted at independence. In addition to producing predominantly two-party systems and over-representing large parties, this form of majoritarian electoral system also lends itself to partisan gerrymandering and malapportionment, especially if national electoral commissions are not politically independent, was the case in Kenya since early in the Kenyatta regime.<sup>210</sup>

In the Kenyan case, its last redistricting prior to the 1992 elections, and its first since 1966,<sup>211</sup> was undertaken in 1987 under the supervision of the regime-biased Electoral Commission.<sup>212</sup> At this time, thirty new districts were created, bringing Kenya's total number of parliamentary constituencies from 158 to 188. Ostensibly, the new constituencies were to adjust for demographic shifts such that "[a]ll

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<sup>210</sup> See Chapter Three for a discussion of specific constitutional amendments that led to the demise of Kenya's Electoral Commission's independence.

<sup>211</sup> The redistricting undertaken in 1966 was to absorb Kenya's 41-seat Senate into its House of Representatives to form a unicameral parliament. See Chapter Three for discussion of this.

<sup>212</sup> All members were appointed by President Moi without any formal institutional check.

constituencies shall contain as nearly equal numbers of inhabitants as appears to the [Electoral] Commission to be reasonably practicable,” as required by Kenyan Constitutional law.<sup>213</sup> In fact, however, all thirty new seats were created in rural constituencies that had experienced little, if any, population growth, but had proven themselves to be “Moi-loyalist.”<sup>214</sup> The fact that Kenya’s Electoral Commission had no intention to fulfill its constitutional mandate was also made apparent by the fact that neither Nairobi nor Mombasa, Kenya’s two largest metropolitan centers, were allocated new seats. In fact, neither of these cities had been allocated new seats since independence, despite the fact that the populations of both cities had nearly doubled during this time.<sup>215</sup>

Thus, as Fox concludes, “[i]f the 1987 delimitation was a serious attempt to achieve equity as regards the size of the population in each constituency –at least as revealed in the number of *registered voters*-- . . . it was a considerable failure.”<sup>216</sup> The

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<sup>213</sup> Republic of Kenya, *The Constitution of Kenya*, 1992, Chapter.III, Section 42 (3).

<sup>214</sup> Fox, “Bleak Future for Multi-Party Elections in Kenya,” pp. 600 – 601. It should be mentioned that Kenya was still a one-party state at this time (1987), so regime gerrymandering was focused on increasing the influence of “Moi-loyalist” areas of the country.

<sup>215</sup> Based on Kenya’s 1969 and 1989 official population census, Fox reports Nairobi’s population growth as 509,286 in 1969 to 1,324,570 in 1989 and Mombasa’s as 247,073 in 1969 to 461,753 in 1989. Fox, “Bleak Future for Multi-Party Elections in Kenya,” pp. 601 and 602. In general, Kenya’s urban populations tended to be more critical of the repressiveness of both the Kenyatta and Moi regimes, since they had greater access to multiple sources of information than did rural Kenyans. As mentioned above, rural Kenyans depended primarily on the state-controlled radio service, the Kenya Broadcasting Corporation (KBC), for information. Moreover, as Fox also mentions, Kikuyus and Luos, two of the major ethnic groups that the Moi regime consciously tried to marginalize, were predominant in these cities, with the Kikuyu constituting a majority in the Nairobi metropolitan area and Luos in Mombasa. *Ibid.* See Chapter Three for a discussion of the Moi regime’s strategies to marginalize, or at the very least, undermine, Kikuyu and Luo dominance in Kenya.

<sup>216</sup> Fox, *Bleak Future for Multi-Party Elections in Kenya*,” p. 603.

results of this were clearly seen by the 1992 elections, when constituency size in Kenya varied from lows of less than 4000 registered voters per constituency to highs of over 100,000 registered voters per constituency.<sup>217</sup> Without exception, low-density districts were districts with strong KANU support and high-density districts were concentrated in areas where emergent opposition parties were believed to be strong.<sup>218</sup>

Thus, the links between Kenya's highly majoritarian electoral system and the political violence witnessed during 1991 and 1992 are several. As electoral system analysts point out, single-member plurality districts create institutional incentives for groups of similar segments to cluster together in order to gain political influence.<sup>219</sup> This, in turn, tends to encourage both parochial voting and group polarization<sup>220</sup>—as was clearly witnessed in Kenya during this period. Not only did KANU have to ensure that it delivered nearly all the constituencies in Rift Valley Province, its core area of support, but it also had to win key constituencies in neighboring Western and Nyanza provinces, as well as in Coast and Eastern provinces, in order to secure a majority in parliament.<sup>221</sup>

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<sup>217</sup> Ndegwa points out that Mandera West (in North Eastern Province) had fewer than 4000 registered voters, while Mathare constituency in Nairobi has over 116,000 registered voters. Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya," pp. 207, 208.

<sup>218</sup> Fox, "Bleak Future for Multi-Party Elections in Kenya," pp. 598 - 599.

<sup>219</sup> See, for example: Lewis, *Politics in West Africa*, pp. 64 – 74, Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, pp. 156 – 168, Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 143 – 170.

<sup>220</sup> Ibid.

<sup>221</sup> Because KANU had effectively closed off opposition party access to North Eastern Province, accessible primarily by air, it was almost guaranteed these seats; whereas Central Province, the home province of Kenya's Kikuyus, was assumed to vote overwhelmingly for opposition parties, so little campaigning was conducted there.

As was mentioned above, and as strategically makes sense, KANU targeted its campaign efforts in swing constituencies in these areas --and it was in these areas that the majority of Kenya's violence was witnessed. In the end, largely as a consequence of pre-election violence, KANU ended up with 17 unopposed seats in Rift Province. Moreover, the Commonwealth election monitoring team estimated that approximately 1.5 million Kenyans were prevented from voting as a result of Kenya's violence,<sup>222</sup> and that these individuals, disproportionately, came from the Kikuyu, Luo and Luhya tribes --and, predominately from Rift, Western and Nyanza provinces.<sup>223</sup>

#### **The December 1992 Elections:**

It was against this background of political violence, as well as SMOs' efforts to document it and expose its causes, that Kenya's first multiparty elections in twenty-six years took place. As mentioned above, eight political parties ultimately participated in the elections, with four of these eight --KANU, Ford-Asili, Ford-Kenya, and the Democratic Party-- playing a dominant role. Despite the problems in voter registration reported above by NEMU, as well as the Commonwealth monitoring team's estimate that 1.5 million Kenyans were prevented from voting because of political violence,<sup>224</sup> voter turnout was approximately 70 percent, the highest in Kenya since the

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<sup>222</sup> These individuals had either been forcibly evicted from their land and the province, and/or had their homes burned, together with all identification and voter registration papers, which could not be reproduced in time for them to register (or re-register, in many cases) as voters for elections.

<sup>223</sup> Cited in Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, pp. 70 –71.

<sup>224</sup> Ibid.

independence elections of 1963, and almost twice that of the previous elections in 1988.<sup>225</sup> Important electoral reforms won by Kenya's human rights and democracy movement in preparation for these elections included: (1) re-instatement of Kenya's secret ballot, (2) elimination of the 70 percent rule,<sup>226</sup> and (3) limitations on presidential tenure to two five year terms.<sup>227</sup> Given that the parliament remained predominantly loyal to Moi as a consequence of the blatantly rigged 1988 elections,<sup>228</sup> however, the regime remained in a strong position to employ its historically proven strategy of enacting constitutional amendments to preserve its position of power.

Specifically, the Constitution of Kenya (Amendment) Bill of August 1992 introduced two new laws, which together virtually guaranteed the Moi-KANU regime's re-election in December 1992. The first of these required that presidential candidates win a minimum of 25 percent of the vote in five of Kenya's eight provinces, in addition to receiving a plurality of the national vote. This law became known as the "25 percent rule" and its historical precedent was Nigeria. It was first introduced in Nigeria's 1979 constitution as an institutional incentive to encourage the

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<sup>225</sup> Dieter Nohlen, Michael Krennerich and Bernhard Thibaut, eds., *Elections in Africa: A Data Handbook*, Oxford: Oxford University Press, 1999, p. 486.

<sup>226</sup> As discussed in Chapters Three and Four, Kenya's secret ballot was revoked in the first round of voting for the 1988 elections and, instead, was replaced by a "queuing system" in which voters were required to publicly queue behind posters of their designated candidates. The "70 percent rule" stated that any candidate receiving 70 percent of the vote in this first round of voting, no matter what the voter turnout, was declared elected and did not have to stand for a second round. Both of these electoral laws were finally repealed as a consequence of the Saitoti Commission, discussed in Chapter Four, which was formed in response to movement demands in the summer of 1991.

<sup>227</sup> This was passed by parliament in August of 1992, as part of the Election Law (Amendment) Act of 1992. See National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. 20 – 21.

<sup>228</sup> These are discussed in detail in Chapters Three and Four.

development of “a small number of parties . . . each with broad multiethnic support.”<sup>229</sup> Similar to the Nigerian case, the Moi-KANU regime’s justification for introducing the law was to ensure that successful presidential candidates had broad-based national support. Although over the long term the law was to have this general effect in Kenya,<sup>230</sup> as opposition parties and movement leaders argued at the time, and as empirical evidence was later to support, in the short term, it was a carefully calculated electoral strategy on the part of the Moi-KANU regime designed to ensure its re-election. Since KANU was the only political party with a national presence, it would be virtually impossible for any political party except KANU to win 25 percent of the vote in five provinces, unless opposition parties agreed to run a single presidential candidate. As is discussed below, this possibility was basically precluded by the regime’s second law, which required Kenya’s elected president to form a cabinet solely from his or her own party.

Moreover, some movement and opposition leaders argued that the 25 percent rule actually contributed to the escalation of political violence leading up to Kenya’s 1992 elections. Specifically they argued that the political violence and

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<sup>229</sup> Donald L. Horowitz, “Chapter Fifteen: Structural Techniques to Reduce Ethnic Conflict,” *Ethnic Groups in Conflict*, Berkeley: University of California Press, 1985, p. 636. As Horowitz explains, “[t]o be elected president [under Nigeria’s new electoral law], a candidate was required to win a plurality of votes nationwide plus at least 25 percent of the vote in no fewer than two-thirds of [Nigeria’s] nineteen states. Since no one or two ethnic groups (even in combination) had voters distributed widely enough to meet this stringent requirement, the expectation was that it would produce a party system with a small number of parties, perhaps just two, each with broad multiethnic support.” Ibid.

<sup>230</sup> As is discussed in Chapter Seven, this law was, among other factors, an important institutional incentive for the opposition coalition, the National Rainbow Coalition (NARC) to finally agree to field a single presidential candidate for Kenya’s December 2002 elections. In this case, however, the result was a coalition of multiple, primarily ethnically based parties. The DP-wing of the coalition, however, as is discussed in the study’s postscript, tried very hard to have constituent parties dissolve themselves and form a single political party—which it, for all intents and purposes, would control.

disproportionate dislocation of Kikuyus, Luos and Luhyas from Rift and Western provinces, in particular, was a regime strategy designed not only to ensure that KANU received the minimum 25 percent threshold in these provinces, but also that opposition parties were *prevented from* achieving this threshold.<sup>231</sup> Moreover, they argued that the mobilization of Kambas, who predominate in Eastern Province, and the Mijikenda's and related coastal groups, who predominate in Coast Province, through *majimbo* rallies, control of Kenya's Public Broadcasting Corporation (KBC) and harassment of opposition politicians in these areas, was also a targeted electoral strategy by the regime to ensure that it would secure the 25 percent threshold in these provinces as well. Finally, by then restricting opposition travel to Kenya's remote North Eastern Province,<sup>232</sup> the regime guaranteed that only KANU had a significant presence there.<sup>233</sup> In so doing, the regime secured the 25 percent requirement in five of Kenya's eight provinces: Rift Valley, Western, Eastern, Coast and North Eastern.

As mentioned above, the second new law enacted as part of the Constitution of Kenya (Amendment) Bill of 1992 was highly majoritarian in character and required Kenya's elected president to form a cabinet solely from his or her own party. As movement leaders argued, and as in fact was the case, this law made it virtually

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<sup>231</sup> KANU was concerned about surpassing the 25 percent threshold in Western Province, in particular, as well as preventing Matiba of FORD-A and Odinga of FORD-K from meeting this threshold. As Table 5.1 indicates, Moi-KANU ultimately received 41 percent of the vote to Matiba's 36 percent and Odinga's 18 percent in Western. In Rift Valley Province, KANU successfully prevented any other candidate from meeting the 25 percent threshold.

<sup>232</sup> Because of the poor state of roads to Northeastern Province, as well as the time it takes to travel these roads, by restricting air traffic to the Province, the Moi-KANU regime was able to ensure that citizens there had little or no access to opposition political perspectives.

<sup>233</sup> As Table 5.1 shows, KANU received 78.1 percent of the vote in North Eastern Province.

impossible for opposition parties to field a single presidential candidate –thus assuring Moi’s re-election. Moreover, since this constitutional amendment was not passed until August 1992, only four months prior to Kenya’s December 29<sup>th</sup> elections, there was not sufficient time for movement or opposition party leaders to organize opposition in response to it.

As a consequence, each of Kenya’s three main opposition parties ran its own presidential candidates, and Moi ended up winning the election with only 36 percent of the national vote, but with the 25 percent threshold met in five of Kenya’s eight provinces. Kenneth Matiba, of FORD-Asili, came in second with 26 percent of the vote; Mwai Kibaki, of the DP, third, with 20 percent of the vote; and Oginga Odinga, of FORD-Kenya, fourth, with 18 percent of the vote.<sup>234</sup> Thus, had the original FORD not split along ethnic lines, it potentially could have won 44 percent of the national vote. Moreover, had the three opposition parties been able to agree on a single candidate, they potentially could have won 64 percent of the national vote. Finally, a united opposition also easily could have won a minimum of 25 percent of the vote in five of Kenya’s eight provinces.<sup>235</sup> By outlawing coalitional government, however, the Moi-KANU regime ensured that this was not a possibility.

In many respects, Kenya’s parliamentary elections were much more interesting than its presidential election, and they even more clearly illuminate the disproportional political consequences of Kenya’s majoritarian electoral system. In these elections,

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid, p. 490. See Table 5.1.



KANU ended up winning 53 percent of the elected parliamentary seats (100 of 188) with less than one-third (26.6 percent) of the total popular vote.<sup>236</sup> Moreover, once Kenya's twelve nominated seats were allocated, this brought KANU control of total parliamentary seats up to 56 percent (112 of 200).<sup>237</sup> Only 16.6 percent of the elected seats (31 of 188) and 15.5 percent of the total seats (31 of 200) went to FORD-K and FORD-A, which received 18 and 22 percent of the vote, respectively. The DP, on the other hand, won only 12.2 percent of the elected seats and 11.5 percent of the total seats, despite the fact that it received 20 percent of the popular vote. Three smaller parties, KNC, PICK and KSC each received 1 seat with 1.5, 0.8 and 0.5 percent of the vote, respectively.

Although there have been many insightful analyses of Kenya's 1992 elections, few have focused on the electoral system itself as an important variable in KANU's eventual victory. Three important exceptions, however, are the work of Stephen

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<sup>236</sup> As noted above, exact vote share that KANU earned in these elections is disputed. For example, Nohlen, Krennerich and Thibaut report that KANU received 25.5 percent of the vote. Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, p. 486. An earlier (1993) report by Kenya's National Election Monitoring Unit (NEMU) reported that KANU received 31 percent of the vote. National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, Kenya: NEMU, 1993, pp. 115. Since NEMU's work was ultimately taken over by IED during the 1993 – 1997 electoral cycle, I use IED's data in this analysis, which reports 26.6 percent. Institute for Education in Democracy (IED), *National Elections Data Book: Kenya 1963 – 1997*, Nairobi: IED, July 1997, p. 187. See Table 5.2 at the end of this chapter for a summary of Kenya's 1992 parliamentary elections.

<sup>237</sup> Until the Inter-Parliamentary Parties Group (IPPG) reform package was enacted in November 1997, Kenya's President, together with the Attorney General and Speaker of the House, appointed all twelve of Kenya's nominated seats. Thus, not surprisingly, all twelve of these seats went to KANU. With the IPPG reforms, however, nominated seats were allocated according to parties' proportional strength in parliament,

Ndegwa, Roddy Fox and Rok Ajulu.<sup>238</sup> Using data from Kenya's 1989 census, which recorded the number of Kenyans aged fifteen and above who would be over the voting age of eighteen by 1992, and dividing this number<sup>239</sup> by the total number of Kenya's electoral constituencies at the time (188), Fox finds that average constituency size in Kenya, if constituencies were drawn equitably according to population size --as is required by Kenya's constitution, would be just over 59,000 voters per constituency.<sup>240</sup> Although only 71 percent of this total number of theoretically eligible voters actually registered as voters for the 1992 elections,<sup>241</sup> Fox notes that this would still have yielded an average constituency size of 42,000 voters.<sup>242</sup> In fact, however, constituency size varied from lows of less than 4000 registered voters to highs of over 100,000 registered voters.<sup>243</sup> Invariably, low-density districts were those districts with strong KANU support, and high-density districts were concentrated in areas where emergent opposition parties were believed to be strong.<sup>244</sup>

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<sup>238</sup> Stephen N. Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya," *Africa Today*, vol. 45, no. 2, 1998; Roddy Fox, "Bleak Future for Multi-Party Elections in Kenya," *The Journal of Modern African Studies*, v. 34, no. 4, 1996; Rok Ajulu, "Kenya: The Survival of the Old Order," in by John Daniel, Roger Southall, and Morris Szeftel, eds., *Voting for Democracy: Watershed Elections in Contemporary Anglophone Africa*, Brookfield, VT: Ashgate, 1999. pp. 110 – 135.

<sup>239</sup> The 1989 census recorded 11,157,575 Kenyans aged 15 and above. Cited in Fox, "Bleak Future for Multi-Party Elections in Kenya," p. 604.

<sup>240</sup> Ibid.

<sup>241</sup> That is, 7,897,973 Kenyans ultimately registered for the 1992 elections. Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ndegwa points out that Mandera West (in North Eastern Province) had fewer than 4000 registered voters, while Mathare constituency in Nairobi has over 116,000 registered voters. Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya," pp. 207, 208.

<sup>244</sup> Fox, "Bleak Future for Multi-Party Elections in Kenya," pp. 597 – 607.

Despite this evidence of blatant malapportionment, surprisingly, as Stephen Ndegwa points out, “[h]ardly any link is made . . . between the electoral system and constituency delimitation” in analyses of Kenya’s democratic transition.<sup>245</sup> Further underscoring the extent to which Kenya’s electoral system itself biased regime support, Ndegwa reports that “KANU won ninety-five seats with an average of 14,138 votes,”<sup>246</sup> whereas “[FORD-Kenya] won thirty-one seats with an average tally of 32,152 votes; FORD-Asili won twenty-nine seats with an average of 38,220 votes; and the Democratic Party won twenty-three seats with an average of 43,779 votes, three times KANU’s average.”<sup>247</sup> As he concludes, “[s]uch divergence in constituency size and in vote tallies reflects the extent of malapportionment and deviation in the proportionality of votes and seats that different parties receive.”<sup>248</sup> Had electoral districts been apportioned equitably for Kenya’s 1992 elections, as is required by Kenya’s Constitution, Fox argues that KANU’s parliamentary majority “would almost certainly [have been] lost.”<sup>249</sup>

Interestingly, despite this seemingly apparent source of electoral distortion, neither Kenya’s human rights and democracy movement, nor opposition political parties, made reform of Kenya’s majoritarian electoral system a central concern of

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<sup>245</sup> Ndegwa, “The Incomplete Transition: The Constitutional and Electoral Context in Kenya,” pp. 205 – 207.

<sup>246</sup> *Ibid.*, p. 207.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, p. 207, 208.

<sup>249</sup> Fox, “Bleak Future for Multi-Party Elections in Kenya,” p. 605.

their reform agendas at this time. As mentioned above, each of Kenya's three main opposition parties remained confident in their ability to defeat the Moi regime, despite electoral system biases and regime violence, right up until the elections. It was also not until *after* the elections that leaders of Kenya's reform movement began to converge on a subset of necessary constitutional reforms, which included replacing Kenya's majoritarian electoral system with a system of proportional representation (PR), as is examined in the following chapter.

One of the many advantages of proportional representation systems, as consensus theorists of democracy have argued, is that once constituency boundaries are drawn, only the number of representatives representing the constituency, or district magnitude, changes over time in order to adjust to population fluctuations. Moreover, by creating larger multi-member PR constituencies, thresholds to representation are reduced, votes are more accurately translated into parliamentary seats and, thus, the stakes for winning seats are also reduced. As a consequence, as consensus theorists argue, regional polarization should be attenuated, multi-ethnic coalitions facilitated and, in the long term, greater toleration of different segmental communities encouraged. Under these conditions, since minorities are guaranteed proportional representation, regardless of the "majority" influence in their constituency or region, elections should be less of a zero-sum game. These hypotheses are further explored in the following two empirical chapters.

**Conclusion:**

This chapter has advanced three main arguments. First, it has argued that Kenya's human rights and democracy movement continued to play a central role in promoting democratizing reforms in Kenya during this period largely because of the development of new movement mobilizing structures in the form of formal social movement organizations (SMOs). These SMOs created an enduring organizational structure for movement development that allowed it to sustain successful collective action efforts much longer than democratic transitions theorists could anticipate or predict. The emergence, survival and success of these organizations, in turn, were the consequence of favorable political opportunity structures and effective framing and legal mobilization strategies. Two changes in national and international political opportunity structures that were particularly important were: (1) the regime's political opening in December of 1991, which lowered state barriers to independent organization, and (2) the provision of material, technical and moral support to these organizations by foreign-based human rights organizations, private foundations and aid agencies of donor states.

Second, the chapter has argued that two important variables in explaining the political violence that Kenya witnessed during this period were: (1) successful framing strategies by *countermovement* leaders, and (2) Kenya's majoritarian electoral system. Specifically, the chapter argues that leaders of a regime-supported countermovement successfully employed framing strategies to mobilize Kenyans predominantly from Kenya's smaller ethnic groups, who formed the core of the Moi-KANU political base,

to forcibly expel Kenyans from larger ethnic groups from their home regions. The form this countermovement took, and the demands its leaders made, however, were largely shaped by institutional incentives embedded in Kenya's single-member district plurality electoral system. As the chapter documents, the vast majority of political violence witnessed during this period was concentrated in KANU swing districts, which the party needed to win in order to secure a majority of seats in parliament. As electoral systems theorists have argued, and as the Kenyan case clearly illustrates, single-member districts create institutional incentives for groups of similar segments to cluster together in order to gain political influence. This, in turn, tends to encourage parochial voting, group polarization and, ultimately, in the Kenyan case, political violence.

If, instead, Kenya introduced larger multi-member constituencies and proportional representation, as consensus theorists of democracy, as well as leaders of Kenya's human rights and democracy movement, advocate, thresholds to representation would be reduced, votes more accurately translated into parliamentary seats, and the stakes for winning seats also reduced. As a consequence, regional polarization in Kenya would likely be attenuated, multi-ethnic coalitions facilitated and, in the long term, greater toleration of different ethnic communities encouraged. Under these conditions, since minorities are guaranteed proportional representation at the national level regardless of the "majority" influence in their constituency or region, elections would also likely be less of a zero-sum game in Kenya.

The third, and final, argument advanced in this chapter is that Kenya's majoritarian electoral system is also an important, but largely neglected, factor in explaining Moi-KANU's ultimate victory in Kenya's 1992 multiparty elections. As electoral system theorists have argued, not only do majoritarian systems with single-member plurality districts, like Kenya's, tend to overrepresent large parties, like KANU, but they also lend themselves to partisan gerrymandering and malapportionment. This is especially the case where national electoral commissions are not independent, as was also the case in Kenya at this time. As a consequence, KANU ended up winning 53 percent of the elected seats in parliament with under one-third of the popular vote, and the presidency, with just over a third of the vote (36 percent), in Kenya's 1992 multiparty elections.

**Table 5.1: Kenya's 1992 Presidential Elections  
Provincial Distribution of Votes by Candidate and Party<sup>250</sup>**

Province	Moi/KANU	Matiba/FORD-A	Kibaki/DP	Odinga/FORD-K	Total Vote
Nairobi	62,402 (16.6%)	165,533 ( <b>44.1%</b> )	69,715 (18.6%)	75,898 (20.2%)	375,574
Central	21,882 (2.1%)	621,368 ( <b>60.1%</b> )	372,937 ( <b>36.1%</b> )	10,765 (1.0%)	1,034,016
Eastern	290,494 ( <b>36.8%</b> )	80,515 (10.2%)	398,727 ( <b>50.5%</b> )	13,064 (1.7%)	789,232
North East	57,400 ( <b>78.1%</b> )	7,440 (10.1%)	3,297 (4.5%)	5,237 (7.1%)	73,460
Coast	200,596 ( <b>64.1%</b> )	35,598 (11.4%)	23,766 (7.6%)	50,516 (16.1%)	312,993
Rift Valley	994,844 ( <b>67.8%</b> )	274,011 (18.7%)	111,098 (7.6%)	83,945 (5.7%)	1,467,503
Western	217,375 ( <b>40.9%</b> )	192,859 ( <b>36.3%</b> )	19,115 (3.6%)	94,851 (17.9%)	531,159
Nyanza	111,873 (14.4%)	26,922 (3.3%)	51,962 (6.4%)	609,921 ( <b>74.7%</b> )	816,387
<b>Total</b>	1,962,866 (36.4%)	1,404,266 (26.0%)	1,050,617 (19.5%)	944,197 (17.5%)	5,400,324

<sup>250</sup> Vote tallies are from *The Daily Nation*, 5 January 1993, p. 1., as cited in Throup and Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*, p. 435. Provincial vote totals that reached or exceeded the 25 percent minimum threshold are in bold print. As can be seen, only KANU was able to meet the new election requirement that winning presidential candidates meet or exceed the 25 percent threshold in five of Kenya's eight provinces. The largest opposition party, FORD-A, only surpassed the threshold in three provinces; the DP exceeded it in only in two provinces, and FORD-K exceeded it only in its presidential candidate's home province of Nyanza.



**Table 5.2: Kenya's 1992 Parliamentary Elections**

Party	Seats <sup>251</sup>	% of Seats <sup>252</sup>	% Votes <sup>253</sup>
KANU	100/112	53.2 / 56	26.6
FORD-Asili	31	16.5 / 15.5	22.0
FORD-Kenya	31	16.5 / 15.5	18.4
DP	23	12.2 / 11.5	20.0
KNC	1	0.5 / 0.5	1.5
PICK	1	0.5 / 0.5	0.8
KSC	1	0.5 / 0.5	0.5
KENDA	----	----	0.02
TOTAL	188/200		

<sup>251</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, p. 488. The first number records the number of seats elected, and the second the total number of seats after the twelve nominated seats were allocated. Because KANU had sole authority to nominate these seats, not surprisingly, all twelve went to KANU.

<sup>252</sup> The first number is the percentage of seats based on Kenya's 188 elected seats, and the second includes the twelve nominated seats for a seat percentage based on the total 200-member parliament.

<sup>253</sup> Data for the largest five parties is from the Institute for Education in Democracy (IED), *National Elections Data Book: Kenya 1963 – 1997*, July 1997, p. 187. Data from the remaining four parties is from the National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, 1993, pp. 199 – 202. These percentages are disputed among different sources, however. For example, Nohlen, Krennerich and Thibaut report the vote percentages as follows: KANU = 24.5%; FORD-A = 20.6%; DP = 18.7%; FORD-K = 17.1%; KNC = 1.5%; PICK = 0.8%; KSC = 0.3%. Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, p. 486.

## Chapter Six

### The Politics of Constitutional Reform and Kenya's Second Multiparty Elections, 1993 – 1997

Six months ago, it was assumed that President Moi and . . . KANU had so much control that they would easily be swept back to power during the elections. Nevertheless, we the people, raised our voices loudly for democracy and reform. And so loud and clear was that voice that even those “friendly” politicians who were keener on power than on reforms, and who tried to derail the NCEC<sup>1</sup> in various ways, were unable to do so . . . And so strong was our courage and conviction that Moi's brutal police could not stop the NCEC . . . We exposed cracks in Moi's government, cracks so large that Moi and KANU dare not face a genuinely fair election. Cracks so large that the very existence of KANU became sorely threatened.

--Maina Kiai, Director, Kenya Human Rights Commission  
Third Plenary, National Convention Assembly  
Keynote Address, October 28, 1997

#### Introduction:

A central theoretical puzzle addressed in this chapter, like the previous chapter, is the continued development and dominant role of Kenya's human rights and democracy movement in promoting democratic reforms in the period following Kenya's founding elections in December 1992 through Kenya's second multiparty elections in December 1997, despite democratic transitions theory assumptions to the contrary. A fundamental assumption of democratic transitions theory, as discussed in Chapter Five, is that although civil society actors may play a role in advancing democratization once a political opening has occurred in a formerly authoritarian regime, this mobilization is “always ephemeral.”<sup>2</sup> Specifically, democratic transition

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<sup>1</sup> NCEC stands for the “National Convention Executive Council.” This council was democratically elected at the movement's First Plenary for a National Convention, convened April 3 – 7, 1997.

<sup>2</sup> Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore: The Johns Hopkins University Press, 1986, 3<sup>rd</sup> ed., 1991, p. 55.

theorists contend that once founding elections are announced by the regime, civil society actors recede into the background and political parties assume “center stage in the political drama.”<sup>3</sup> As was seen in Chapter Five, however, Kenya’s human rights and democracy movement continued to play a lead role in promoting democratic reforms not only after Moi’s announcement of founding elections in December 1991, but also through the entire period leading up to the convening of these elections in December 1992. The chapter below documents the continued leadership role of Kenya’s human rights and democracy movement in promoting democratic reforms through Kenya’s next electoral cycle, January 1993 – December 1997, long after democratic transitions theory predicts that civil society mobilization should have dissipated.

Building on theoretical insights from social movements and legal mobilization theories, this chapter, like Chapter Five, argues for the continued importance of three social movements concepts –*mobilizing structures*, *political opportunity structures* and *framing processes*, as well as legal mobilization strategies, to explain the continued development and political impact of Kenya’s human rights and democracy movement. Specifically, these chapters argue that two changes in national and international political opportunity structures explain the emergence, development and political impact of new mobilizing structures in the form of formal social movement organizations (SMOs).<sup>4</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Social movement organizations (SMOs) are defined as “those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although

Nationally, the regime's opening in December of 1991 lowered state barriers to independent organization. Internationally, foreign-based human rights organizations, private foundations and aid agencies of donor states provided material, technical and moral support to these organizations. It was these SMOs that then enabled the movement to create a more enduring organizational structure than it otherwise could have and, in so doing, allowed it to play a lead role in promoting rights reforms much longer than democratic transitions theory anticipates.

Specific reforms at the state level that this chapter traces to Kenya's human rights and democracy movement can be categorized into three types: (1) constitutional reforms, (2) statutory reforms, and (3) administrative reforms. Regarding constitutional reforms, the Constitution of Kenya (Amendment) Bill of 1997, enacted in early November 1997 as a direct result of movement activism, effected five major constitutional changes in Kenya: (1) it repealed part of the Constitution of Kenya (Amendment) Bill of August 1992 to allow for the formation of coalition government; (2) it made Kenya's Electoral Commission more independent and impartial; (3) it required that Kenya's twelve nominated parliamentary seats be allocated to

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their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation." SMOs may "vary in their degree of *formalization*, or formally defined roles, rules and criterion of membership, and *centralization*, or the degree of concentration of decision-making power." Jackie Smith, Ron Pagnucco, and Charles Chatfield, "Social Movements in World Politics: A Theoretical Framework," in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Jackie Smith, Charles Chatfield and Ron Pagnucco, eds., Syracuse: Syracuse University Press, 1997, pp. 60 – 61. In an early work, Mayer Zald and Roberta Garner argue that social movement organizations differ from other types of organizations in two ways: (1) "they have goals aimed at changing the society and its members; they wish to restructure society or individuals" and (2) "they are characterized by an incentive structure in which purposive incentives predominate. While some short-run material incentive may be used, the dominant incentives offered are purposive." Mayer N. Zald and Roberta Ash Garner, "Social Movement Organizations: Growth, Decay, and Change," p. 123. See also Chapter Five.

parliamentary parties on the basis of their proportional strength in parliament;<sup>5</sup> (4) it constitutionally entrenched Kenya's status as a "a multi-party democratic state;"<sup>6</sup> and (5) it prohibited discrimination on the basis of sex.<sup>7</sup> In addition, the Constitution of Kenya Review Commission Bill, also enacted in early November 1997, committed the regime to undertaking comprehensive constitutional reforms, a demand it had consistently refused since movement leaders began mobilizing on the issue in the immediate post-1992 election period.

In the area of statutory law reform, Kenya's human rights and democracy movement was also directly responsible for parliament's passage of the Statute Law (Repeals and Miscellaneous Amendment) Bill in late October 1997. This bill addressed twenty-eight statutory laws that movement leaders had targeted as violating Kenyans' fundamental political and civil rights, as protected under Kenya's Constitution and international human rights law. These included, among others: (1) the Societies Act, (2) the Public Order Act, (3) the Chief's Authority Act, (4) the Preservation of Public Security Act, (5) the Films and Stage Plays Act, (6) the Public Collections Act, (7) the Public Broadcasting Corporation Act, (8) Sections 56 and 57

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<sup>5</sup> Previous to this amendment, all twelve seats were appointed by Kenya's President, Attorney General and Speaker of the House. Thus, in the 1992 elections, despite the fact that opposition parties held nearly 50 percent of parliamentary seats, all twelve nominated seats went to KANU, increasing its parliamentary majority three percentage points from 53 to 56 percent.

<sup>6</sup> *The Constitution of Kenya, 1997*. Cited in Arne Tostensen, Bard-Anders Andreassen, Kjetil Tronvoll, *Kenya's Hobbled Democracy Revisited: The 1997 Elections in Retrospect and Prospect*, Oslo: University of Oslo, Norwegian Institute of Human Rights, February 1998, p. 35.

<sup>7</sup> This historic constitutional amendment was a direct result of Kenya's reform movement's insistence on gender equity, and the growing strength and voice of women's groups in Kenya as they became increasingly mobilized by and within Kenya's reform movement.

of Kenya's Penal Code,<sup>8</sup> (9) the Outlying Districts Act, and (10) the Special District (Administrative) Act.<sup>9</sup>

Finally, in terms of administrative reforms, Kenya's human rights and democracy movement won four major concessions from the regime. First, the regime was obliged to review all cases of remaining political detainees in Kenya and either clearly state the legal/constitutional grounds for continued detainment, or immediately release these individuals.<sup>10</sup> Second, the regime was required to register all pending applications for opposition political parties under the Societies Act, or immediately inform parties of the legal basis for denying registration.<sup>11</sup> Third, all provincial commissioners, district commissioners, district officers, local chiefs, and police were prohibited from interfering with Kenya's electoral process. Finally, in addition to implementing the reformed Kenya Broadcasting Corporation Act, as required by the

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<sup>8</sup> These are the sections of Kenya's Penal Code that criminalize most forms of critical political speech as seditious.

<sup>9</sup> Each of these statutory laws is discussed in detail in Chapter Three and in greater depth below.

<sup>10</sup> Although one movement organization, Rescue Political Prisoners (RPP), as documented in Chapter Five, succeeded in getting all of Kenya's political prisoners released during the period between April 2001 and January 2002, in the interim election period (1993 – 1997), many movement activists, opposition politicians and journalists were arrested on questionable constitutional grounds. In most cases, one or more of the aforementioned statutory laws was invoked as grounds for arrest. Thus, since these laws were in the process of repeal, movement leaders demanded that remaining political prisoner cases be reviewed.

<sup>11</sup> This resulted in a total of fifteen new parties being registered, although one party closely affiliated with Kenya's reform movement, Safina, ultimately was not registered until November 26<sup>th</sup>, only one week prior to candidate nomination deadlines, and after more than a three-year wait. As is discussed below, the Moi regime considered Safina, in particular, to be a significant electoral threat to the regime, because it was believed that Safina had the potential to unite a powerful coalition of opposition parties. By delaying Safina's registration, thus preventing it from engaging in organizational activities, and by delaying the repeal of Kenya's Constitutional Amendment, which prohibited coalition government, the Moi-KANU regime ensured that Safina did not play this role. In the end, Safina won only four seats in parliament; this, in and of itself, was a remarkable accomplishment, given the obstacles it faced in mobilizing as a political party, however.

Statute Law (Repeals and Miscellaneous Amendment) Bill, the regime also was compelled to process all pending applications for broadcasting licenses.<sup>12</sup> Although some of these constitutional, statutory and administrative reforms remained unevenly enforced in the post-1997 period, as will be seen in Chapter Seven, overall, they constituted a distinct and dramatic shift in state policies and practices toward greater democratic openness.

Perhaps even more impressive than these reforms at the state level, however, were the further changes that Kenya's human rights and democracy movement catalyzed at the level of civil society. As a consequence of movement leadership, between 1993 – 1997, Kenyans practiced political speech, formed and joined opposition organizations, engaged in civil disobedience, and demanded state accountability through public demonstrations, boycotts, strikes, parliamentary lobbying and the courts. In addition, dominant social movement organizations comprising Kenya's human rights and democracy movement produced a draft constitutional proposal, which became the focus for future constitutional debates and negotiations; organized and convened three constitutional assemblies; and largely defined the terms of Kenya's reform agenda for the 1997 elections and beyond. In so doing, in the words of movement leader Kivutha Kibwana, they "popularised and legitimized issue-driven politics" in Kenya and "made possible prolonged unity of and

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<sup>12</sup> Although some of these applications were processed, the regime continued to resist this demand, as is discussed in Chapter Seven.

corporate action by [opposition political parties],<sup>13</sup> an accomplishment that opposition parties had failed to achieve on their own.

Social movement organizations (SMOs) comprising Kenya's human rights and democracy movement also continued their efforts in the areas of civic and voter education outreach, human and democratic rights awareness, recording and publicizing regime abuses, establishing paralegal training programs, providing legal aid to victims of abuse and supporting public interest litigation –thus, further institutionalizing supports for human and democratic rights at the societal level in Kenya. Moreover, movement organizations continued, and expanded upon, their earlier efforts to create conditions for free and fair elections through engaging in, and supervising, Kenya's local election monitoring programs. Whereas approximately 7000 poll watchers monitored Kenya's 1992 elections, Kenya's human rights and democracy movement was largely responsible<sup>14</sup> for *quadrupling* this number to over 28,000 for the 1997 elections.<sup>15</sup> As a consequence, Kenya's 1997 elections, though still flawed, were considerably more free and fair than the 1992 elections. Finally, during this period (1993 – 1997), Kenya's human rights and democracy movement

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<sup>13</sup> Kivutha Kibwana. Cited in Willy Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Nairobi, SAREAT, 1999, p. 241.

<sup>14</sup> As the chapter documents, SMOs were provided with financial and technical support from donor state aid agencies to train electoral monitors and poll watchers.

<sup>15</sup> Kenya's independent local election monitoring unit for the 1997 elections, a coalition primarily comprised of Institute for Education in Democracy (IED), the Catholic Justice and Peace Commission (CJPC) and the National Council of Churches of Kenya (NCCCK), records the number of poll watchers as 28, 126 for these elections. Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, Nairobi: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, 1998, p. 22.



succeeded in greatly expanding its societal reach, such that by late 1997, it was estimated to have more than four million members.<sup>16</sup>

Despite these impressive reforms achieved by Kenya's human rights and democracy movement during this period, and the fact that most analysts of Kenyan politics agree that the reforms enacted prior to 1997 elections were "historic" and a major breakthrough in Kenya's democratization process, they ultimately failed to address several central movement concerns. In particular, the reforms left "KANU's grip on the electoral commission and the electoral process . . . intact."<sup>17</sup> Not only did Moi-KANU interests retain a majority on Kenya's electoral commission after reforms were enacted, but the commission itself remained institutionally housed within Kenya's Office of the President.<sup>18</sup> Moreover, movement leaders had also demanded a comprehensive review of constituency boundaries in Kenya to address problems of severe malapportionment and gerrymandering, as well as a minimum six-month period between the redrawing of boundaries and the convening of elections. None of these demands were addressed in the pre-election reform package, however. Finally, because reforms were enacted only seven weeks prior to Kenya's December 29th – 30<sup>th</sup> elections, there was not sufficient time for them to significantly effect electoral outcomes.

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<sup>16</sup> Maina Kiai, "Commentary: A Last Change for Peaceful Change in Kenya?" *Africa Today*, vol. 45, no. 2, 1998, p. 189. Kenya's total population is estimated to be approximately 33,800,000. CIA, *The World Factbook*: <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>17</sup> Kivutha Kibwana, cited in: "Opposition Calls Off Planned National Strike," Nairobi: Panafrican News Agency, September 13, 1997.

<sup>18</sup> As the chapter discusses, the president continued to exercise unchecked powers in appointing the electoral commission's chair and more than half its members.

The chapter below is divided into two main sections. The first analyzes the development and political impact of Kenya's human rights and democracy movement through Kenya's 1993 – 1997 electoral cycle in terms of the theoretical framework laid out in the previous chapter. The second section focuses on Kenya's 1997 elections, and the role of Kenya's majoritarian electoral system in creating institutional incentives that contributed not only to another electoral "victory" for the Moi-KANU regime, but also to another round of pre-election political violence. Although the violence leading up to the 1997 elections was on a much smaller scale than that leading up to the 1992 elections, it was still serious, with an estimated 200 Kenyans killed and more than forty-thousand displaced.<sup>19</sup>

### **Movement Development and Impact: January 1993 – December 1997:**

#### Drafting A Constitutional Reform Proposal:

The results of Kenya's founding elections in December 1992, where KANU won 53 percent of the seats in parliament<sup>20</sup> with only 26.6 percent of the vote, and

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<sup>19</sup> The numbers killed and displaced in the political violence leading up to Kenya's 1997 elections vary considerably. The numbers cited here come from two sources: (1) Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, Nairobi: KHRC, 1998 and (2) Frank Holmquist and Michael Ford, "Kenya Politics: Toward a Second Transition?" *Africa Today*, vol. 45, no. 2, 1998, p. 229. In the violence leading up to Kenya's 1992 elections, it was estimated that approximately 1500 Kenyans were killed and at least 300,000 displaced. Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, New York: Human Rights Watch, November 1993, p.1

<sup>20</sup> As discussed in Chapter Five, this percentage increased to 56 percent once all twelve nominated seats were allocated to KANU.

President Moi was re-elected with only 36 percent of the popular vote,<sup>21</sup> confirmed Kenya's human rights and democracy movement's resolve to focus its further reform efforts specifically on electoral and constitutional reforms. As discussed in Chapter Five, although two movement organizations, Rescue Political Prisoners (RPP) and the Kenya Human Rights Commission (KHRC), attempted to launch a constitutional reform effort prior to the 1992 elections, they ultimately failed in this effort. This was due, primarily, to lack of time during the one-year period from the announcement of Kenya's founding elections in December 1991, to their convening in December of 1992, to put forth a constitutional reform agenda with sufficiently broad-based national support.

As a consequence, and as was also documented in Chapter Five, the 1992 elections took place on a highly uneven playing field and under electoral rules that virtually guaranteed the Moi-KANU regime re-election. Despite unprecedented and unpredicted efforts by the movement to ensure that these elections were as free and fair as possible under the circumstances, extant constitutional, statutory and administrative laws stood as firm structural barriers to "genuine . . . elections . . . by universal and equal suffrage,"<sup>22</sup> as required by Kenyan constitutional law and the International Covenant on Civil and Political Rights (ICCPR), which Kenya ratified in 1972 and which entered into force in 1976.

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<sup>21</sup> See tables 5.1 and 5.2 at the end of Chapter Five for a summary of presidential and parliamentary election results in 1992.

<sup>22</sup> *International Covenant on Civil and Political Rights*, Article 25 (b), <http://www.ohchr.org/english/law/ccpr.htm>

Almost immediately following the Moi-KANU win in December 1992, the Kenya Human Rights Commission (KHRC) took a lead role in producing a constitutional reform agenda for the movement. By April of 1993, four months after the 1992 elections, the KHRC had produced a twenty-point document for a “draft” constitutional reform proposal. Of the twenty points outlined by the KHRC, four general points were considered fundamental: (1) a “democratised and decentralised” executive power, with constitutionally entrenched checks and balances by an empowered parliament and independent judiciary, as well as significantly devolved power to local governments; (2) an enforceable Bill of Rights, which protects “[t]he rights of women, children, persons with disabilities and minorities [with] . . . specific equity;” (3) a land policy with the “ultimate goal . . . [of making] land accessible to every Kenyan citizen;” and (4) electoral law and institutional reform, and specifically the “need to discuss . . . proportional representation in Parliament. . .” and “to consider the importance of . . . an upper house, to represent ethnic, racial, religious, regional, generational and gender concerns in the nation.”<sup>23</sup> The fact that the substantive content of this initial constitutional reform proposal incorporated central institutional features of consensus democracy<sup>24</sup> demonstrates that, even in its earliest stages,

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<sup>23</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, pp. 51 – 53. By August of 1995, the suggestion that proportional representation be considered had turned into a demand that “[p]roportional representation should be introduced in Kenya.” See: Citizens Coalition for Constitutional Change, *The 50 Point Kenya Tuitakayo Platform on National Plan and Strategies for Constitutional Reform and Democratization*, Nairobi: Citizens Coalition for Constitutional Change, August 24, 1995. Reproduced in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, p. 418.

<sup>24</sup> Specifically: (1) executive-legislative balance of power, (2) proportional representation, (3) a bicameral parliament constituted such that it gives meaningful representation to minority ethnic interests, (4) rigid constitutional structure, and (5) judicial review. Lijphart, *Patterns of Democracy*:

movement leaders were concerned to address the challenges presented by Kenya's multiethnic character, such that ethnic minorities would be equitably represented at the national level, contrary to the claims of countermovement leaders.<sup>25</sup>

With funding provided by the National Endowment of Democracy (NED),<sup>26</sup> the KHRC hired a constitutional lawyer from the University of Nairobi, Kanyi Kimondo, as a consultant to incorporate these points into a more formal constitutional reform proposal.<sup>27</sup> Kimondo began his work in May 1993 and, within two months, submitted his completed draft to the KHRC's co-directors, Willy Mutunga and Maina Kiai.<sup>28</sup> With a further grant provided by the Friedrich-Ebert Stiftung Foundation, a

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*Government Forms and Performance in Thirty-Six Countries*, pp. 3 – 4. Because of the movement's central concern that executive power be "democratized" and "decentralized" in Kenya's multiparty state, one could potentially also add a sixth characteristic of executive power-sharing, although this movement concern is not explicitly articulated until later when they demanded protections for the formation of coalition government in Kenya. Finally, because of the link between proportional representational electoral systems and multipartyism, one could also argue that the movement, albeit implicitly at this time, advocated multipartyism over a two-party system, a seventh characteristic of consensus models of democracy.

<sup>25</sup> As was documented in Chapter Five, countermovement leaders framed Kenya's reform movement as merely a thinly veiled attempt of Kenya's larger ethnic groups to seize national power—to the exclusion of Kenya's minority groups, who comprised the current ruling coalition of KANU.

<sup>26</sup> The National Endowment for Democracy (NED) is a United States-based private, nonprofit organization, founded in 1983, "to strengthen democratic institutions around the world through nongovernmental efforts." <http://www.ned.org/about/about.html> It receives annual appropriations from the U.S. Congress and makes "hundreds of grants each year to support prodemocracy groups in Africa, Asia, Central and Eastern Europe, Latin America, the Middle East, and the former Soviet Union." Ibid.

<sup>27</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 69.

<sup>28</sup> It should be noted that in March 1993 Willy Mutunga was elected president of the Law Society of Kenya (LSK) and Maina Kiai was elected to its governing council, thus providing a close organizational link between the KHRC and the LSK. Both Mutunga and Kiai are trained as constitutional lawyers.

private German foundation,<sup>29</sup> Mutunga and Kiai then reviewed and revised this draft, and organized a seminar to introduce it to Kenya's professional legal association, the Law Society of Kenya (LSK) and the Kenya section of the International Commission of Jurists (ICJ-K).<sup>30</sup> From this point forward, these three SMOs—the KHRC, the LSK and ICJ-K—worked closely together in further revising and refining this draft. It was almost a year later, however, before these SMOs were able to secure additional funding from the Friedrich-Ebert Stiftung and the Friedrich-Naumann Stiftung foundations<sup>31</sup> to finalize, print and distribute their draft constitutional proposal.<sup>32</sup>

With this funding, the KHRC, LSK and ICJ-K convened three workshops in May, June and July of 1994<sup>33</sup> to finalize their working draft and broaden its political

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<sup>29</sup> The Friedrich-Ebert-Stiftung (FES) is a foundation affiliated with Germany's Social Democratic Party (SPD), and was founded in 1925 by Germany's first democratically elected president, Friedrich Ebert. It was banned by the Nazis in 1933 and not re-established until 1947. Its main aims are: (1) "furthering political and social education of individuals from all walks of life in the spirit of democracy and pluralism," (2) "facilitating access to university education and research for gifted young people by providing scholarships," and (3) "contributing to international understanding and cooperation." [http://www.fes.de/intro\\_en.html](http://www.fes.de/intro_en.html)

<sup>30</sup> The LSK is extensively discussed in Chapter Four, and ICJ-K is discussed in Chapter Five.

<sup>31</sup> The Friedrich Naumann Foundation is an independent, nonprofit, German foundation committed to promoting "liberalism" and "advancement of individual freedom" through "strengthening of democratic structures, the reduction of state interventionism, the advocacy of decentralization and privatization, the cutting of existing state regulations . ." <http://www.fnstusa.org/Startpage.htm> It was founded in 1958 by the first president of the Federal Republic of Germany, Theodor Heuss, and named for liberal political scholar and political Friedrich Naumann (1860 – 1919). As of 2006, it had offices in approximately 60 countries in the world. It works both with state and civil society organizations.

<sup>32</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 54. The impetus for this renewed effort to push the constitutional reform proposal forward was a pastoral letter issued by Kenya's Catholic bishops in March 1994 calling on the Kenyan government to immediately undertake constitutional reforms in order to ensure that there was sufficient time for these reforms to be implemented prior to the December 1997 elections. As mentioned in Chapter Four, the Catholic Church in Kenya represents approximately thirty-three percent of the population. CIA, *The World Factbook*: <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>33</sup> The workshops were convened May 13 – 14, 1994, June 1, 1994 and July 6, 1994.

support. Movement leaders Gibson Kamau Kuria<sup>34</sup> and Kivutha Kibwana, both trained as constitutional lawyers, drafted a preamble that was appended to the draft, and another SMO, the Kenya chapter of the International Federation of Women Attorneys (FIDA-K),<sup>35</sup> reviewed the entire draft to ensure that it provided equal protection for women. A “Core Committee,” comprised of representatives of the KHRC, the LSK and ICJ-K, was then formed at the second workshop. By the third workshop, this committee approved a near final draft of what was called “Kenya Tuitakayo: A Proposal for a Model Constitution.”<sup>36</sup> Although there were plans to convene a press conference announcing the draft by the end of July 1994, it was more than three months later, on November 3, 1994, before the “official” launch of the draft was made. Another grant from NED enabled the Core Committee to establish a skeletal secretariat<sup>37</sup> to assist it in launching the draft, and in organizing the movement’s first broadly public constitutional caucus, which was convened on December 9, 1994.

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<sup>34</sup> See Chapter Four for a discussion of Gibson Kamau Kuria’s important role in the emergence of Kenya’s human rights and democracy movement.

<sup>35</sup> See Chapter Five for a discussion of FIDA-Kenya.

<sup>36</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 57. “Kenya Tuitakayo” is Kiswahili for “The Kenya We Want.”

<sup>37</sup> This secretariat was comprised of a chairperson (Willy Mutunga), two coordinators (Erasmus Wamugo and Njeri Kabeberi), a secretary (Diane Wataika) and clerk (Kinynajui Karari). *Ibid.*, p. 71.

The December 1994 Constitutional Caucus:

A total of 634 participants and sixteen diplomatic observers, including three representatives from each of twenty-eight different social and political organizations, as well as fifteen press organizations, were invited to the movement's December 9<sup>th</sup> constitutional caucus.<sup>38</sup> Ultimately, 217 participants and observers attended. These included representatives of Kenya's Human Rights and Advocacy Network,<sup>39</sup> dominant religious organizations,<sup>40</sup> some opposition parties, some labor groups,<sup>41</sup> and even some representatives of KANU.<sup>42</sup> Although all members of parliament were

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<sup>38</sup> Ibid., p. 59.

<sup>39</sup> Kenya's Human Rights and Advocacy Network was the first formal NGO network established by Kenya's National Council of NGOs after its founding in 1993. As is discussed in greater detail below, during the time period covered in this chapter (1993 – 1997), eleven NGOs comprised this network: (1) the Law Society of Kenya (LSK); (2) Rescue Political Prisoners (RPP); (3) the Kenya Human Rights Commission (KHRC); (4) the International Commission of Jurists, Kenya Section (ICJ-K); (5) the Federation of Women Lawyers, Kenya Chapter (FIDA-K); (6) Kituo cha Sheria (Kituo); (7) the Legal Education and Aid Programme (LEAP); (8) the Institute for Education in Democracy (IED); (9) the Public Law Institute (PLI); (10) the Legal Resources Foundation (LRF); and (11) the Centre for Law and Research International (Clarion). In-depth interviews were conducted with representatives of all of these organizations in Nairobi between May and July of 1998 and 1999.

<sup>40</sup> Specifically, this included the leadership of the National Council of Churches of Kenya (NCCCK) and Kenya's Catholic Bishops. As noted in Chapter Four, the NCCCK is an umbrella organization representing most of Kenya's Protestants, who comprise approximately 45 percent of Kenya's population; and Kenya's Catholic Bishops represent nearly 33 percent of Kenya's population, who are Roman Catholic. CIA, *The World Factbook*, <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>41</sup> All of these labor groups were ones that had split from the regime-dominated Central Organization Trade Union, COTU.

<sup>42</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 63. Counter to assumptions of democratic transitions theory, where regime splits precede regime openings and civil society mobilization, in the Kenyan case, a split in the regime between “hardliners,” referred to as KANU-B, and “reformers,” referred to as KANU-A, occurred after civil society mobilization had forced a regime opening. Thus, it was representatives of the KANU-A faction, the reformers, that attended this first constitutional caucus convened by Kenya's human rights and democracy movement, and it was this faction that played an important role in facilitating the IPPG reform package discussed below.



formally invited to the caucus, in the end, only four MPs attended. From this caucus, a “Steering Committee of the Proposed Model Constitution” was formed to represent all interested groups and to incorporate their specific concerns into the draft constitutional proposal.

In response to the degree of public support the movement’s constitutional reform proposal generated, President Moi, in his New Year’s Day speech on January 1, 1995, promised the nation that comprehensive constitutional reforms would soon be undertaken in Kenya. In an attempt to take control of the process and reform demands catalyzed by the movement, he insisted that parliament (still controlled by KANU) should be the central actor in directing reforms, however. He conceded that input would be welcome “from all Kenyans,” but that ultimately these views would be “put to parliament for debate in the usual manner.”<sup>43</sup> Although movement leaders cautiously welcomed the regime’s apparent concession to at least undertake comprehensive constitutional reforms, they remained critical of the process outlined by Moi. Instead, they insisted that citizens play a central role in the constitutional reform process, especially given the skewed representation in Kenya’s extant parliament.<sup>44</sup>

In part in response to Moi’s New Years’ speech, and in part to emphasize the importance of citizen participation in the constitutional reform process, on January 6,

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<sup>43</sup> Excerpts from President Moi’s New Years Speech. *Xinhua News Agency*, “Kenya: Constitutional Reform,” Nairobi: Xinhua News Agency, Sunday, January 1, 1995.

<sup>44</sup> As discussed in Chapter Five, this was a consequence of Kenya’s biased electoral system and less than completely free and fair elections in 1992.

1995, the Steering Committee of the Proposed Model Constitution renamed its project the “Citizens’ Coalition for Constitutional Change,” or the “4Cs.” Reflecting its broadened social and political base, five new co-chairs were appointed to represent the coalition. They were: (1) Bishop Ndingi Mwana’ Nzeki, representing Kenyan Catholics; (2) Bishop Nthamburi, representing Kenyan Protestants; (3) Professor Maria Nzomo, representing women’s groups in Kenya; (4) Willy Mutunga, representing Kenya’s Human Rights Network and profession groups, as director of the KHRC and chair of the LSK; and (5) Sheikh Munir Mazrui, representing Kenyan Muslims.<sup>45</sup>

Building National and International Support for Constitutional Reform:

To prevent their constitutional reform effort from being co-opted by the Moi-KANU regime, movement leaders recognized that they would need not only to broaden their social bases of support, but also secure the support of opposition political parties in Kenya, as well as international donor organizations. Despite the Moi regime’s promises, they were skeptical of its resolve to undertake meaningful constitutional reform, unless faced with a serious electoral threat by opposition political parties. However, it appeared that opposition parties would not likely support

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<sup>45</sup> Estimates of the Muslim population in Kenya vary widely, ranging anywhere from ten to twenty percent of the population. CIA, *The World Factbook*, <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

the movement's reform agenda, unless the movement could effectively mobilize their rank and file on the issue to demand that it do so.<sup>46</sup>

Movement leaders also recognized that the support of international donors would be central to their success, not only to put political pressure on the regime “from above,” but also to provide necessary financial support as they sought to broaden their social and political base to pressure the regime “from below.”<sup>47</sup> As movement leader Willy Mutunga points out, domestic funding sources for the movement remained quite limited.<sup>48</sup> Kenya's business community, for example, remained too fearful that “their businesses would be ruined if the government even suspected that they were [supporting the movement].”<sup>49</sup> In addition, Kenya's Public Collections Act, one of the statutory laws the movement had targeted for reform, required government authorization for fundraising in Kenya's rural areas, and this permission was consistently denied to movement organizations.

Finally, opposition political parties themselves were in desperate need of funds, so were not in a position to lend financial support to the movement and its key

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<sup>46</sup> As is discussed in greater detail below, although many opposition parties were supportive of “minimal” constitutional reforms, focused on ensuring a more fair electoral environment for the 1997 elections, none (at this time) would commit to more comprehensive reforms.

<sup>47</sup> Alison Brysk uses these terms in her analysis of Argentina's human rights movement. See: Alison Brysk, “From Above and Below: Social Movements, the International System, and Human Rights in Argentina,” *Comparative Political Studies*, vol. 26, no. 3, 1993, pp. 259-285.

<sup>48</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 96.

<sup>49</sup> *Ibid.*

organizations. Ultimately, however, over the next three years,<sup>50</sup> the 4Cs was able to secure both material and moral support from the following foreign-based organizations: the National Endowment for Democracy (NED);<sup>51</sup> the Ford Foundation;<sup>52</sup> the Friedrich-Ebert Stiftung and Friedrich-Naumann Stiftung foundations;<sup>53</sup> the central foreign aid agencies of the U.S. (U.S. AID), Denmark (DANIDA), Sweden (SIDA) and Canada (CIDA); the U.S., Danish, Swedish, German and Netherlands embassies; the European Union; the Norwegian consulate; and the Canadian and Australian High Commissions.<sup>54</sup>

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<sup>50</sup> That is, from early 1995, when the 4Cs was founded, through December of 1997, when elections were convened.

<sup>51</sup> As mentioned above, NED is a United States-based private, nonprofit organization, founded in 1983, “to strengthen democratic institutions around the world through nongovernmental efforts.” <http://www.ned.org/about/about.html>

<sup>52</sup> The Ford Foundation is an independent, nonprofit, nongovernmental organization that aims to “strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement.” <http://www.fordfound.org/about/mission2.cfm>

<sup>53</sup> As noted above, the Friedrich-Ebert-Stiftung (FES) is a foundation affiliated with Germany’s Social Democratic Party (SPD), and was founded in 1925 by Germany’s first democratically elected president, Friedrich Ebert. It was banned by the Nazis in 1933 and not re-established until 1947. Its main aims are: (1) “furthering political and social education of individuals from all walks of life in the spirit of democracy and pluralism,” (2) “facilitating access to university education and research for gifted young people by providing scholarships,” and (3) “contributing to international understanding and cooperation.” [http://www.fes.de/intro\\_en.html](http://www.fes.de/intro_en.html)

The Friedrich Naumann Foundation is an independent, nonprofit, German foundation committed to promoting “liberalism” and “advancement of individual freedom” through “strengthening of democratic structures, the reduction of state interventionism, the advocacy of decentralization and privatization, the cutting of existing state regulations . . .” <http://www.fnstusa.org/Startpage.htm> It was founded in 1958 by the first president of the Federal Republic of Germany, Theodor Heuss, and named for liberal political scholar and political Friedrich Naumann (1860 – 1919). As of 2006, it had offices in approximately 60 countries in the world. It works both with state and civil society organizations.

<sup>54</sup> Conversations with Willy Mutunga, Nairobi, Kenya, May – July 1998 and 1999. See also, Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, pp. 80 –81.

Building on earlier reform movement successes, the 4Cs leadership remained committed to strategies of legal mobilization and peaceful civil disobedience. In the words of movement leader Willy Mutunga, the 4Cs explicitly endorsed a “nonviolent, legal, moral and peaceful constitution-making project,” which would actively “resist any breaches of the law by the [regime] to stop its mission,” and which firmly “believed that the right to civil disobedience . . . was a constitutional right open to it.”<sup>55</sup> Through the course of 1995 and 1996, movement efforts were focused on convening a series of workshops and seminars targeted to specific social and political groups in Kenya in order to incorporate their ideas on constitutional reform into their draft proposal and consolidate their support for the movement’s reform agenda.

#### Convening Domestic Workshops to Build Movement Support:

The first of these workshops was convened in March 1995 to discuss workers’ rights. Eighty-eight participants attended, most of whom represented trade unions that had become disillusioned with the regime-dominated leadership of Kenya’s Central Organization of Trade Unions (COTU).<sup>56</sup> By the end of the seminar, Mutunga reports that the 4Cs had received endorsement by seventeen of the trade unions represented, all of which opposed COTU leadership.<sup>57</sup>

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<sup>55</sup> Ibid., p. 74. See also: Kivutha Kibwana, “The Right to Civil Disobedience,” in Kivutha Kibwana, Chris Maina Peter and Joseph Oloka-Onyango, eds., *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, Nairobi: Claripress, 1996, pp. 362 - 367.

<sup>56</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 95.

<sup>57</sup> Ibid., p. 105.

Shortly after its meeting with workers' organizations, the 4Cs also set up private meetings with Kenya's two major employer associations, the Federation of Kenya Employers (FKE) and the Kenya Association of Manufacturers (KAM). In these meetings, their goal was to persuade dominant leaders of the business community of the importance of constitutional reforms, not only for their community specifically, but also for Kenya's economic development in general. Although it was clear, from a strictly rational policy perspective, that the business community should enthusiastically support constitutional reforms to make executive power in Kenya more accountable, given the degree of regime corruption and rent-seeking behavior that had become endemic in the country, as movement leaders explain, by the end of the meeting, it was obvious that these organizations were still too fearful of the consequences of directly confronting the Moi regime on the issue of constitutional reform.<sup>58</sup> Thus, although some within the business community privately, and quietly,

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<sup>58</sup> In an insightful article, Frank Holmquist and Michael Ford explain that in order to understand the failure of Kenya's business community to support constitutional reforms, one must have some understanding of patterns of post-independence capital accumulation in Kenya. Specifically, they point out that "[w]hen Moi came to office [in late 1978], he found that the major African capitalists on the leading edge of the economy were Kikuyu and thus politically threatening [to him as a Kalenjin]. Rather than nurture Kikuyu accumulation, as was done under the prior Kenyatta regime, Moi held the Kikuyu in check, and some of their capital was targeted, disadvantaged, and suffered disaccumulation. Meanwhile, efforts were made to elevate select Kalenjin individuals through the provision of special business opportunities, sometimes in concert with prominent Asians [Kenyans of Indian descent, who comprise approximately x percent of Kenya's population and] who, along with international capital, were not a political threat due to their historical lack of social and political resonance with the African population . . . Given regime efforts to improve the standing of some business people, create new business elites, and punish others (coupled with the vulnerable position of Asian business people), business finds itself deeply divided, and individuals dare not stick their political necks out too far. Otherwise, opportunities may be foreclosed or sanctions may be applied—in the form of state banks calling in loans, government contracts going to competitors, and legal difficulties emerging without warning." Frank Holmquist and Michael Ford, "Kenya Politics: Toward a Second Transition?" *Africa Today*, vol. 45, no. 2, 1998, p. 241. A respected Kenyan economist, Peter Warutere, also argues that "most business people [in Kenya] are so frightened of being labeled radical or anti-government that they dare not complain for the fear of being victimized. Indeed, [despite liberalization of the economy], there appears to be a widespread fear in the business community that the government is still capable of

supported reform movement activities, none would take a public stand on constitutional reform at this time.

The next workshop organized by the 4Cs was in May 1995 and focused specifically on issues of land rights and land reform in Kenya. Invited to this workshop were representatives of farmers unions, pastoral groups, squatters and representatives of Kenya's land cooperatives.<sup>59</sup> The degree of regime sensitivity to even discussion of land reform and land rights was reflected in the fact that late on the second day of the workshop, police stormed into the meeting, declared it illegal under the Public Order Act, and ordered those present to immediately disperse. Movement leaders and workshop participants refused, citing their constitutional rights to free association and assembly. Engaging in legal mobilization, they insisted that no law consistent with their constitutional rights had been violated, except for the fact that the officers had broken into the premises without a search warrant and, thus, were trespassing on private property! Infuriated, the police officers then called in Kenya's riot police, who succeeded in (temporarily) shutting the meeting down.

In response, the 4Cs rescheduled another land reform workshop for two months later, in July 1995. This time, they widely publicized the meeting not only in Kenya's national press, but also among Kenya's diplomatic community based in Nairobi. As a result, 126 individuals attended the workshop, representing not only

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stifling businesses whose proprietors do not support the government, or are seen to support the opposition." Peter Warutere, "Focus on the Economy, Not just Politics," *Economic Review*, September 8 – 14, 1997, p. 22. Cited in *ibid*, p. 256.

<sup>59</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, pp. 96 – 99.

farmers unions, pastoral groups, land cooperatives and squatters, but also local embassies, and national and international press corps.<sup>60</sup> This time, especially given the presence of diplomats and the international press, the regime dared not disrupt the meeting. Again, in contrast to countermovement leaders' efforts to frame Kenya's reform movement as an attempt to economically and politically marginalize Kenya's ethnic minority communities, the consensus reached at the end of this workshop was that a reformed constitution must address the concerns of Kenya's ethnic minorities, and that questions of federalism, or *majimboism*, in its original,<sup>61</sup> not contemporary, meaning, "must feature prominently into any constitutional settlement."<sup>62</sup> Moreover, as soon as Peter Okondo's book on *majimboism*,<sup>63</sup> the first written work to provide a concrete framework for operationalizing *majimboism* in contemporary Kenya, was published a year later, in 1996, it was made required reading for members of the 4Cs, and became an important part of the 4Cs archives for further reform efforts.

The following month, in August 1995, the 4Cs organized a constitutional workshop for Kenya's political parties. Although the leadership of the 4Cs had begun

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<sup>60</sup> Ibid., p. 98.

<sup>61</sup> That is, its meaning in Kenya's pre-independence debates of the early 1960s.

<sup>62</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 99.

<sup>63</sup> Peter Okondo, *A Commentary on the Constitution of Kenya*, Nairobi, Phoenix Press, 1996. As Mutunga and others explain, Okondo's book was widely perceived within the movement as an important and positive contribution to the project of constitution-making, because, unlike the framing of the most vocal proponents of *majimboism*, who became the dominant leaders of Kenya's countermovement, Okondo did not equate *majimboism* with ethnic cleansing. Instead, he focused on Kenya's history of presidential authoritarianism, and the need to devolve, decentralize and democratize executive power in Kenya. Conversations with Mutunga, Nairobi, Kenya, May 1999. See also: Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 142.



meeting with representatives of opposition political parties soon after its founding in January 1995, this workshop was an effort to bring together representatives of *all* political parties, including KANU, to discuss political party interests in constitutional reform. Despite the fact that 143 individuals attended the workshop, ultimately only fourteen were sitting MPs.<sup>64</sup> Movement leaders had generally been highly critical of opposition party leaders because, although they paid lip service to the need for constitutional reform, none were specific about substantive proposals, nor had they produced policy statements outlining their ideas. As mentioned above, most opposition parties generally supported a narrow constitutional reform agenda aimed at ensuring fair elections in 1997 and not comprehensive constitutional reforms, as advocated by the reform movement. In particular, opposition parties were reluctant to even discuss proposals for decentralizing and democratizing executive power—a central concern of the movement.<sup>65</sup>

As movement leaders explained, dominant opposition party leaders still believed they could defeat the Moi regime in the 1997 elections; thus they had a self-interest in maintaining the existing concentration of executive power.<sup>66</sup> For this reason, the movement's strategy was to bring political parties on board their reform agenda through outlining specific "minimal" constitutional reforms focused on fair

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<sup>64</sup> Ibid., p. 93.

<sup>65</sup> See, for example, the movement's first "twenty point" draft for constitutional reform discussed above. See also Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, pp. 113- 114.

<sup>66</sup> Conversations with Mutunga, Nairobi, Kenya, May – July 1998 and 1999.

elections in 1997, but then demonstrate why these minimal reforms needed to be linked to a more comprehensive reforms in order to advance human and democratic rights protections in Kenya. Ultimately, however, it was not until the movement convened its First Plenary on constitutional reform in April 1997, as is discussed below, that Kenya's opposition political parties publicly endorsed the movement and its reform agenda.<sup>67</sup>

Almost as important as wooing opposition party support was solidifying the support of Kenya's National Council of Non-Governmental Organizations (NGOs). The National Council of NGOs was established in 1993 as an umbrella organization to advance the general interest of NGOs in Kenya, and included all international, national and local NGOs registered in Kenya under the NGO Coordination Act.<sup>68</sup>

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<sup>67</sup> As is discussed below, the only three parties not represented at the movement's First Plenary on constitutional reform were KANU, the Kenyan Social Congress (KSC) and the Kenyan National Congress (KNC). Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 132. Both the KSC and KNC were minor parties in Kenya, winning one seat each in the 1992 elections. In the 1997 elections, the KSC again won one seat, whereas the KNC failed to win even a single seat. Dieter Nohlen, Michael Krennerich and Bernhard Thibaut, eds., *Elections in Africa: A Data Handbook*, Oxford: Oxford University Press, 1999, p. 488.

<sup>68</sup> This Act was initially introduced into Kenya's parliament as the NGO Coordination Bill in December 1990. It was a deliberate attempt by the Moi regime to monitor and control the growing number of NGOs in Kenya by requiring them to register with the state through a central NGO Bureau. As Stephen Ndegwa notes in his insightful analysis of the evolution of this Bill, the NGO Bureau was originally and "ominously placed under the internal security secretariat of the Office of the President." Stephen N. Ndegwa, "Civil Society and Political Change in Africa: the Case of Non-Governmental Organizations in Kenya," *International Journal of Comparative Sociology*, vol. 35, no. 1 –2, January – April 1994, p. 5. So urgent was the felt need to respond to the increasingly political role of Kenya's NGOs through its human rights and democracy movement, that the proposed Bill was rushed through parliament and passed within two days. The only other legislation that was passed with comparable speed, as Ndegwa reports, was Kenya's constitution amendment of 1982, which made Kenya *de jure* a one-party state. In response to the strict registration requirements of this Bill, 130 of Kenya's NGOs constituted themselves into an "NGO Network" and elected a ten-member standing committee, the NGO Standing Committee (NGOSC), to represent their concerns regarding the Bill to the Moi regime. This committee was later expanded to twenty members, in order to facilitate an expanded lobbying effort by the NGO Network. Over the course of the next two years, the NGO Network and its Standing Committee pressured the Moi regime to make substantive amendments to the Act to repeal highly objectionably

When the National Council of NGOs was founded, there were 370 NGOs registered under the Act. By 1994 – 1995 this number had risen to 440 NGOs, in 1995 – 1996 the number stood at 620 NGOs, by 1996 – 1997 there were 677 registered NGOs, and by 1997 – 1998, 935 NGOs were registered under the Act.<sup>69</sup> Grant income for Kenya’s NGO sectors also steadily increased over this period and was estimated at Ksh. 20,211,218 for the 1997 calendar year.<sup>70</sup> The National Council of NGOs was represented by a democratically elected Executive Committee comprised of fifteen individuals, including a chairperson. Because two members of the 4Cs Steering Committee, Willy Mutunga and Davinder Lamba, also sat on the Executive Committee of the National Council of NGOs, the Executive Committee was kept well informed of the movement’s constitutional reform project and other reform activities, since the founding of the 4Cs in January 1995.

Once the National Council of NGOs was formally established, various groups of NGOs within Kenya’s NGO sector also began to organize themselves as formal “networks” within this sector. This was done to coordinate lobbying activities and share information on issues particularly relevant to their organizational concerns. The

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registration requirements. Although the regime initially promised the NGOSC that it would respond meaningfully to its concerns, it took sustained mobilization by the NGO network, as well as their mobilization of Kenya’s donor community, before the government finally conceded substantive reforms at the end of 1992. In early 1993, the NGOSC reconstituted itself as the “National Council of NGOs.” See Ibid.

<sup>69</sup> The National Council of NGOs, *Annual Report: January – December 1998*, Nairobi: The National Council of NGOs, 1998, p. 3. Of 924 NGOs registered when the study was undertaken in 1998, approximately 200 were international NGOs, 519 were national NGOs and 205 were local NGOs. Ibid.

<sup>70</sup> Ibid., p. 2. The exchange rate from Kenyan shillings to U.S. dollars was approximately seventy-six to one at the time.

first of these formal networks to be registered was the “Human Rights and Advocacy NGO Network,” which was comprised specifically of national NGOs focused on promoting human rights and democratization in Kenya –that is, organizations that were central to Kenya’s human rights and democracy movement. During the 1993 – 1997 period, the following eleven NGOs belonged to this network: (1) the Law Society of Kenya (LSK); (2) Rescue Political Prisoners (RPP); (3) the Kenya Human Rights Commission (KHRC); (4) the International Commission of Jurists, Kenya Section (ICJ-K); (5) the Federation of Women Lawyers, Kenya Chapter (FIDA-K); (6) Kituo cha Sheria (Kituo); (7) the Legal Education and Aid Programme (LEAP);<sup>71</sup> (8) the Institute for Education in Democracy (IED); (9) the Public Law Institute (PLI); (10) the Legal Resources Foundation (LRF); and (11) the Centre for Law and Research International (Clarion).<sup>72</sup> As is discussed in greater detail below, the 4Cs had solid support from all of these organizations, and the Human Rights and Advocacy NGO Network was also represented on the 4Cs Steering Committee.

Although the National Council of NGOs established a “Task Force on Constitution-Making” shortly after the 4Cs was founded, due to heated debates within the NGO sector between those NGOs who considered themselves strictly “developmental” NGOs and wanted to remain “apolitical,” and those who insisted that development concerns remained inextricably linked to questions of democratization

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<sup>71</sup> These seven NGOs, with the exception of the LSK, are discussed in detail in Chapter Five. The LSK, is discussed in Chapter Four.

<sup>72</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 108. In depth interviews were conducted with all of these organizations in Nairobi, Kenya, May – July of 1998 and 1999.

and constitutional reform in Kenya,<sup>73</sup> little progress was made by the Task Force until the end of 1996. At the Annual General Assembly of the National Council of NGOs in late November of 1996, a majority of members finally agreed to support Kenya's reform movement and the Council became officially represented on the 4Cs' Steering Committee. As is discussed below, the NGO Council also eventually became centrally involved in the planning process for the movement's first constitutional convention and was represented on the Convention's National Planning Committee (NCPC), as well as its successor, the National Convention Executive Committee (NCEC).<sup>74</sup>

#### Planning for the National Convention Assembly's First Plenary:

By mid-1996, the 4Cs felt it had secured sufficient national support to convene a meeting to begin planning its First Plenary for a national constitutional assembly, and a planning meeting was scheduled for May 31, 1996. Invitations were sent to all MPs, all political parties --registered as well as unregistered,<sup>75</sup> all major religious

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<sup>73</sup> These NGOs became known as the "governance and democracy NGOs" of Kenya's NGO sector.

<sup>74</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 100.

<sup>75</sup> As was mentioned above, and is discussed in greater detail below, many political parties remained unregistered because Kenya's Registrar of Societies, under the Societies Act, refused or simply delayed their registration. In most cases, no reasons were cited for denying or delaying registrations, and there was no defined time period within which the Registrar was required to either officially register, or not register, an organization. Also, parties denied or delayed registration had no recourse to Kenya's courts under the Act to force the Registrar to act.

organizations,<sup>76</sup> all NGOs,<sup>77</sup> “the private sector and the government . . . and all [other significant social and political] organizations, including the popular and grassroots organizations.”<sup>78</sup> Mutunga lists the attendees at this meeting as representatives of “the National Council of NGOs, the Human Rights NGO Network, National Council of Churches of Kenya (NCCCK), the National Commission on the Status of Women, the National Council of Women of Kenya,<sup>79</sup> National University Students Organisation . . . and two of the unregistered political parties, namely, Safina and Islamic Party of Kenya (IPK).”<sup>80</sup>

It was at this meeting that the National Convention Planning Committee (NCPC) was formed, which was comprised of representatives of all organizations represented at the meeting, as well as additional others that the elected interim convener<sup>81</sup> was allowed to invite at her or his discretion, as long as they were approved by other representatives.<sup>82</sup> Four central objectives of the NCPC were: (1) to articulate the “guiding principles” of the National Convention; (2) to put forth a

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<sup>76</sup> That is, the NCCCK, Kenya’s Catholic Bishops, and the Supreme Council of Kenya Muslims (SUPKEM).

<sup>77</sup> This was done via the National Council of NGOs.

<sup>78</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 121.

<sup>79</sup> These two organizations, the National Commission on the Status of Women and the National Council of Women of Kenya, are Kenya’s two dominant national women’s organizations.

<sup>80</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 121.

<sup>81</sup> Bishop Professor Zablon Nthamburi, the presiding bishop of the Methodist Church, and member of the NCCCK, was elected the Interim Convener of the NCPC. *Ibid.*, p. 149.

<sup>82</sup> *Ibid.*, 122.

proposal for the *process* of constitutional reform; (3) to establish a list of delegates to be invited to the First Plenary of the NCC, as well as set a date for this plenary; and, finally, (4) to assemble a list of “minimal” constitutional, statutory and administrative reforms, which would become the focus of movement activism leading up to 1997 elections.

A concept paper drafted by the 4Cs<sup>83</sup> was adopted by the NCPC as a working document, and a sub-committee, comprised of movement leaders Gibson Kamau Kuria, Willy Mutunga, Kivutha Kibwana, Maria Nzomo and Peter Anyan’ Nyong’o<sup>84</sup> was formed to further refine and revise this paper to reflect the dominant concerns of the general NCPC. Four months later, on September 28, 1996, the revised concept paper, “*Njia ya Kufikia Katiba Mpya, The Way to the New Constitution: Towards the National Convention,*” was made public at a ceremony attended by over a 100 people.<sup>85</sup> In attendance this time were leaders of all major opposition parties in Kenya, representatives of the NCKK and Kenya’s Catholic Bishops, as well as representatives of all SMOs comprising the reform movement. In response to the NCPC’s four objectives outlined above, the paper first summarized the “guiding principle” of the national convention as stemming from their belief that Kenya was

a nation in which men and women have confidence in the sanctity of individual rights and liberties and in the proper safeguard of minorities. . . The convention also recognizes the inherent right of

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<sup>83</sup> Movement leader Gibson Kamau Kuria was the primary author of this paper.

<sup>84</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 149.

<sup>85</sup> *Ibid.*, p. 125.

every Kenyan, irrespective of racial or ethnic origin, to participate in the constitution-making process and help solve the country's current constitutional crisis.<sup>86</sup>

Second, the NCPC largely adopted the process of constitutional reform that had been outlined earlier by the 4Cs leadership. As Mutunga notes, the paper was careful to disassociate their proposed constitutional reform process from reform processes that had characterized Francophone African nations. In these cases, “civilian coups” resulted in entirely new governments being established. Regime and countermovement leaders consistently framed Kenya’s reform movement as “revolutionary” in this way – bent on overthrowing the Moi-KANU government by causing “chaos” and “violence” throughout the country.<sup>87</sup> Instead, the paper insisted that the reform movement was committed to a peaceful process of constitution-making and that “[i]t uses the existing government to facilitate the process of constitutional review and to implement the decisions of the convention.”<sup>88</sup>

Where the process proposed by the NCPC differed from the Moi-KANU regime’s proposal was on two fundamental points: (1) the NCPC believed that the constitutional reform process should not be confined solely to parliament, but should be drafted through a National Constitutional Convention attended by representatives of all major civic and political groups in Kenya; and (2) they believed that the

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<sup>86</sup> *Njia ya Kufikia Katiba Mpya*, The Way to the New Constitution: Towards the National Convention,” Nairobi: National Convention Planning Committee, p. 22. Cited in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 126.

<sup>87</sup> This is discussed in greater detail below.

<sup>88</sup> *Njia ya Kufikia Katiba Mpya*, The Way to the New Constitution: Towards the National Convention,” p. 3.



constitutional proposal that emerged from this Convention should be submitted first to a national referendum for approval, before ratification by parliament.<sup>89</sup> Ultimately, however, they believed that the proposal needed ratification by two-thirds of parliament, as required by Kenya's Constitution, and that parliament was primarily responsible for ensuring that the constitutional reforms passed were in fact implemented.

Third, although the NCPC proposed an impressive list of delegates for its First Plenary, they acknowledged their limitations in identifying "all" significant civic organizations in Kenya, especially those at the grassroots level that did not have a national presence. Thus, they enlisted the assistance of "churches, mosques, NGOs and a few of the popular and grassroots organizations that were known to the sub-committee" in this endeavor.<sup>90</sup> With their help, ultimately 510 delegates were invited to the movement's First Plenary for a National Constitutional Convention.<sup>91</sup> Funding for the Plenary, convened April 3 – 6, 1997, was provided by the Westminster Foundation for Democracy,<sup>92</sup> the Dutch Embassy and the Ford Foundation.<sup>93</sup>

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<sup>89</sup> For obvious reasons, the Moi-KANU regime wanted the constitutional reform process confined to the KANU-dominated parliament. Moreover, as is discussed below, through a further redistricting in September 1996, which resulted in even greater malapportionment favoring the Moi regime, the regime hoped to win two-thirds of Kenya's parliamentary seats, thus controlling the ratification process for constitutional reform. Regime and countermovement leaders also spoke out vehemently against a national referendum procedure, which, they rightly argued, was highly majoritarian in character and, thus, would discount the voices and votes of Kenya's minority groups.

<sup>90</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 128.

<sup>91</sup> *Ibid.*, p. 159.

<sup>92</sup> The Westminster Foundation for Democracy is a London-based foundation established in 1992 "to provide assistance in building and strengthening pluralist democratic institutions overseas." [http://www.bond.org.uk/funding/guide\\_wfd.htm](http://www.bond.org.uk/funding/guide_wfd.htm) The foundation receives funding from the UK

Finally, the NCPC's concept paper also outlined what it considered the "minimal" package of constitutional, statutory and administrative reforms necessary to ensure free and fair elections in 1997. As Mutunga and other movement leaders point out, however, they were careful in proposing these "minimal" reforms to emphasize that they were intended to be "facilitative," not "final," reforms.<sup>94</sup> That is, they were designed to facilitate or "bring about an environment conducive to carrying out comprehensive reforms."<sup>95</sup> Their great fear, as it turns out was justified, was that opposition political parties, in particular, would only support the minimal reform package to promote more free and fair elections in Kenya, then shirk their responsibility to facilitate the comprehensive constitutional reforms necessary to expand, deepen and, ultimately, institutionalize democratic governance in Kenya.

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government and accounts to UK's parliament for its resources through the Foreign and Commonwealth Office. Ibid. It supports programs that "make a practical contribution to the development of pluralist democratic institutions." Ibid.

<sup>93</sup> As mentioned above, the Ford Foundation is an independent, nonprofit, nongovernmental organization that aims to "strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement." <http://www.fordfound.org/about/mission2.cfm> Mutunga notes that the Westminster Foundation for Democracy, despite the objections of the then British High Commissioner to Kenya, contributed Kshs. 4.5 million, the Dutch Embassy contributed Kshs. 5.1 million, and the Ford Foundation provided Kshs. 2 million. See Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 153. The exchange rate at the time was approximately Kshs. 76 per U.S. dollar.

<sup>94</sup> In fact, many within the movement argued that they should not be referred to as "facilitative," and not "minimal," to emphasize that these reforms must be closely linked to the movement's larger constitutional reform effort.

<sup>95</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 128.

“Minimal” and “Facilitative” Reforms:

The “minimal” constitutional, statutory and administrative reforms outlined by the NCPC included the following six constitutional reforms: (1) amendment of the Constitution of Kenya (Amendment) Bill of August 1992 such that the formation of coalition government was allowed; (2) a requirement that presidential candidates receive 50 percent of the vote, in addition to 25 percent of five provinces and, if no winner emerged from the first round of polling, a run-off majoritarian election between the two top candidates held within 21 days;<sup>96</sup> (3) institutionally checked independence of Kenya’s Electoral Commission; (4) a requirement that Kenya’s twelve nominated MPs be selected on the basis of proportional strength of parties in parliament; (5) a fixed time-table for elections, rather than this being left to the sole discretion of the executive; and finally, (6) a constitutional amendment allowing independent candidates to run for political office.

In terms of statutory reforms, the NCPC insisted on the repeal or significant amendment of laws that infringed upon Kenyans’ human and constitutional rights to free assembly, association, speech, movement and information. Specifically, they targeted the following ten laws: (1) the Societies Act, (2) the Public Order Act, (3) the Chief’s Authority Act, (4) the Preservation of Public Security Act, (5) the Films and

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<sup>96</sup> As regime and countermovement critics rightly argued, this majoritarian electoral formula could potentially marginalize the voices of Kenya’s ethnic minorities. Interestingly, however, movement leaders chose not to advocate for the repeal of the twenty-five percent rule, as they believed it important as an institutional incentive for emerging opposition parties to establish a national presence. In addition, however, they also believed that opposition candidates in the 1997 elections could prevent the Moi-KANU regime from winning in five provinces, so it was also for more politically opportunistic reasons that the twenty-five percent rule was not targeted.

Stage Plays Act, (6) the Public Collections Act, (7) the Public Broadcasting Corporation Act, (8) Sections 56 and 57 of Kenya's Penal Code, (9) the Outlying Districts Act, and (10) the Special District (Administrative) Act.<sup>97</sup>

As discussed in Chapter Three, most of these laws had colonial origins and were first re-introduced into Kenyan statutory law by the Kenyatta regime<sup>98</sup> to restrict Kenya's only opposition party at the time, the Kenyan People's Union (1964 – 1966). Upon Kenyatta's death in 1978, the Moi regime continued to use these laws to prevent opposition mobilization, despite the fact that Kenya was a *de jure* one-party state from June 1982 through December 1991. Moreover, even though Section 2(A) of Kenya's Constitution, which prohibited multipartyism, was repealed in December 1991, the Moi regime continued to use these laws to thwart mobilization of emergent opposition parties.

For example, under the Societies Act, all political parties were required to register with the state before they could begin operations. The Registrar of Societies was given sole discretion as to whether to grant registration, as well as *when* to register them. That is, there was no time limit within which registration decisions had to be made. Thus, the Moi regime both denied some emergent parties registration, and delayed the registration of others, as a means to preventing or hindering their mobilization. Under Kenya's Public Order Act, all political parties still had to apply for licenses from the state to organize political rallies. These licenses were issued at

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<sup>97</sup> Each of these statutory laws is discussed in detail in Chapter Three and in greater depth below.

<sup>98</sup> Kenya's first independence regime, 1963 – 1978.

the discretion of district commissioners (DCs), who, in turn, were direct appointees of the president. Moreover, once issued, licenses could be revoked, or meetings cancelled, for almost any reason, again at the discretion of DCs. The Moi regime, thus, strategically used this law not only to deny opposition parties licenses to hold rallies, but to also cancel or stop rallies “when opposition politicians ‘abused’ (read criticized) the government or the president.”<sup>99</sup>

Under the Chiefs’ Authority Act, local chiefs, who were the representatives of Kenya’s provincial administration at the local level, and also directly appointed by the regime, were given broad powers to implement the Public Order Act and “keep the peace” at the local level. In the post-1991 multiparty era, however, as SMOs comprising Kenya’s human rights and democracy movement documented, these powers were used to shut down opposition party meetings, as well as to disrupt voter and civic education seminars organized Kenya’s human rights and democracy movement organizations.<sup>100</sup>

The Preservation of Public Security Act allowed the government to detain individuals deemed risks to public security without trials and for an indefinite period of time. As was discussed in Chapter Four, this law was frequently used against movement activists from the mid-1980s through 1991. It continued to be used against movement activists and opposition politicians in the 1992 – 1997 period, although with less frequency than the earlier period. The Public Collections Act required that

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<sup>99</sup> Ndegwa, “The Incomplete Transition: Constitutional and Electoral Context in Kenya,” p. 198.

<sup>100</sup> Interviews with representatives of the 4Cs, FIDA-K, ICJ-K, IED, KHRC, Kituo, LRF, LSK and RPP, Nairobi, Kenya, May – July, 1998 and 1999. See also, *ibid.*

all politicians apply for licenses from Kenya's provincial administration to organize party fund-raising events. As Kenyan scholar, Stephen Ndegwa, reports, "[t]his law was selectively applied against opposition politicians. Not surprisingly, politicians from the incumbent KANU government had no problems getting such licenses, except when they fell out of favor."<sup>101</sup> The Outlying Districts Act gave district commissioners (DCs) the power to declare any district, or part of a district, in Kenya, "closed" and, in so doing, entry into this district became illegal without special permission.

Finally, the Special Districts (Administration) Act allowed the closed district ordinance to be applied not only to any part of the country, but also to "any person or class of persons from its operation."<sup>102</sup> As explained in Chapter Three, this typically worked in two ways. First, any person, or "class of persons," could be exempted from the rules governing a "closed district," and second, if any person, or class of persons, was determined to be acting in a "hostile manner toward the Government," either the Provincial or District Commissioner could order the arrest of that person, or that *entire class of persons*, as well as "prohibit them from leaving areas reserved for their use and order the seizure and detention of all their property."<sup>103</sup> In the post-1991 multiparty era, these laws were used by the regime to prevent opposition party access to various parts of Kenya declared "KANU zones" by KANU politicians, as well as to

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<sup>101</sup> Ndegwa, "The Incomplete Transition: Constitutional and Electoral Context in Kenya," p. 198.

<sup>102</sup> Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 418.

<sup>103</sup> *Ibid.*

areas affected by political violence. Thus, opposition parties, and movement activists, were largely prevented from even entering much of Rift Valley Province leading up to both the 1992 and 1997 elections.

In addition to these constitutional and statutory reforms, the NCPC also demanded the following six administrative reforms: (1) all political prisoners be released; (2) all victims of Kenya's ethnic violence be resettled; (3) all unregistered opposition political parties be registered;<sup>104</sup> (4) all provincial commissioners, district commissioners, district officers, local chiefs, and police be prohibited from interfering with Kenya's electoral process; (5) all opposition political parties be allowed equal access to Kenya's Public Broadcasting Corporation, and all pending private radio and television applications be licensed immediately; and, finally, (6) all freedoms of speech, association and assembly, especially of movement leaders, the press, opposition political parties and religious organizations be strictly protected. As is documented below, these constitutional, statutory and administrative reforms formed the substance of Kenya's human rights and democracy reform movement demands leading up to the 1997 elections and, ultimately, with some exceptions discussed below, formed content of the reform package finally enacted by the regime in early November of 1997.<sup>105</sup>

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<sup>104</sup> At the time the NCPC made this demand there were approximately seventeen political parties still awaiting registration. Fifteen of these were finally registered with the enactment of the IPPG reforms (discussed below), although one of these, Safina, ultimately was not registered until November 26, 1997, one week prior to candidate nominations, and three *years* after it had initially applied for registration.

<sup>105</sup> Parliament passed the Statute Law (Repeals and Miscellaneous Amendments) Bill and the Constitution of Kenya (Amendment) Bill on October 30, 1997, and the Constitution of Kenya Review Commission Bill on November 6, 1997. President Moi assented to all three bills on November 7, 1997.

The Movement's First Plenary of the National Convention: April 3 – 6, 1997:

With funding provided by the Westminster Foundation for Democracy,<sup>106</sup> the Dutch Embassy and the Ford Foundation,<sup>107</sup> the movement's First Plenary for a National Convention was convened April 3 – 6, 1997. It was attended by 510 delegates including representatives of almost all of Kenya's opposition political parties,<sup>108</sup> Kenya's major religious organizations,<sup>109</sup> the NGO Council and the Human Rights and Advocacy Network. In addition, also attending were:

professionals, farmers, pastoralists, fishermen and fisherwomen, retailers, wholesale trades, industrialists, bankers . . . the disabled, women's groups, youth and students, artisans and the unemployed, the landless and slum-dwellers, matatu operators<sup>110</sup> and other transporters, co-operators, Kenyans in exile, labour movement activists, politicians,

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<sup>106</sup> The Westminster Foundation for Democracy is a London-based foundation established in 1992 "to provide assistance in building and strengthening pluralist democratic institutions overseas." [http://www.bond.org.uk/funding/guide\\_wfd.htm](http://www.bond.org.uk/funding/guide_wfd.htm) The foundation receives funding from the UK government and accounts to UK's parliament for its resources through the Foreign and Commonwealth Office. Ibid. It supports programs that "make a practical contribution to the development of pluralist democratic institutions." Ibid.

<sup>107</sup> As mentioned above, the Ford Foundation is an independent, nonprofit, nongovernmental organization that aims to "strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement." <http://www.fordfound.org/about/mission2.cfm>

<sup>108</sup> Only three political parties were not represented at the meeting: KANU, the Kenyan Social Congress (KSC) and the Kenya National Congress (KNC). Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 132. As mentioned above, both the KSC and KNC were minor opposition parties in Kenya. See footnote 71 above.

<sup>109</sup> Although all major religious organizations were represented at the meeting, both the NCCK and Kenya's Catholic Bishops insisted that they participate in the plenary as "observers only." Ibid. Their concern, as Mutunga explains, was that, given the prominent participation of opposition political parties in the plenary, they would be perceived by their constituents as being too "partisan" if they actively participated.

<sup>110</sup> "Matatus" are the major form of public transport in Kenya. They are typically small minivans or pickup trucks with a cabin in the back.



children's rights organizations, Kenya's language groups, cultural groups, the academic sector and other sectors and interests.<sup>111</sup>

In general, the Plenary had four main objectives: (1) to bring the most broadly representative group of Kenyans as possible together to reach a consensus on minimal constitutional, statutory and administrative reforms to be enacted by the regime prior to the 1997 elections;<sup>112</sup> (2) to adopt a timetable for implementing these reforms; (3) to outline a series of strategic responses, should the regime refuse to enact reforms prior to elections; and (4) to establish a nationwide organizational structure to promote the movement's objectives. It was agreed that the group convened at the Plenary constituted what would be called the "National Convention Assembly" (NCA), and that the NCPC would direct the Assembly's activities until a new executive committee, the National Convention Executive Committee (NCEC), was elected to replace it during the Plenary.

Movement leaders strategically planned the First Plenary for early April, since they anticipated that Kenya's Electoral Commission would soon announce the

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<sup>111</sup> These are the groups that are listed in the plenary's "Declaration and Resolutions of the National Convention Assembly's First Plenary Sitting." "Declaration and Resolutions of the National Convention Assembly's First Plenary Sitting at Limuru Conference and Training Centre From 3<sup>rd</sup> – 6<sup>th</sup> April 1997," Nairobi: National Convention Assembly, p. 1. Reproduced in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, p. 432. It is difficult to get precise information regarding exactly who some of these groups are, as well as how groups' "representatives" or delegates were chosen, however. As discussed above, invited delegates came from a list prepared by the NCPC, which incorporated lists from the leadership of the NCCP, the Catholic Church, as well as SUPKEM.

<sup>112</sup> This was to be accomplished by building onto, and critiquing, the list of minimal reforms proposed by the NCPC. These reforms, in turn, were the result of "a consensus of reforms suggested by the National Council of Churches (NCCK), the Episcopal Conference of the Catholic Bishops, the Citizens Coalition for Constitutional Change (4Cs), political parties . . . among other organizations." Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 130.

beginning of voter registration for the 1997 polls.<sup>113</sup> Their goal was to ensure that at least their “minimal” reform package was implemented in time to impact the electoral process and ensure free and fair elections in 1997. At the end of the three-day plenary, the NCA produced a ten-page document entitled “Declaration and Resolutions of the National Convention Assembly’s First Plenary.”<sup>114</sup> The document contained the list of minimal constitutional, statutory and administrative reforms adopted by the Assembly, which largely endorsed the NCPC’s original proposal discussed above,<sup>115</sup> as well as a list of concrete activities the Assembly would undertake to ensure the reform process moved forward in a timely manner.

These activities included: (1) a broadly publicized presentation of the NCA’s recommendations on constitutional reform at Kamukunji grounds<sup>116</sup> on May 3, 1997, followed by presentations at all of Kenya’s provincial headquarters on May 24, 1997;

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<sup>113</sup> Although, as was the case with the 1992 elections, the exact date of the polls was not yet known, most believed with considerable certainty that they would take place in December, when elections have historically been convened in Kenya. Moreover, it was constitutionally prohibited that they be convened later than March 1998.

<sup>114</sup> “Declaration and Resolutions of the National Convention Assembly’s First Plenary Sitting at the Limuru Conference and Training Centre from 3<sup>rd</sup> – 6<sup>th</sup> April 1997.” Reproduced in Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, pp. 432 – 442.

<sup>115</sup> As discussed above, the NCPC proposal, in turn, had been largely compiled from a consensus of proposals put forward by the NCCK, the Catholic Church, the Supreme Council of Muslims, opposition political parties and the NGO Council. Thus, this proposal already had significant support prior to the convening of the NCA’s First Plenary.

<sup>116</sup> As discussed in Chapter Four, Kamukunji grounds, just outside of Nairobi, held great symbolic meaning for movement leaders and participants, as well as Kenyan citizens in general. It was at here that leaders of Kenya’s independence movement convened public meetings to demand independence from colonial Britain beginning in the 1950s.

(2) the convening of “open air joint interdenominational prayer sessions”<sup>117</sup> to promote the constitutional reform process each Friday, beginning the first Friday in May, until reforms were enacted; (3) the convening of district level meetings “to popularize the reform agenda and necessary action to secure [regime] compliance;”<sup>118</sup> (4) the immediate establishment of a non-partisan national Electoral Commission by the NCA to monitor Kenya’s electoral process until Kenya’s official Electoral Commission was reconstituted on an independent and nonpartisan basis; (5) the commencement of “civil mass action”<sup>119</sup> demonstrations in Nairobi, as well as at provincial, district and locational<sup>120</sup> headquarters, until reforms were passed and implemented; and (6) “[d]isobey[ing] with immediate effect the unconstitutional provisions in the Public Order Act, which have never been obeyed by the ruling party, and all other

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<sup>117</sup> As discussed in Chapter Four, these “prayer sessions” were convened by movement leaders to circumvent the licensing requirements of Kenya’s Public Order Act. As mentioned above, under this Act, all public meetings of ten or more individuals had to be licensed by the district commissioner (DC) of the district within which the meeting was to be held. Religious meeting, however, were exempted from this registration requirement.

<sup>118</sup> “Declaration and Resolutions of the National Convention Assembly’s First Plenary Sitting at the Limuru Conference and Training Centre from 3<sup>rd</sup> – 6<sup>th</sup> April 1997.” Reproduced in Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, p. 439.

<sup>119</sup> As Mutunga explains, “[m]ass action took various forms: rallies, demonstrations, processions, strikes, sit-ins, vigils, prayers, and parading coffins of the dead at police stations before burials.” Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 157. As he further explains, “[a]ll of these activities were in defiance of [unconstitutional] laws” and undertaken as a form of civil disobedience. Ibid. “This mass action was premised on the legal theory . . . [that] states that laws of a repressive government should not be obeyed.” Ibid. By thus engaging in civil disobedience and legal mobilization, “[m]ass action challenged the legitimacy of the existing legal order.” Ibid.

<sup>120</sup> Administratively, Kenya is divided into provinces, districts, divisions, “locations” and “sub-locations.” Locations and sub-locations constitute the local level of Kenya’s provincial administration and are supervised by state-appointed chiefs and sub-chiefs, respectively.

unconstitutional and oppressive laws which deny or limit the citizen's freedom of assembly, association and expression."<sup>121</sup>

Finally, the NCA's "Declaration and Resolutions" also established the National Convention Assembly's organizational structure. In addition to electing the National Convention Executive Council (NCEC) to replace the NCPC as its leadership, the Assembly also established provincial, district, divisional, location and sub-location assemblies. This was done to ensure that as many Kenyans as possible, at all levels of society, could actively participate in the constitutional reform process in a meaningful and informed way. The assembly also established numerous committees to focus on specific aspects of the NCA's reform agenda, and all delegates, including political party leaders, were required to "bind . . . themselves to this Declaration and Resolutions and commit . . . themselves to support the objectives and work of the National Convention Assembly."<sup>122</sup>

For the first time since Kenya's political opening in December 1991, almost all of Kenya's opposition political parties, and significantly, all four of Kenya's dominant opposition parties,<sup>123</sup> joined together to support a unified agenda of constitutional reform –something that opposition political parties could not have achieved without the leadership of Kenya's human rights and democracy movement. The NCEC was

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<sup>121</sup> "Declaration and Resolutions of the National Convention Assembly's First Plenary Sitting at the Limuru Conference and Training Centre from 3<sup>rd</sup> – 6<sup>th</sup> April 1997." Reproduced in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, pp. 439 – 440.

<sup>122</sup> *Ibid.*, p. 442.

<sup>123</sup> That is, the Democratic Party (DP), FORD-Kenya (FORD-K), FORD-Asili (FORD-A) and the National Democratic Party (NDP).

charged with delivering a copy of the “Declaration and Resolutions” to the Moi-KANU government, and a committee was established to ensure that the document was translated into all of Kenya’s dominant vernacular languages, as well as the national language, Kiswahili,<sup>124</sup> and “promptly disseminated to all sectors of our society” by attending delegates.<sup>125</sup> Finally, following this First Plenary, the NCEC also began holding weekly press conferences to keep the public informed of movement activities.<sup>126</sup>

**Mass Action Campaigns: May 3, 1997 – October 20, 1997:**

Kamukunji Demonstrations: May 3, 1997:

As promised in its “Declaration and Resolutions,” the NCA’s first “mass action” activity was to broadly publicize their recommendations for constitutional reform at Kamukunji grounds outside Nairobi on May 3, 1997. As it had also promised, the NCEC refused to apply for a licensing permit from the state under the Public Order Act to convene the meeting. Engaging in civil disobedience and legal mobilization, movement leaders insisted that a state license was not required for them to exercise their constitutionally given rights of free association, assembly and

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<sup>124</sup> Kiswahili is Kenya’s “national” language, whereas English is its “official” language. English is, thus, the “official” language of commerce, politics and education in Kenya. For example, beginning at the high school level, all students’ classes and national exams are taken in English, with the exception of their Kiswahili language class.

<sup>125</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 169.

<sup>126</sup> *Ibid.*, p. 181.

expression. As with many other of the movement's earlier demonstrations,<sup>127</sup> a peaceful procession was planned from central Nairobi to Kamukunji grounds, located just outside of the city. Since, as was expected, the NCEC was denied access to the Kenya's Public Broadcasting (radio) services to advertise their event, the meeting was publicized primarily through pamphlets distributed throughout Nairobi at Kenya's Labor Day celebrations two days earlier, on May 1.

It was estimated that more than 10,000 Kenyans attempted to attend the rally publicizing the NCA's "Declaration and Resolutions,"<sup>128</sup> and the Moi-KANU regime responded in its typical manner. It declared the meeting illegal under the Public Order Act, and sent approximately 2000 heavily armed police and paramilitary officers to prevent the meeting from taking place.<sup>129</sup> As observers reported, the demonstration was remarkable in that "top professionals [from] Nairobi offices joined hands with university students and the Nairobi 'lumpens'<sup>130</sup> . . . in fighting off the riot police."<sup>131</sup> Although members of Kenya's professional class had participated in some of the movement's earlier demonstrations, it was not until this rally that their numbers were significant. As Mutunga explained:

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<sup>127</sup> See Chapters Four and Five.

<sup>128</sup> Amnesty International, *Kenya: The Quest for Justice*, London: Amnesty International, September 1997, p. 7.

<sup>129</sup> Ibid.

<sup>130</sup> "Lumpens" is general term used to refer to street hawkers, the unemployed and the homeless, who congregate in Nairobi's streets.

<sup>131</sup> Mutahi Ngunyi, "Comparative Constitution-Making in Africa: A Critique of the Kenya Process from Seven Countries," in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 269.

It was encouraging to see the Kenyan middle class, in particular, the professionals, in large numbers at Kamukunji. They had driven to the neighboring estates and parked their cars and then walked to the grounds. That concern shown by the middle class, reflected by showing support in large numbers, was a new phenomenon in Kenya. Ordinarily, the middle class would end their concerns at the realm of ideas.<sup>132</sup>

Although no one was ultimately killed as the police attempted to prevent the gathering, many demonstrators were seriously injured.<sup>133</sup> Movement leaders responded by alerting not only national and international presses, but also their international human rights networks to publicize the demonstration and the regime's violent response. Amnesty International, as well as Human Rights Watch and the Robert F. Kennedy Center for Human Rights were all alerted,<sup>134</sup> and all issued strong statements of condemnation to the Kenyan government. Amnesty International also promised to send a high level delegation to Kenya within the next month to investigate human rights conditions and meet with movement leaders and government officials.

In addition, the U.S. Embassy in Nairobi, as well as representatives of twenty-one other countries who had joined together with the United States to form the Donor Democratic Development Group (DDG),<sup>135</sup> privately issued a joint response to the

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<sup>132</sup> Ibid., p. 173.

<sup>133</sup> Amnesty International, *Kenya: The Quest for Justice*, p. 7.

<sup>134</sup> These organizations are all discussed in Chapter Four.

<sup>135</sup> The "Donor Democratic Development Group," or "DDG," was formed just prior to Kenya's 1992 elections by Kenya's major donors in an effort to coordinate their foreign policy responses to democratic reform in Kenya. The group included the United States, Canada, Japan and most countries comprising the European Union. Facts on File World News Digest, "Donor Countries Step Up Pressure," Nairobi: Facts on File, Inc., July 31, 1997.

Moi regime outlining four major areas of concern: (1) protection of Kenyans' rights to free assembly, (2) protection of Kenyans' rights to free information, (3) opposition access to the electorate, and (4) Kenyans' general access to the ballot.<sup>136</sup> Although Amnesty, Human Rights Watch and the R.F.K. Center for Human Rights all publicly supported the movement's constitutional reform efforts, none of the representatives of foreign embassies in Kenya publicly endorsed the constitutional reform effort at this time, however.

Uhuru Park Demonstrations: May 31, 1997:

Because Kenya's riot police had largely succeeded in preventing the NCEC from presenting the NCA's "Declarations and Resolutions" at the May 3 Kamukunji meeting, the movement planned a second rally for this purpose on May 31. This time, however, the meeting was planned for Uhuru Park in central Nairobi. Strategically, movement leaders realized that Uhuru Park was easier for interested groups to access and, because it had multiple entrances and exits, it would be easier for groups to disperse should the riot police again begin attacking demonstrators.

Once again publicizing Kenyans' constitutional rights to free association, assembly and expression, movement leaders refused to apply for a licensing permit from the state for the rally. And, once again, the Moi-KANU regime declared the demonstration illegal and warned: "anybody who defies th[is] notice to attend the meeting will be acting contrary to the law of this country and will be dealt with

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<sup>136</sup> Ruth Nabakwe, "U.S. Gives Conditions For Free Elections," Nairobi: Panafrikan News Agency, August 23, 1997.



accordingly.”<sup>137</sup> In response, and in an historic move, all four of Kenya’s main opposition parties not only announced their total support for the movement’s constitutional reform package, but also for the leadership of the NCEC in representing and coordinating their reform demands. Once again, however, the peaceful assembly of Kenyans that had gathered to hear the NCEC’s demands was violently attacked and dispersed by Kenyan police and paramilitary forces.

Amnesty International immediately responded to the violence by also engaging in legal mobilization and stating: “Kenya has ratified the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights which protect the right to freedom of association denied today.”<sup>138</sup> They continued, “[t]he teargassing and beatings meted out to peaceful protesters was unwarranted and excessive, particularly since the law under which the government declared the meeting illegal contravenes international human rights standards which Kenya has ratified.”<sup>139</sup> Amnesty’s special investigative delegation, led by Secretary General Pierre Sane, also arrived in Kenya the following day for a twelve-day visit.

In addition to investigating human rights conditions, and meeting with reform movement leaders and government officials, the Amnesty delegation launched its publication “Human Rights Manifesto for Kenya.”<sup>140</sup> As Amnesty representatives

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<sup>137</sup> KBC Radio, “Government Outlaws 3rd May National Convention Rally,” Nairobi: KBC Radio, Friday, May 2, 1997. Reported by the BBC Summary of World Broadcasts.

<sup>138</sup> Africa News, “Amnesty Criticizes Violent Break-Up of Kenya Rally,” London: Africa News, Saturday, May 31, 1997.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

explained, “[t]he manifesto sets out reforms essential to improving human rights [in Kenya], including the repeal of legislation such as the Public Order Act, and calls on the government to bring Kenyan legislation into line with international standards.”<sup>141</sup> Referring to the May 31 violence at Uhuru Park, Amnesty commented that “[t]his latest incident shows the importance of the reforms outlined in our manifesto in ensuring that the fundamental rights of all Kenyans are protected in the future.”<sup>142</sup> In its recommendations, Amnesty insisted that the Kenyan government establish “a prompt and impartial investigation into [the events of May 31<sup>st</sup> and] ensure that those responsible for using excessive force are brought to justice, and that the security forces follow international guidelines when dealing with future rallies.”<sup>143</sup>

In response, in his June 1<sup>st</sup> Madaraka Day speech<sup>144</sup> President Moi reiterated that under no circumstances would the regime undertake constitutional reforms prior to the 1997 elections. Bowing to movement demands, however, he conceded that the Public Order Act would be repealed and replaced by the “Peaceful Assemblies Act.”<sup>145</sup> As Moi stated, “I am glad to inform Kenyans today that the government has considered some amendments to [the Public Order Act] and new legislation, entitled

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Madaraka Day marks the day of Kenya’s internal independence from Britain. On June 1, 1963, Kenya gained sovereignty of its internal/domestic affairs, while Britain remained in control of its external/foreign affairs until official independence on December 12, 1963.

<sup>145</sup> “Kenyan President Call for Political Federation in East Africa,” Nairobi: *Xinhua News Agency*, Sunday, June 1, 1997.

the Peaceful Assemblies Bill, will soon be presented for debate in parliament. This new law will replace the Public Order Act.”<sup>146</sup> Although no details were given at the time, it was assumed, wrongly it turned out, that the Peaceful Assemblies Act would merely require individuals or groups planning a public meeting to notify the Kenyan police.

Although movement leaders welcomed this amendment, they insisted that their entire list of minimal constitutional, statutory and administrative reforms must be enacted *prior* to the 1997 elections in order for elections to be reasonably free and fair. Moreover, they reminded the regime that the deadline for introducing these reforms, as stated in their First Plenary’s “Declaration and Resolutions,” was June 30<sup>th</sup>. If reforms were not enacted by this date, they insisted that the electoral process could not be free or fair, and they would immediately launch a campaign of continuous mass action until reforms were introduced.

Budget Day Demonstrations: June 19, 1997:

The next major reform activity sponsored by the movement was a disruption of Kenya’s national budget reading on Budget Day, June 19<sup>th</sup>. By strategically using parliamentary Standing Orders, opposition members of parliament affiliated with the NCEC basically drowned out the reading of the budget by shouting “No Reforms, No

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<sup>146</sup> KBC TV, “President Moi: Constitution Not to be Discussed until after Elections,” Nairobi: KBC TV, Sunday, June 1, 1997. BBC Summary of World Broadcasts.

Budget.”<sup>147</sup> Historically, the reading of Kenya’s national budget is broadcast both on Kenyan public radio and television, and is an event closely followed by many Kenyans. As soon as NCEC-affiliated MPs launched their demonstration, however, the KBC issued an immediate news blackout. As Mutunga explained, “KBC radio and television ceased to be public in the eyes of Kenyans on that day.”<sup>148</sup> Immediately, students listening to the KBC at the University of Nairobi organized a march to KBC headquarters demanding their rights to free media access and information. In response, Kenya’s riot police again responded violently, seriously injuring many students. Once again, movement leaders mobilized their national and international supporters, and once again, these groups strongly condemned the regime’s use of violence and failure to respect Kenyans’ fundamental human and democratic rights. Even in the face of mounting international and domestic criticism, the regime was insistent that no reforms would be enacted prior to elections.

Saba Saba Day Demonstrations: July 7<sup>th</sup>, 1997:

As the reform movement’s June 30<sup>th</sup> deadline came and went without regime response, as promised, movement leaders announced they would begin mass action activities, beginning with *Saba Saba Day* demonstrations throughout the country on

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<sup>147</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 177.

<sup>148</sup> *Ibid.*, p. 178.

July 7th.<sup>149</sup> Engaging in legal mobilization, movement leaders again refused to apply for licenses for any of these rallies, stating their constitutionally and internationally recognized rights to free assembly, association and speech. On July 7th, demonstrations took place at more than fifty locations throughout Kenya,<sup>150</sup> the largest of which was at Uhuru Park in central Nairobi.

As with previous movement rallies, the Moi regime declared these illegal under the Public Order Act, despite the fact that the Act was in the process of repeal. As soon as demonstrators began to gather in the park, as had been the case in earlier rallies, Kenyan riot police began violently dispersing those gathered. Moreover, the police also forcibly entered All Saints Cathedral, where a constitutional reform prayer session was being led by Bishop Timothy Njoya, and began violently attacking those in attendance. As a local Kenyan newspaper reported, “police stormed into the church, fired tear gas into the congregation and beat anyone within reach of their clubs, claiming that the cathedral was being used as a sanctuary for dissidents and hooligans.”<sup>151</sup> Although police later denied these actions, they were eventually forced to acknowledge them when both the *Daily Nation* and *Standard* newspapers, Kenya’s

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<sup>149</sup> As discussed in Chapter Four, “*saba*” is the Kiswahili word for seven; thus, *Saba Saba* Day refers to the seventh day of the seventh month. On July 7, 1990 there was also a major movement demonstration at Kamukunji grounds. Although the government admitted to only twenty deaths at this demonstration, movement leaders insisted that the number was well over a hundred, with hundreds more seriously injured. Moreover, *The Daily Nation*, Kenya’s most widely read newspaper, reported that 1056 people had been arrested and charged with “riot-related” offences in the wake of the demonstrations. *The Daily Nation*, July 11, 1990. Cited in Africa Watch, *Kenya: Taking Liberties*, p. 65.

<sup>150</sup> Margaret Popkin, “Kenya at the Crossroads: Demands for Constitutional Reform Intensify,” Washington D.C.: Robert F. Kennedy Memorial Center for Human Rights, July 1997, p. 23.

<sup>151</sup> Philip Ngunjiri, “Police Killings Condemned,” Nairobi: Inter Press Service, Tuesday, July 8, 1997.

two most widely read national papers, published color photographs of the attacks the following morning. In the end, fourteen people were killed and hundreds seriously injured as a consequence of police violence at these demonstrations.<sup>152</sup>

Not only did Kenya's local newspapers publish vivid photographs of police violently attacking peaceful movement demonstrators, but the incident also made headlines in major international papers. The *Washington Post*, for example, also published a color photograph of the Kenyan police beating Reverend Timothy Njoya.<sup>153</sup> The result was both national and international condemnation of the regime for failing to ensure the safety of the demonstrators, especially after announcing the eminent repeal of the Public Order Act only a month earlier.<sup>154</sup>

In response to the violence, movement leaders immediately convened a heavily-attended press conference at which movement leader Maina Kiai stated: "It is a sad moment for this country, whose government professes democratic governance but condones merciless killings of innocent people demanding their constitutional rights."<sup>155</sup> Moreover, he continued, the beating of movement and opposition party leaders by the Kenyan police clearly demonstrates that extent to which the Moi-

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<sup>152</sup> Amnesty International, *Kenya: The Quest for Justice*, p. 7.

<sup>153</sup> *Washington Post*, July 8, 1997. Cited in Popkin, "Kenya at the Crossroads: Demands for Constitutional Reform Intensify," p. 23.

<sup>154</sup> Although the Moi-KANU regime conceded that the Act was about to be repealed, it insisted that until this time all gatherings were still required by law to be licensed, and that unlicensed meetings would be dispersed by police.

<sup>155</sup> Maina Kiai, Executive Director of the Kenya Human Rights Commission (KHRC) as cited in Philip Ngunjiri, "Police Killings Condemned," Nairobi: Inter Press Service, Tuesday, July 8, 1997.

KANU regime freely uses state institutions, in this case the Kenyan police, to repress and harass regime critics.<sup>156</sup>

To protest the violence, and continue their peaceful agitation for constitutional reform, movement leaders also announced a month-long timetable of mass action activities. The first event was a memorial ceremony at Uhuru Park on July 16,<sup>th</sup> where, symbolically, fourteen coffins were displayed to commemorate the lives lost during *Saba Saba* 1997. Bi-weekly events were then scheduled through the convening of the National Convention Assembly's Second Plenary, August 26 – 28. Movement leaders announced that they would discuss further plans for mass action at the plenary and, depending on the regime's response, these would be made public at its conclusion. In an effort to ensure continued international support for their activities, movement leaders also announced they would present a memorandum stating their concerns to Kenya's major donors at the next donors' consultative meeting.<sup>157</sup>

#### Regime Concessions:

In response to growing national and international pressure catalyzed by the movement, on July 15th, a week after the *Saba Saba* demonstrations, President Moi agreed to negotiate with the NCEC under two conditions: (1) they suspend their mass action activities, and (2) dominant religious leaders in Kenya act as mediators in the negotiation process. In addition, on the following day, July 16th, President Moi

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<sup>156</sup> Ibid.

<sup>157</sup> That is, at the next meeting of the Donor's Democratic Development Group (DDG). See above.

announced that the government would henceforth grant licenses for all opposition rallies, unless there were “exceptional circumstances.”<sup>158</sup> Finally, on July 17th, President Moi convened a meeting of KANU’s National Executive Committee (NEC), which ultimately recommended, under Moi’s chairmanship, that the government put forward a parliamentary bill providing for a constitutional review commission to review Kenya’s Constitution and make reform proposals. Moreover, KANU’s NEC also recommended the publishing of a Statute Law (Repeals and Miscellaneous Amendment) Bill to provide for the repeal or significant amendment of many of the statutory laws movement leaders had targeted as violating Kenyan’s fundamental constitutional rights, as well as the enactment of some of the administrative reforms demanded by the movement.

The movement’s response to the regime’s apparently sweeping concessions was divided. Although it welcomed the regime’s concessions, the leadership pointed out that many of their central demands remained untouched by the regime’s proposals.<sup>159</sup> First, they insisted they be involved in all discussions “concerning the body that will conduct [Kenya’s constitutional] review and the modalities to be used.”<sup>160</sup> Second, they insisted that three key issues, missing from the regime’s proposed reform package, be addressed: (1) institutional guarantees of the Kenya Electoral Commission’s independence, (2) equal access of all opposition political

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<sup>158</sup> “Rally Allowed After Political Violence: Government Makes Concessions,” Nairobi: Facts on File, Inc., July 31, 1997.

<sup>159</sup> “Mixed Reaction to KANU Move,” *The Daily Nation*, Nairobi: The Nation, July 19, 1997.

<sup>160</sup> *Ibid.*



parties to Kenya's publicly owned media (KBC), and (3) election spending reform, including provision of state funds to *all* political parties, not just KANU, and imposed state ceilings on election spending.<sup>161</sup> In the end, however, the movement's leadership agreed to temporary suspension mass action activities for ten days, as long as KANU agreed, in writing, that their minimal package of constitutional, statutory and administrative reforms would be enacted at least six months prior to Kenya's general elections.

#### Regime Reversals:

Two days prior to the ten-day deadline set by the NCEC, the Moi-KANU regime suddenly announced that it would not negotiate with the NCEC after all, because it was not a "nationally elected" body. In response, leaders of all Kenya's major opposition parties issued a joint statement declaring that they "mandated the National Convention Executive Council (NCEC) to negotiate with the ruling party on constitutional reforms" on their behalf.<sup>162</sup> As the leader of the opposition in parliament, Michael Kijana Wamalwa explained, "[w]e are capable leaders. We know what is right for us. And we cannot be told what to do. They [Moi-KANU] must either meet with the NCEC or go!"<sup>163</sup>

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<sup>161</sup> Ibid.

<sup>162</sup> "Kenyan Opposition Mandates Body for Talks with Government," Xinhua News Agency, Saturday, July 26, 1997.

<sup>163</sup> "Opposition Unites: It's NCEC for Reform Dialogue," *The Sunday Nation*, Nairobi: The Nation, Sunday, July 27, 1997.

Leader of Kenya's second largest opposition party, the Democratic Party, Mwai Kibaki also insisted "it [is] only through the NCEC that the Opposition [can] meet without intra-party wrangling or self-interest," and, thus, NCEC is our designated negotiator.<sup>164</sup> Kibaki further stated that "[w]e have resolved as a party to work with the NCEC, and that it be our arch-spokesman in the dialogue" with the regime.<sup>165</sup> The general secretary of the NCCK, Mutava Musyimi, further supported opposition party leaders' statements by claiming that the "NCEC [must be] a key stakeholder to any negotiations on reforms."<sup>166</sup> Moreover, a letter written by the Canadian Ambassador to Kenya<sup>167</sup> on behalf of the twenty-two embassies in Kenya's Donor Democratic Development Group (DDG), urged President Moi "to pursue negotiations with the pro-reform movement in order to avert further violence."<sup>168</sup> Finally, Germany and Great Britain "publicly threatened to cut aid to Kenya if the government continued to resist democratic reforms," while "[o]ther nations were believed to have delivered similar messages privately."<sup>169</sup> Despite this growing national and international pressure, the regime refused to negotiate with the NCEC.

A little more than a week later, on Monday, August 4, in an effort to restart the stalled negotiations between the regime and the NCEC, twenty-two of Kenya's

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> "Angry Reaction to KANU Stand," *The Daily Nation*, Nairobi: The Nation, Friday, July 25, 1997.

<sup>167</sup> The Canadian Ambassador at the time was Bernard Dussault.

<sup>168</sup> "Donor Countries Step Up Pressure," Nairobi: Facts on File World News Digest, Inc., July 31, 1997.

<sup>169</sup> Ibid.

religious leaders, most of whom were associated with the NCEC, arranged for a meeting with President Moi, at which time they presented him with a list of seven demands. These were: (1) that “religious leaders act as facilitators between the government, the NCEC and other stakeholders on reforms;” (2) that “KANU establish a team to enter into negotiations with the NCEC and other stakeholders;” (3) that “preparations for elections be stopped pending the outcome of the structured negotiations;” (4) that “a written commitment to and acceptance of the resolutions be made by Moi at Monday's meeting with the religious leaders;” (5) that “the [proposed] Constitutional Review Commission Bill and the Statutes (Miscellaneous Amendment) Bill be withdrawn until facilitators have held structured negotiations [regarding their content] with the government;” (6) that “the countrywide strike planned for Friday [by the NCEC] be called off if the resolutions [were] accepted by the president on or before noon on Thursday;” and (7) that “the government recognise the NCEC as representative of all reformists stakeholders in change.”<sup>170</sup> Noon on Thursday, August 7th was set as the deadline for President Moi to respond to them in writing.

Although the regime also refused to concede to these demands, later that day, as a strategy to signal, both nationally and internationally, that it was moving forward with reforms, and in an effort to gain agenda-setting power in the reform process, Kenya's Attorney General, Amos Wako, published a draft bill proposing the establishment of a constitutional review commission “to collect the views of Kenyans

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<sup>170</sup> “Kenyan Opposition MPs Threaten to Upset Debate on Reform Bills,” *Agence France Presse*, Wednesday, August 6, 1997.

for constitutional reforms” in a special issue of the *Kenya Gazette Supplement*.<sup>171</sup> He announced that the bill would soon be introduced into parliament for debate and, adopting movement framing, he claimed that it “would enable Kenyan people to freely participate in and contribute to the debate for changing the current constitution.”<sup>172</sup> Moreover, the regime also published the Statute Law (Repeals and Miscellaneous Amendment) Bill at this time.<sup>173</sup>

*Nane Nane* Strike: August 8, 1997:

Despite these apparent concessions by the regime, since it ultimately failed to agree to the religious leaders’ demands by noon on August 7, as promised, movement leaders moved forward with their plans for a national strike the following day, Friday, August 8. This strike became known as the “*Nane Nane*,” meaning the eighth day of the eighth month in Kiswahili. In addition to Nairobi, protests took place in more than sixty towns across Kenya. To signal their support for the movement’s proposed

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<sup>171</sup> “Kenya to Set Up Commission for Constitutional Reforms,” Xinhua News Agency, Monday, August 4, 1997.

<sup>172</sup> The bill provided for a constitutional review commission of twenty-six commissioners, to be appointed by the president, from “religious organizations, political parties, trade unions and ‘other bodies,’” and was required to “complete its work within 24 months from the date of its appointment.” Ibid. The commissioners were then to present their report to the president, who, in turn, would send it to the Speaker of the National Assembly and a select parliamentary committee for discussion. Once out of committee, parliament was to debate the report, and if approved by a two-thirds vote, the constitutional amendments were to be adopted. Ibid.

<sup>173</sup> Interestingly, signaling their level of distrust for the regime and their level of commitment to the reform movement’s leadership, two days later, on August 6, thirty opposition MPs threatened to “disrupt parliamentary debate on the two government bills,” as they had on Budget Day, “unless they [were] discussed first by the National Convention Executive Council (NCEC).” “Kenyan Opposition MPs Threaten to Upset Debate on Reform Bills,” *Agence France Presse*, Wednesday, August 6, 1997.

constitutional reform package, the NCEC asked Kenyans to stay home from work and to gather at their nearest soccer field or bus station for peaceful demonstrations.<sup>174</sup>

Specific reforms that the NCEC highlighted for the strike, none of which were addressed in the regime's recently published reform bills, were: (1) an independent electoral commission; (2) repeal of the constitutional amendment prohibiting coalition government; (3) a requirement that all presidential appointments and terminations be approved by a 65 percent parliamentary vote; (4) a requirement that presidential candidates receive 50 percent of the vote, in addition to 25 percent of five provinces; and finally, (5) amendment of the proposed Peaceful Assemblies Act, so that organizers of public meetings need only notify the police within a reasonable period of time so that security could be provided, instead of the government's proposal that these gatherings still had to be licensed, albeit with less stringent requirements.<sup>175</sup> Even though peaceful protestors in the *Nane Nane* strike were, as usual, met with regime violence, ultimately resulting in three deaths and many injuries, the strike was heralded as a "resounding success" by movement leaders.<sup>176</sup> Dennis Akumu, former leader of Kenya's Central Organization of Trade Unions (COTU) and current opposition member of parliament, commented that "[t]he government is now being

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<sup>174</sup> "Kenyan Opposition Says It Will Stage Mass Protest Strike," Deutsche Presse-Agentur, Thursday, August 7, 1997.

<sup>175</sup> Conversation with Willy Mutunga, Nairobi, Kenya, 15 May 1998.

<sup>176</sup> Annie Thomas, "Kenyan Opposition Split Ahead of Strike to Press Reforms," Agence France Presse, August 7, 1997.

pushed to the limit by ordinary Kenyans” and called the strike as “the boldest move [yet] by advocates of reform.”<sup>177</sup>

Following the *Nane Nane* strike, the regime again agreed to enter into negotiations with the NCEC, given the same conditions it had proposed earlier: (1) that the NCEC suspend mass action activities; and (2) the dominant religious leaders act as mediators. It was agreed that negotiations would take place beginning on August 25th, and by August 19th both KANU and the NCEC had established negotiating teams to represent them in the constitutional reform talks. On the NCEC’s team were representatives of all opposition political parties, according to a general formula of proportional representation,<sup>178</sup> the NCEC’s ten-member Management Committee, and five additional members representing constituent groups of the NCA, who were not represented on the Management Committee.

On the morning of the scheduled negotiations, however, the KANU team failed to show up. Once the meeting was called to order, the chair of the religious leaders’ mediating team, Archbishop David Gitari, announced that the Moi-KANU regime had made a last minute decision to boycott the talks because it (again) insisted that it would negotiate only with “elected representatives of the people,” and not those “un-

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<sup>177</sup> Chege Mbitiru, “Undercover Officer Reported Killed During Kenyan Strike,” Associated Press, Friday, August 8, 1997.

<sup>178</sup> As a result of this formula, Ford-Kenya, Ford-Asili, and the Democratic Party each selected five members to represent them; the National Democratic Party and the Kenya Social Conference each selected three members; and Safina, the Islamic Party of Kenya, the Labour Party Democracy, the Kenya National Democratic Alliance and the Party of Independent Candidates of Kenya each selected two members to represent them on the negotiating team. Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 201.

elected representatives of the NCEC.”<sup>179</sup> In response, the NCEC announced it would “resume mass action until the government shifts its stand and holds talks with it.”<sup>180</sup> Moreover, they stated that a detailed strategy to place increased pressure on the regime would be discussed at its Second Plenary, scheduled to begin the following day, August 26, at Ufungamano House in Nairobi.

The Second Plenary of the National Convention Assembly: August 26 – 28, 1997:

At its Second Plenary (August 26 – 28), the movement’s National Convention Assembly (NCA) made the decision to boycott Kenya’s two upcoming public holidays, Moi Day on October 10, and Kenyatta Day on October 20<sup>th</sup>, to protest the failure of both of these regimes to guarantee the fundamental human and democratic rights of Kenyans. As stated in its Second Plenary “Declaration and Resolutions,” “[c]itizens must withhold dialogue rights to officials until the government commits itself to dialogue with the NCEC. . . .”<sup>181</sup> Engaging in legal mobilization, the plenary also published its own revised versions of the regime’s proposed reform bills<sup>182</sup> and

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<sup>179</sup> Ibid., p. 204. The Moi-KANU regime further insisted that the NCEC was not “a legitimate representative of the people.” In response, the chair of the NCEC team, Kivutha Kibwana, commented: “Did the Moi-KANU regime appreciate and understand . . . that the NCA/NCEC could similarly claim it did not recognize the regime as legitimate?” Ibid., pp. 204 – 205.

<sup>180</sup> “Kenyan Government Rejects Talks with Opposition Umbrella Body,” Xinhua News Agency, Monday, August 25, 1997.

<sup>181</sup> “Declaration and Resolutions of the National Convention Assembly’s Second Plenary Sitting at Ufungamano, Nairobi, August 25 – 28, 1997,” Reproduced in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, p. 448.

<sup>182</sup> These Bills were titled: (1) The Constitution of Kenya (Amendment Bill No. 2), 1997, and (2) The National Convention Assembly Bill, 1997.

submitted these to Kenya's Attorney General, the Speaker of Parliament, and President Moi.

Other new resolutions of the Second Plenary included "affirmative action for women, youth, the differently abled, marginalized communities and other minority and disadvantaged interests" in Kenya.<sup>183</sup> The Plenary also resolved that amnesty be extended to Kenya's current leadership, including "KANU 'hardliners,'" but only if they confessed their economic and political crimes, and cooperated with movement leaders in implementing a progressive human and democratic rights reform agenda<sup>184</sup> Finally, the Plenary also resolved to continue its legal mobilization and mass action campaigns "as long as necessary to encourage and persuade, KANU to negotiate reforms with the NCA."<sup>185</sup>

#### The IPPG Reforms and Movement Responses:

In response to the movement's convening of its Second Plenary, President Moi organized a counter-meeting of a 110 MPs from both KANU and opposition political parties on August 27.<sup>186</sup> At this meeting, it was decided that the group would be

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<sup>183</sup> These demands reflected the broadening of the movement's social base.

<sup>184</sup> "Declaration and Resolutions of the National Convention Assembly's Second Plenary Sitting at Ufungamano, Nairobi, August 25 – 28, 1997," Reproduced in Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, Appendix D, p. 447.

<sup>185</sup> *Ibid.*, p. 448.

<sup>186</sup> It is important to note that not only did KANU members form a majority on the IPPG, but also that many opposition party representatives remained divided as to whether they should cooperate with the regime through this group. Ultimately, however, primarily because most opposition party leaders wanted elections to proceed as scheduled, and they were assured that the NCEC could be consulted throughout the negotiation process, they agreed to participate.



called the “Inter-Party Parliamentary Group,” or IPPG, and it would serve as the legal body for negotiating reform proposals put forth by the NCEC with the regime. The IPPG then formed a thirteen-member executive committee, comprised of two members each from Kenya’s three main opposition parties --FORD-Kenya, FORD-Asili and the DP, five from KANU, and one each from the Kenya Social Congress (KSC) and National Development Party (NDP), two smaller opposition parties, to “play an executive role in the dialogue and consultations” between the government and the opposition.<sup>187</sup>

Interestingly, and indicative of the regime’s agenda, in a press statement following the IPPG’s first meeting, it was announced that the IPPG had resolved that “members of the National Convention Executive Council . . . could not participate in the discussions, as they did not have electoral mandates; they could, however act as consultants.”<sup>188</sup> James Orengo, an opposition MP from FORD-K, who participated in the IPPG meeting, immediately issued a counter statement making clear that “words to the effect that they [the IPPG] disowned NCEC as the organ mandated to discuss reforms with KANU were not included” when they signed the statement.<sup>189</sup>

The regime’s statement was not retracted, however. At the IPPG’s second meeting, during the first week of September, it completed its technical work on

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<sup>187</sup> This was a major concession by the regime to grant a majority to opposition political party representatives on the IPPG’s executive committee.

<sup>188</sup> Eman Omari, “All-Party MP Talks Say No to NCEC,” *The Daily Nation*, Nairobi: The Nation, August 29, 1997.

<sup>189</sup> *Ibid.*

minimal constitutional, statutory and administrative reforms, and by its third session, attended by 132 MPs, a consensus was reached on an ultimate reform package.<sup>190</sup>

Support for the IPPG reform bill was expressed not only by President Moi, but also by seventeen foreign embassies, including the most of the DDG group, as well as dominant religious leaders in Kenya.<sup>191</sup>

#### Substance of the IPPG Reforms:

After two weeks of debate,<sup>192</sup> the first of two key bills comprising the IPPG reform package,<sup>193</sup> was ratified by Kenya's parliament on October 30<sup>th</sup>, 1997. The Constitution of Kenya (Amendment) Bill of 1997 effected five major constitutional changes demanded by Kenya's reform movement. First, it allowed the formation of coalition government. Second, it made Kenya's Electoral Commission (relatively) more independent and impartial by enlarging the Commission to a new constitutional maximum of twenty-one, ten of whom were to be appointed from lists submitted by opposition political parties.<sup>194</sup> Third, it required that Kenya's twelve nominated

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<sup>190</sup> "Most of Kenyan MPs Agree on IPPG Reform Package," Xinhua News Agency, Thursday, September 11, 1997.

<sup>191</sup> "Kenyan Situation Peaceful and Stable," Xinhua News Agency, Saturday, September 6, 1997.

<sup>192</sup> During this period, Kenya's reform movement and opposition political parties forced the Moi-KANU regime to withdraw an earlier attempt to shorten the already agreed upon list of reforms.

<sup>193</sup> The Constitution of Kenya (Amendment) Bill of 1997 and the Statute Law (Repeals and Miscellaneous Amendment) Bill.

<sup>194</sup> As is discussed in greater deal below, this reform also resulted in greater transparency of the Electoral Commission and a general public perception that the Commission was more impartial than the entirely KANU-selected Commission. As movement leaders insisted, however, this reform did nothing to institutionalize an independent appointment procedure. Moreover, although ten new Commissioners

parliamentary seats be allocated to parliamentary parties on the basis of their proportional strength in parliament.<sup>195</sup> Fourth, it constitutionally entrenched Kenya's status as a "a multi-party democratic state."<sup>196</sup> Finally, fifth, it prohibited discrimination on the basis of sex.<sup>197</sup>

The day after this Constitutional (Amendment) Bill was passed, under political pressure from Kenya's reform movement, President Moi immediately appointed ten new commissioners representing opposition political parties to Kenya's Electoral Commission. Although this increased the transparency of the Commission, as well as impacted Kenyans' general perception of the Commission's impartiality, as movement leaders were quick to point out, this reform did nothing to formally institutionalize the independence of the Commission, nor the independence of its appointment procedures—two central concerns of the NCEC.

The second major bill of the IPPG reform package, the Statute Law (Repeals and Miscellaneous Amendment) Bill, ultimately ended up addressing twenty-eight statutory laws that movement leaders had targeted as violating Kenyans' fundamental

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representing opposition political parties were added, a majority of eleven had already been appointed by President Moi, with no parliamentary oversight of this appointment process.

<sup>195</sup> Previous to this amendment, all twelve seats were appointed by the president, with no parliamentary oversight. Thus, following the 1992 elections, despite the fact that opposition parties held nearly 50 percent of parliamentary seats, all twelve nominated seats went to KANU.

<sup>196</sup> *The Constitution of Kenya, 1997*. Cited in Tostensen, Andreassen, Tronvoll, *Kenya's Hobbled Democracy Revisited: The 1997 Elections in Retrospect and Prospect*, p. 35.

<sup>197</sup> This historic constitutional amendment was a direct result of Kenya's reform movement's insistence on gender equity, and the growing strength and voice of women's groups in Kenya as they became increasingly mobilized by and within the movement.

political and civil rights.<sup>198</sup> Specifically, the Bill amended Kenya's Public Order Act such that, as Kenya's reform movement had demanded, groups planning a public meeting need only notify the police of the intended gathering, replacing the state's previously stringent licensing requirements. It similarly amended the Public Collections Act and Film and Stage Plays Act so that groups had only to notify authorities of fundraisers, films and plays. It also significantly amended the controversial Preservation of Public Security Act, which authorized preventive detention by the regime. The Chiefs' Authority Act was similarly amended, preventing chiefs from interfering with movement and opposition party activities, and/or conducting searches of private premises without clear legal authority.

The Societies Act was also amended to give the Registrar of Societies a maximum of 120 days within which she/he had to make a decision on pending registration applications, and the wide discretion previously allowed by the Act to deny or delay registration was also significantly curtailed. Moreover, for the first time, an appeals process was granted to Kenya's High Court in the case of denied or rescinded registrations, and the Court was required to deliver its decision on these cases within ninety days. The Kenya Public Broadcasting Corporation Act was also amended such that the Kenya Broadcasting Corporation (KBC) was explicitly required to "keep a fair balance in all respects in allocation of broadcasting hours as between different political viewpoints."<sup>199</sup>

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<sup>198</sup> This was opposed to the regime's original Bill, which addressed only eleven laws.

<sup>199</sup> The Kenya Broadcasting Corporation Act, *The Laws of Kenya*. Cited in Joel D. Barkan, "Toward a New Constitutional Framework in Kenya," *Africa Today*, vol. 45, no. 2, 1998, p. 220.

Finally, the most controversial sections of Kenya's Penal Code, which criminalized most forms of critical political speech as seditious, were also deleted, and the Outlying Districts Act and the Special District (Administration) Act were repealed in their entirety. Again adopting the framing of Kenya's human rights and democracy movement, Kenya's Attorney General, Amos Wako, triumphantly declared that the Bill would give Kenyans "a legal environment which will enhance [respect] for human rights, democracy and a free and fair General Election with an even playing ground."<sup>200</sup>

Administrative reforms that were enacted as part of the IPPG reform package included four major concessions to the reform movement. First, the government committed itself to review all cases of detainees in Kenya serving sentences for sedition and all other "political" offenses. Second, the regime promised to immediately register all pending applications by opposition political parties under the Societies Act, or inform parties of the legal basis for denying registration. This resulted in a total of fifteen new parties being registered as a consequence of the IPPG reforms. Third, all provincial commissioners, district commissioners, district officers, local chiefs, and police were prohibited from interfering with Kenya's electoral process. Finally, the regime also committed itself to processing all pending applications for broadcasting licenses. Although some of these applications were

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<sup>200</sup> Justin Konchora and Eric Shimoli, "Attorney-General Says Government Fully Behind Reforms," *The Daily Nation*, October 1, 1997.

processed, the regime continued to resist this demand, as is discussed in the following chapter.

Finally, the third major bill comprising the IPPG reform package, the Constitution of Kenya Review Commission Bill, was passed by parliament the following week, on November 6th. This Bill established a constitutional review commission comprised of twenty-eight commissioners, in addition to a chair,<sup>201</sup> to collect the views of Kenyans on constitutional reform. The twenty-eight commissioners were to be appointed by the president from recommendations put forth by all parliamentary parties, Kenya's dominant religious organizations,<sup>202</sup> the Law Society of Kenya, the NGO Council, dominant business organizations,<sup>203</sup> COTU,<sup>204</sup> among "others."<sup>205</sup>

As Attorney General Wako insisted, again adopting movement framing, the Bill would allow *all* Kenyans "to freely participate in and contribute to the debate for changing the current constitution."<sup>206</sup> Kenyans' recommendations were to be presented to the president, who, in turn, was to send the Commission's report to the

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<sup>201</sup> This individual was required to be "an eminent lawyer with a specialty in constitutional matters and laws." "Kenya to Set Up Commission for Constitutional Reforms," Xinhua News Agency, Monday, August 4, 1997.

<sup>202</sup> Specifically, the leadership of the NCKK, Kenya's Catholic Bishops, the Supreme Council of Kenya Muslims, and the Evangelical Fellowship of Kenya --a religious group consistently supportive of the Moi regime since the reform movement's emergence.

<sup>203</sup> Specifically, the Federation of Kenya Employers, the Kenya National Chamber of Commerce and Industry, and the Association of Professional Societies of East Africa --all of which remained supportive, or at least not critical, of the Moi regime since the reform movement's emergence.

<sup>204</sup> Kenya's Central Organization of Trade Unions, whose leadership remained controlled by the regime.

<sup>205</sup> "Constitutional Reform Bill Out," *The Daily Nation*, August 5, 1997.

Speaker of Parliament. From there, the report was to go to a parliamentary select committee for discussion before going to the floor of parliament for ratification. If the recommendations received two-thirds support in parliament, they were to be enacted. President Moi assented to the entire IPPG reform package on November 7th,<sup>207</sup> and parliament was dissolved three days later in preparation for Kenya's December elections.

#### Responses to the IPPG Reforms:

Most analysts of Kenyan politics have described the IPPG reform package using such terms as “historic,”<sup>208</sup> “remarkable,”<sup>209</sup> and “effecting far-ranging constitutional, legal and administrative changes” in Kenyan politics.<sup>210</sup> Leaders of Kenya's reform movement also, at least initially, acknowledged the impressive breadth and depth of the reforms. They called off planned mass actions for late September and early October to allow “reform negotiations a chance” to develop<sup>211</sup> and “to give Kenyans enough time to digest what has been offered and tell us the way forward.”<sup>212</sup> As NCEC leader Kivutha Kibwana explained, “NCEC will revisit the issue of mass-

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<sup>207</sup> Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 233.

<sup>208</sup> Gitau Warigi, “Reform Talks: Where the IPPG Went Wrong,” *The Daily Nation*, October 5, 1997.

<sup>209</sup> Holmquist and Ford, “Kenya Politics: Toward a Second Transition?” p. 240.

<sup>210</sup> Ndegwa, “The Incomplete Transition: Constitutional and Electoral Context in Kenya,” p. 202.

<sup>211</sup> Luke Odhiambo, “Kenyan Reform Lobby Temporarily Cancels Mass Protests,” *Agence France Presse*, September 27, 1997.

<sup>212</sup> “National Strike Called Off in Kenya,” *Xinhua News Agency*, September 13, 1997.

action after parliament concludes discussion on the minimal reform agenda.”<sup>213</sup>

Ultimately, however, as the final reform package began to take its final shape during the second week of October, movement leaders became increasingly critical of what they perceived as a regime strategy to co-opt the power of the movement by “touch[ing] on [aspects of] what the NCEC asked for, but not the substance.”<sup>214</sup>

In particular, movement leaders pointed out that the IPPG reforms left “KANU’s grip on the electoral commission and the electoral process . . . intact.”<sup>215</sup> As discussed above, one of the central demands of the movement was that Kenya’s Electoral Commission be made independent. Thus, while the appointment of ten new members on the recommendation of opposition political parties was an improvement, regime-appointed commissioners still constituted a majority of the twenty-one member Commission. As Maina Kiai explains, “what the NCEC and its constituent members had sought was a Commission whose mode of appointment had a measure of control, like being subjected to ratification by Parliament.”<sup>216</sup> Moreover, movement leaders had insisted that all preparations for elections be stopped until electoral

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<sup>213</sup> Ibid.

<sup>214</sup> Gitau Warigi, “To NCEC’s Bitter Grief, Government Seizes the Initiative,” Nairobi: *The East African*, September 20, 1997.

<sup>215</sup> Kivutha Kibwana. Cited in Panafrican News Agency, “Opposition Calls Off Planned National Strike,” Nairobi: Panafrican News Agency, September 13, 1997.

<sup>216</sup> Maina Kiai, “How to Safeguard the MPs’ Fragile Deal,” *The Sunday Nation*, Sunday, September 28, 1997.



reforms, including a review of constituency boundaries by a new and independent Electoral Commission,<sup>217</sup> were enacted.

In addition, movement leaders ultimately rejected the reformed Societies Act. Political parties, they insisted, should not be subject to any state registration requirements and should simply need to notify the Electoral Commission of their existence. Finally, movement leaders also rejected the Constitutional of Kenya Review Commission Bill in its entirety. They insisted that, especially given the degree of presidential control over commissioners' appointment, the commission, inevitably, would suffer the fate of all so-called "reform" commissioned thus far convened in Kenya.<sup>218</sup> It would serve mainly as a "public relations" exercise for the regime, and a means of signaling to the international community, and some national groups, that meaningful reforms were in the works, while nothing of substance was actually enacted.

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<sup>217</sup> As is discussed in greater detail below, the exclusively regime-appointed Electoral Commission conducted another review of Kenya's constituency boundaries in September 1996 in preparation for the 1997 elections and, as most anticipated, the creation of twenty-two new constituencies clearly tipped the already biased system further in favor of KANU.

<sup>218</sup> Other movement critiques of the Bill were that, although a timeframe was established for the work of the Commission, no time limits were established for the actual appointment of the Commission, or presidential assent to the legislation, once it was passed by parliament. Moreover, reform movement leaders were suspicious of the Bill's requirement that the Commission's report go *first* to the president, rather than going directly to the parliamentary select committee on constitutional reform. The reform movement's greatest fear, as turned out to be justified, was the Commission would not only be regime-dominated, but that its structure allowed for the regime to use it as a stalling tactic in the process of comprehensive constitutional reform.

*Kumi Kumi Day Demonstrations, October 10th, 1997:*

In response, again engaging in legal mobilization strategies, movement leaders submitted their own “revised” versions of the reform bills<sup>219</sup> to the regime and established October 8<sup>th</sup> as a deadline for the regime to respond. When the October 8<sup>th</sup> deadline came and went without regime response, movement leaders reactivated their mass action campaign and proceeded with earlier plans to convene demonstrations to parallel Moi Day celebrations on October 10<sup>th</sup>.<sup>220</sup> Widely publicized as “*Kumi Kumi*” day protests, Kiswahili for the tenth day of the tenth month, a permit that had earlier been issued to movement leaders, under Moi’s July 17<sup>th</sup> promise that, henceforth, all opposition public meetings would be licensed, was cancelled. Leveraging legal mobilization strategies, movement leaders again cited their constitutional and internationally recognized rights to free association, assembly and speech. As movement leader Kivutha Kibwana stated in a press conference just prior to the demonstration: “[t]hese constitutional provisions entitle every person in Kenya to either participate in the Moi Day programme or in the NCEC . . . *Kumi Kumi* programme or any other, including remaining at home.”<sup>221</sup>

As historically was the case, the Kenyan riot police cordoned off Kamukunji grounds, where the *Kumi Kumi* protests had been scheduled, and began tear gassing,

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<sup>219</sup> These had been drafted at the movement’s Second Plenary at the end of August.

<sup>220</sup> As mentioned above, October 10<sup>th</sup> is the day designated by the Moi regime to celebrate the regime’s rule.

<sup>221</sup> Kivutha Kibwana as cited in Maguta Kimemia, “NCEC Says Rally Will Go On As Planned,” *The Daily Nation*, October 10, 1997.

beating and arresting those who attempted to enter the area. As the local press reported, “policemen boxed, kicked and whipped [those attempting to convene], provoking fierce running battles with an estimated crowd of 5,000 people which had turned up for the rally.”<sup>222</sup>

A similar rally, convened ten days later to protest the regime-sponsored Kenyatta Day celebrations on October 20<sup>th</sup>, was likewise violently disrupted by Kenya’s riot police. Drawing direct parallels to South Africa, movement leaders were emphatic in pointing out that “[y]ou [the Moi regime] are behaving like the South African police before Mandela.”<sup>223</sup> As movement leaders insisted in press conferences following both the Moi and Kenyatta Day celebrations, the demonstrations “broke no laws. Indeed, [they] affirmed local and international human rights law on the freedom of association and assembly, and also the spirit of reform that KANU and the IPPG are touting.”<sup>224</sup> As they concluded after the Kenyatta Day protests were violently disrupted, “[t]his is a very sad day for Kenyans and their quest for true democracy.”<sup>225</sup>

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<sup>222</sup> Kenyan Television Network, “Three MPs Arrested and Later Released,” Nairobi: Kenyan Television Network, October 10, 1997. BBC Summary of World Broadcasts. Notably, and reflecting increased independence of the media in Kenya, the police violence at Kamukunji was televised on the Kenyan Television Network, which broadcasts throughout the Nairobi area.

<sup>223</sup> “Kenyan Riot Police Fire Tear-Gas to Break Up Rally,” Nyahururu, Kenya: Agence France Presse, October 19, 1997.

<sup>224</sup> Maina Kiai, “Hurried Poll Not a Smart Idea,” *The Daily Nation*, October 19, 1997.

<sup>225</sup> Wanjohi Nderitu, “Police Disperse NCEC Rally,” *The Daily Nation*, October 20, 1997.

The Third Plenary of the National Convention Assembly: October 26 –28, 1997:

The movement's Third Plenary on constitutional reform was convened six days later, from October 26 – 28. At the plenary, movement leaders made the decision to establish their own constitutional review process to parallel the regime's proposed review commission. Since the Review Commission Bill virtually guaranteed that commissioners would not be independent from the regime, given the degree of executive control over their appointment, the movement's strategy was to make apparent to Kenyans the vast differences between this regime-controlled review commission and a broadly participatory constitutional convention. Preliminary plans were thus made to transform the National Convention Assembly itself into a National Constitutional Convention, and to use this forum to expose and critique anticipated regime sleight-of-hand in the constitutional reform process.

A significant subset of SMOs at the plenary also supported an election boycott, since they argued it would be impossible to convene free and fair elections in December. Even with enactment of the IPPG reforms, they pointed out that Kenya's deeply flawed electoral system remained intact, as discussed above. Opposition political parties, and perhaps even more importantly, Kenya's dominant religious organizations and donors states were far less critical, however. In fact, it was during the Third Plenary that a subset of Kenya's major donors finalized a generous aid package to a relatively new SMO, the Institute for Education and Democracy (IED),<sup>226</sup> together with the Catholic Justice and Peace Commission (CJPC) and the National

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<sup>226</sup> IED was founded in 1993 and is discussed in greater detail below.

Council of Churches of Kenya (NCKK).<sup>227</sup> This aid was to be used to support reform activities focused specifically on promoting free and fair elections in December.<sup>228</sup> Especially without the support of Kenya's dominant church organizations, movement leaders recognized that an election boycott could not succeed. So, as was the case with Kenya's 1992 elections, most SMOs, although not all,<sup>229</sup> turned their attention toward ensuring that the 1997 elections were at least as free and fair as possible, given the circumstances.

### **The December 1997 Elections:**

Despite the fact that the IPPG reforms were not as broad or deep as Kenya's human rights and democracy movement demanded, and the fact that the reforms were not enacted until seven weeks prior to Kenya's December 29th – 30th elections, most analysts agree that they were still significant in at least providing for more free and fair elections than Kenya's founding elections in 1992. The fact that this was the case was also largely due to movement efforts. For example, in mid-October 1997 a joint media monitoring initiative was launched by the Kenya Human Rights Commission (KHRC) and Article 19, a London-based NGO dedicated to promoting free media

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<sup>227</sup> As is discussed below, for all intents and purposes, these three groups took over and greatly expanded upon the monitoring efforts initially established by the National Election Monitoring Unit (NEMU), Kenya's first independent (nongovernmental) elections monitoring unit, founded just prior to the 1992 elections

<sup>228</sup> The aid package was worth the equivalent of U.S. \$2.6 million. Major donors were the Netherlands, Britain, Sweden and Denmark. Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 238.

<sup>229</sup> The Kenya Human Rights Commission (KHRC) and the Rescue Political Prisoners (RPP) group, in particular, continued to advocate a boycott of the December elections.

access,<sup>230</sup> just as the IPPG reforms were reaching completion. Similar to the media monitoring effort prior to the 1992 elections, the KHRC and Article 19 monitored KBC broadcasts and recorded airtime allocated to KANU and opposition political parties, as well as the qualitative content of this airtime. They then widely publicized their findings both “locally and internationally . . . with a view to lobbying the KBC to present more impartial and independent broadcasts.”<sup>231</sup> The monitoring project found that, despite enactment of the IPPG reforms requiring more equitable broadcasting, it was only after “word . . . spread about the monitoring project [that] positive portrayal of opposition parties . . . increased.”<sup>232</sup> As the two organizations explained on December 19<sup>th</sup>, “[t]he increase has been dramatic in the last six weeks . . . out of all the coverage the opposition received, positive references jumped from 14 percent to 94 percent on the radio, and from 16 percent to 95 percent on television.”<sup>233</sup>

Moreover, the civic education and rights awareness campaigns launched by SMOs in preparation for Kenya’s 1992 elections were also continued and expanded upon in the inter-election period (1993 – 1997). As was discussed in Chapter Five, key SMOs engaging in these activities leading up to the 1992 elections were ICJ-

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<sup>230</sup> Article 19 refers to Article 19 of the Universal Declaration of Human Rights (UDHR), which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” *Universal Declaration of Human Rights* <http://www.un.org/Overview/rights.html>

<sup>231</sup> Alamin Mazrui of the KHRC. Cited in Philip Ngunjiri, “Quarrel Over Air Time Widens Political Gap,” Nairobi: Inter Press Service, Friday, November 21, 1997, Friday.

<sup>232</sup> “Ruling Party Dominates Airwaves,” Toronto: The International Freedom Of Expression Exchange Toronto, December 23, 1997.

<sup>233</sup> Ibid.

Kenya, FIDA-Kenya, Kituo cha Sheria and the Legal Education Aid Programme (LEAP), as well as Kenya's dominant church organizations, the National Council of Churches of Kenya (NCCK) and the Catholic Justice and Peace Commission (CJPC). All of these organizations not only continued their efforts through the inter-election period, but also increased the size and reach of their programs, as more international funding became available for civic education after the 1992 elections.<sup>234</sup>

Finally, three new SMOs --the 4Cs, the Institute for Education in Democracy (IED) and the Legal Resources Foundation (LRF)—also made considerable contributions in the area of rights awareness and civic education during this period.<sup>235</sup> As discussed above, the 4Cs was founded in January 1995 and the substance of its educational outreach programs focused on human and democratic rights in conjunction with constitutional reform. IED was founded just after the 1992 elections, in early 1993, to focus specifically on election-related reforms ranging from voter

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<sup>234</sup> For example, U.S. AID, among other bi-lateral aid organizations, provided generous support to movement organizations conducting civic education and rights awareness programs in Kenya. U.S. AID's program was entitled *Effective Demand for Sustainable Political, Constitutional and Legal Reform* and was organized under a "Special Mission Objective." See Dart Thalman, Heather Sutherland, Wachira Maina, Betty Wamalwa, "Civic Education Study for Kenya: Democracy and Governance, Civil Society IQC: #AEP-I-00-6013-00, Washington D.C.: World Learning, May 15, 1997. This report evaluates the effectiveness of U.S. AID's funding of civic education programs in Kenya.

<sup>235</sup> In addition to these nine main organizations, others involved in civic education and rights awareness programs at this time included: the Educational Centre for Women in Democracy (EWCD), Agency for Development Education and Communication (ADEC), Institute for Civic Education and Development in Africa (ICEDA), Young Women's Christian Association (YWCA), Research and Civic Awareness Program (RECAP), the Civic Resource and Information Center (CRIC), the National Council of Women of Kenya (NCWK), the National Commission on the Status of Women (NCSW), Writers Association of Kenya (WAK), Professionals Committee for Democratic Change (PCDC), The League of Kenya Women Voters, The Coalition of Violence Against Women, Kenya Family Development Association (KENFAD), Gender Sensitive Initiatives (GSI), Peace and Development Network (PEACENET), and FEMNET. See *ibid.*, p. 70.

education and profession training of elections observers, to developing an extensive research database of electoral conditions and laws since independence.<sup>236</sup> The research and materials produced by IED were historically unprecedented for an indigenous organization in Kenya, and were invaluable to the larger constitutional reform effort in publicizing the political consequences of specific electoral laws and institutions in Kenya.

Finally, the Legal Resources Foundation (LRF) was initially founded under the name “Rights Awareness Program,” or “RAP,” in October 1993. Because they were denied registration under Kenya’s NGO Act, however, it was June 1994 before they became operational as the “Legal Resources Foundation,” or “LRF,” as a “project” of the KHRC.<sup>237</sup> Their primary focus was human and democratic rights awareness and legal literacy, which they engaged in through four main programs: (1) community drama/theater, (2) educational outreach through Kenya’s secondary and tertiary schools, (3) paralegal training programs, and (4) publications.<sup>238</sup> Their community drama/theater programs focused on dramatically presenting situations of rights abuse, then posing critical questions to their audiences in terms of types of actions that could be taken to remedy abuses. Their secondary and tertiary schools’ outreach programs were typically in the form of promoting after school programs and clubs focused on

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<sup>236</sup> Interview with Cleophas Torori, Program Director, IED, Nairobi, 13 and 14 May 1999.

<sup>237</sup> As mentioned above, this was a strategy of many SMOs comprising Kenya’s human rights and democracy movement, who were denied formal status as an organization under Kenya’s NGO Act. For example, the 4Cs also ended up being officially registered simply as a joint “project” of the LSK, KHRC and ICJ-K.

<sup>238</sup> Interview with Mburu Gitu, Program Officer, Legal Resources Foundation, Nairobi, 29 May 1999.



human and democratic rights, as well as helping students publish their own newsletters focusing on rights concerns. The LRF's goal was to establish these newsletters and/or clubs as forums for students to debate human and democratic rights issues.

In their paralegal training programs, the LRF, like ICJ-K, FIDA-K and Kituo cha Sheria, often worked through community church organizations in soliciting volunteers. Ideally, they tried to select community members with leadership experience and who were well respected within their communities. These individuals were then trained in basic legal education, aid and advice, and their two primary responsibilities were: (1) to facilitate rights awareness education in their communities, and (2) advise citizens on remedies, if rights were abused. Paralegals were also required to make monthly reports to the LRF documenting the content of their interactions with community members. Finally, the LRF also promoted awareness of rights and remedies through its publications. In addition to the school newsletters mentioned above, the LRF published, and widely distributed, a booklet on constitutional reform, as well as paralegal training manuals, which were then used by other SMOs with paralegal training programs.<sup>239</sup>

As Mburu Gitu of LRF explains, a primary concern of the organization was to facilitate the process by which Kenyans ultimately “internalize” democratic values and human rights, and in so doing, empower them to demand democratic change and government accountability whenever they encountered abuse. Although he admits the

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<sup>239</sup> Ibid.

difficulty of assessing the precise impact of its programs,<sup>240</sup> he notes that in almost all cases he was aware of “paralegals clearly become increasingly empowered through their training. Simply the knowledge they gain in terms of protected rights and avenues of redress . . . has clearly given them greater courage to speak out against abuse.”<sup>241</sup> Moreover, as Gitu points out, if one examines paralegals’ monthly reports, “one can clearly discern changes in attitudes, beliefs, values, behavior, practices overtime”<sup>242</sup> In areas where paralegal programs have been introduced, there has been, over time, measurably higher levels of awareness of rights and avenues of redress.<sup>243</sup>

In terms of election monitoring, as mentioned above, IED, in conjunction with the Catholic Justice and Peace Commission (CJPC) and the National Council of Churches of Kenya (NCCCK) took over, and greatly expanded, the monitoring efforts initially established by the National Election Monitoring Unit (NEMU), Kenya’s first independent elections monitoring unit, founded just prior to the 1992 elections.<sup>244</sup>

With the assistance of generous donor aid,<sup>245</sup> and under IED’s leadership, more than

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<sup>240</sup> As Gitu explains, this was largely due to challenges in defining the parameters of change, especially since their efforts were focused primarily on consciousness-raising and cultural change, and the fact that multiple variables are often operating simultaneously. *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> The NEMU was established in 1992 as a joint project of ICJ-K, FIDA-K, the PCDC (Professional Committee for Democratic Change) and the NECEP (the National Ecumenical Civic Education Programme, a project of the NCCCK.). See Chapter Five.

<sup>245</sup> In particular, the Royal Netherlands Embassy, the British Department for International Development (DFID), the Swedish International Development Agency (SIDA) and the Danish International Development Agency (DANIDA) gave U.S. \$ 2.6 million to IED, CJPC, and NCCCK. Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*,

28,000 Kenyans monitored the 1997 elections, compared with only about 7000 monitors in 1992.<sup>246</sup> This formidable presence of professionally trained domestic monitors in an of itself was an important contributor to Kenya's 1997 elections being considerably more free and fair than its founding elections in 1992. There continued to be problems in voter registration, largely due to failure of the Moi regime to issue identity cards to all Kenyans who came of voting age since the 1992 elections, as well as their refusal to allow other forms of identification in the voter registration process. The nomination of candidates and general campaign processes, however, both of which were marred by considerable violence in 1992, were significantly more free and fair, with minimal disruption recorded. Most observers attribute this to the implementation of the IPPG reforms, despite the relatively short period between their enactment and the convening of elections.<sup>247</sup>

Although, technically, the campaign process did not "officially" begin until presidential and parliamentary nominations were received in early December,<sup>248</sup> in practice, the campaigning began following the 1992 elections. Thus, although the IPPG reforms were in place for the entire official campaign period, as well as for

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p. 238. See also: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, 1998, p. 8.

<sup>246</sup> Ibid., p. 22, cites the exact number of poll watchers as 28,126. See also: Joel D. Barkan "Toward a New Constitutional Framework in Kenya," *Africa Today*, vol. 45, no. 2, 1998, p. 224.

<sup>247</sup> It was only seven weeks after President Moi signed the IPPG reforms into law that the 1997 elections were convened.

<sup>248</sup> Presidential nominations took place on December 3 and 4 and parliamentary nominations on December 8 and 9.

candidate nominations, KANU had an obvious head start in the process with complete dominance of the KBC airwaves up until this time. In addition, as had been the case leading up to the 1992 elections, the Moi-KANU regime continued to use of the aforementioned statutory, constitutional and administrative laws to thwart opposition party mobilization. Finally, as was also the case in 1992, the regime continued to use state resources for its re-election campaign, including everything from drawing on the public coffers, to use of state security forces and Kenya's provincial administration to hinder opposition mobilization. In terms of polling, although there were problems reported in the timely opening of polling stations and insufficient ballots at some stations, the consensus of most observers was that these problems were largely innocent and more likely due to heavy rains in parts of the country, as well as genuine mix-ups in the delivery of ballots, rather than intentional regime tampering.

Although the vote counting process also ended up being inordinately slow, continuing into the first week in January, which created suspicions among many, “[o]nly 4 per cent of . . . count certifiers reported allegations of ballot boxes being stuffed,”<sup>249</sup> Also, unlike the 1992 elections, where there were numerous reports of provincial administrators and state security forces interfering with the electoral process,<sup>250</sup> there were many fewer reports of this in the 1997 elections, again largely due to passage of the IPPG reforms. For the first time in Kenyan history, as a consequence of the IPPG reforms, provincial administrations were prohibited from

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<sup>249</sup> Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, p. 82.

<sup>250</sup> See Chapter Five.

playing a role in the electoral process. Finally, also as a result of the IPPG reforms, which required opposition party representation on Kenya's Electoral Commission, the Commission reportedly conducted its business in a much more transparent and open way. For example, for the first time in Kenya's history, and as demanded by Kenya's reform movement, it held regular press briefings during the official campaign period, as well as regular meetings with representatives of opposition political parties, and national and international election observer groups.<sup>251</sup> Moreover, also for the first time in Kenyan history, the Commission began to seriously investigate, and prosecute, election violations.

Despite these important improvements in the electoral process, two major, and related, factors significantly comprised the fairness of Kenya's 1997 elections, as they did in 1992: (1) political violence catalyzed by a regime-supported countermovement;<sup>252</sup> and (2) Kenya's highly majoritarian electoral system. Although the political violence leading up to Kenya's 1997 elections was on a much smaller scale than in 1992,<sup>253</sup> it was still serious with an estimated 200 Kenyans killed and

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<sup>251</sup> Major international election observers for Kenya's 1997 elections included: the Donor's Democratic Development Group (DDG), Electoral Reform International Services (ERIS), and the National Democratic Institute (NDI). Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, p. 15.

<sup>252</sup> "Countermovements" are defined by social movement theorists simply as those movements that "make contrary claims simultaneously to those of the original movement." Meyer and Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity," *American Journal of Sociology*, v. 101, no. 6, May 1996, p. 1631. As documented in Chapter Five, a regime-support countermovement began to emerge in the last quarter of 1991 in response to movement demands for multipartyism and democratic reform.

<sup>253</sup> Human Rights Watch estimated that, by the end of 1993, at least 1500 Kenyans had been killed and 300,000 displaced in this violence. Human Rights Watch - Africa Watch, *Divide and Rule; State-Sponsored Ethnic Violence in Kenya*, p. 1. See Chapter Five.

more than forty-thousand displaced.<sup>254</sup> As was the case in 1992, two important, but largely neglected, variables that contributed to the violence were successful countermovement framing<sup>255</sup> and Kenya's single-member district plurality electoral system.

Violence preceding the 1997 elections began on August 13, 1997 when somewhere between 100 and 500 armed individuals invaded a police station in Likoni District, Coast Province, and stole between 30 to 50 guns and approximately 3000 to 5000 rounds of ammunition.<sup>256</sup> Although most of the violence was concentrated in Likoni District, it spread both north and south along Kenya's coast, and continued from mid-August well into November 1997. An investigation into the violence by

<sup>254</sup> The numbers killed and displaced in the political violence witnessed on Kenya's coast vary considerably. The numbers cited here come from two sources: (1) Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, Nairobi: KHRC, 1998 and (2) Holmquist and Ford, "Kenya Politics: Toward a Second Transition?" p. 229.

<sup>255</sup> In the framing of countermovement leaders, Kenya's reform movement was nothing more than a thinly veiled attempt by Kenya's larger ethnic groups, the Kikuyu and Luo, to seize political power from the current ruling coalition of primarily "minority" ethnic groups --the Kalenjin (President Moi's ethnic group), the Maasai, Turkana, Samburu and Mijikenda. The ancestral homelands of these groups, collectively referred to as the KAMATSU, is primarily Kenya's Rift Valley Province, where the majority of violence leading up to the 1992 elections was witnessed. The ancestral homeland of the Mijikenda is Coast Province, where most violence was concentrated leading up to the 1997 elections, although sporadic violence was also seen in parts of Rift and Western provinces. One of the central demands of countermovement leaders, as discussed in Chapter Five, was for the introduction of a system of *majimboism*, or regionalism, if the interests of Kenya's ethnic minorities were to be protected in a new multiparty state. This demand harkens back to Kenya's independence debates. In its contemporary incarnation, however, *majimboism* came to mean the establishment of primarily ethnically homogenous *majimbo*s through the forcible expulsion of groups who could not claim "indigenous"/ancestral land rights in the region. In Rift Valley Province, this meant primarily Kikuyus, but also some Luos, who had either purchased land in the province in the post-independence period, or had been forcibly moved there by British colonialists as farm workers during the colonial period.<sup>255</sup> In Coast Province, this meant primarily the expulsion of Luo groups, most of whom had purchased land there in the post-independence period. See Chapter Five for a more in-depth discussion.

<sup>256</sup> Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, p. 1.

Kenya's Human Rights Commission found that "there is a disproportionately large size of registered Luo voters in the Likoni constituency, who were instrumental in the 1992 FORD-Kenya win, and that the members of the Likoni Luo community seem to have been especially targeted by the raiders."<sup>257</sup>

As electoral systems theorists argue, single-member district plurality electoral systems create institutional incentives for groups of similar segments to cluster together in order to gain political influence.<sup>258</sup> This, in turn, tends to encourage parochial voting, group polarization and, in some cases, political violence. This appears to be the case in Kenya not only leading up to the 1992 elections, but also preceding the 1997 elections, where regime elites, responding to these institutional incentives, and engaging in effective countermovement framing, succeeded in mobilizing radicalized constituents to engage in political violence to secure the Likoni seat for KANU, and ensure that opposition parties did not gain a stronghold in Coast Province.

Moreover, as discussed in Chapter Five, one of the great disadvantages of plurality electoral systems, especially in countries where the national electoral commission is not entirely independent from the regime, as was the case in Kenya, is that they are vulnerable to regime malapportionment and gerrymandering. Chapter Five documented the extent to which constituency malapportionment contributed to electoral distortions in Kenya's 1992 elections. This was again a problem in Kenya's

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<sup>257</sup> Ibid., p. 50.

<sup>258</sup> See, for example, W. Arthur Lewis, *Politics in West Africa*, Westport, CT: Greenwood Press, 2<sup>nd</sup> ed. 1981, c1965, pp. 64 – 74.

1997 elections. In fact, the first act of Kenya's newly appointed Electoral Commission in September of 1996<sup>259</sup> was to create twenty-two new constituencies, bringing the total number to the constitutional maximum of 210. Had the Electoral Commission followed its constitutional mandate to respect the population principle in drawing constituency boundaries,<sup>260</sup> the vast majority of new seats would have gone to opposition political parties.

For example, had the population principle been followed, Kenya's two largest cities, Nairobi and Mombasa, would have been allocated an additional eight and three seats, respectively.<sup>261</sup> Because these urban areas voted almost exclusively for opposition political parties in the 1992 elections, however, no additional seats were allocated to either city.<sup>262</sup> In addition, at the time constituency boundaries were drawn (September 1996) at least four constituencies that ultimately voted for opposition parties were considered "safe seats" for KANU: (1) Mathioya, (2) Gwasi, (3) Uriri and

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<sup>259</sup> This was more than a year prior to the implementation of the IPPG reforms; thus, all members of Kenya's Electoral Commission were appointed solely by President Moi, with no parliamentary check on these appointments at this time.

<sup>260</sup> Kenya's Constitution mandates that "[a]ll constituencies shall contain as nearly equal numbers of inhabitants as appears to the commission to be reasonably practicable." *The Constitution of Kenya, 1997*, Section 42. Cited in Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, p. 116.

<sup>261</sup> Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, 1998, p. 42.

<sup>262</sup> As discussed in Chapter Five, this was also the case in the 1987 review of constituency boundaries, the last review prior to the 1992 elections, despite population booms in both cities.



(4) Gatunda North.<sup>263</sup> Moreover, the regime also expected to win newly created seats in Central and Nyanza provinces, where it spent considerable time and money courting votes in the interim election period. Ultimately, however, these seats ended up also going to opposition political parties. In the end, despite the regime's anticipated control of all twenty-two new seats, they won just more than half (twelve).<sup>264</sup>

Compared to Kenya's founding elections in 1992, five additional opposition parties competed for parliamentary seats in the 1997 elections –the National Democratic Party (NDP), the Social Democratic Party (SDP), Safina, FORD-People, and Shirikish, while two parties that won seats in 1992, Kenya National Congress (KNC) and PICK,<sup>265</sup> failed to win seats in 1997. Moreover, FORD-Asili, which was one of the three dominant parties in 1992, winning 31 of 188 parliamentary seats, won only one seat in 1997.<sup>266</sup> This was due in part to the fact that its leader, Kenneth Matiba, decided not to stand for presidential election,<sup>267</sup> and in part to intra-party divisions that compromised the party's previous strength.

By percentage of total seats, KANU won two percent less seats in 1997 than in 1992 --51 percent in 1997 compared to 53 percent in 1992.<sup>268</sup> Moreover, although

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<sup>263</sup> Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, p. 43.

<sup>264</sup> The DP won four of these seats, the NDP three, and FORD-K, the SDP and FORD-P won one seat each. Ibid.

<sup>265</sup> These parties each won one seat in the 1992 parliamentary elections.

<sup>266</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, 1999, p. 488.

<sup>267</sup> Holmquist and Ford, "Kenya Politics: Toward a Second Transition?" p. 237.

<sup>268</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, 1999, p. 488.

KANU managed to maintain its majority in parliament, winning 107 of 210 seats, the margin of its majority was reduced.<sup>269</sup> This was primarily due to the IPPG reform requiring that Kenya's twelve appointed seats be distributed proportionately according to party presence in parliament. Thus, once the nominated seats were allocated, KANU received only seven of twelve seats and its percentage of seats remained basically the same,<sup>270</sup> compared to 1992, when all 12 seats went to KANU, increasing its percentage of seats held by three points from 53 to 56 percent.<sup>271</sup> The most significant gain among opposition parties was a nearly seven percent increase in the number of parliamentary seats won by the Democratic Party (DP).<sup>272</sup> Two of Kenya's new parties, the NDP<sup>273</sup> and SDP, also established respectable presences in parliament, winning 10 and 7 percent of parliamentary seats, respectively.<sup>274</sup>

Largely because the regime-supported constitutional amendment that prohibited coalition government<sup>275</sup> was not finally repealed until early November 1997, only seven weeks prior to Kenya's 1997 elections, opposition presidential candidates were too invested in their individual campaigns to agree to run a single

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<sup>269</sup> Ibid.

<sup>270</sup> In fact, it decreased slightly from 51 percent to 50.9 percent. See Table 6.2 at the end of this chapter.

<sup>271</sup> See Table 5.2 at the end of Chapter 5.

<sup>272</sup> This was largely due to the collapse of FORD-A.

<sup>273</sup> The NDP was formed from a faction of FORD-K, thus explaining the drop in FORD-K seats by nearly eight percent.

<sup>274</sup> See Table 6.2.

<sup>275</sup> As discussed in Chapter Five, this was enacted in August 1992, as part of the Constitution of Kenya (Amendment) Bill of 1992.

opposition candidate. Moreover, the Democratic Party (DP), which emerged as the dominant opposition party in the 1997 elections, believed its candidate, Mwai Kibaki, could win. As a consequence, once again opposition votes were divided, and President Moi was able to secure his re-election. Moreover, President Moi was also able to increase his national vote share by four percentage points, from 36 to 40 percent between 1992 and 1997.<sup>276</sup> This may, in part, be explained by the lower voter turnout in these elections (64.5%) compared to the 1992 elections (70%). However, had only Kenya's two main opposition parties, the DP and the NDP, agreed to field a single candidate, they very likely would have defeated the Moi regime, albeit narrowly.<sup>277</sup> Of significance in the 1997 elections, as well, was the fact that, for the first time in Kenyan history, a woman, Charity Ngilu of the SDP, ran for presidency. Although she ended up with only eight percent of the national vote, her campaign received considerable national and international attention, as she nearly prevented the Moi regime from gaining its requisite 25 percent in her home province.<sup>278</sup>

### **Conclusion:**

Building on theoretical insights from social movements and legal mobilization theories, this chapter demonstrated the value of three social movements concepts –

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<sup>276</sup> Nohlen, Krennerich and Thibaut, eds., *Elections in Africa: A Data Handbook*, 1999, pp. 488 – 489.

<sup>277</sup> See Table 6.1 at the end of this chapter.

<sup>278</sup> The 25 percent rule, as discussed in Chapter Five, requires that winning presidential candidates secure 25 percent of the vote in at least five of Kenya's eight provinces. Moi needed to win 25 percent of the vote in Ngilu's home province, Eastern, in order to meet this requirement.

*mobilizing structures, political opportunity structures and framing processes*, as well as legal mobilization strategies, to explain the continued development and political impact of Kenya's human rights and democracy movement in the period following Kenya's founding elections in December 1992 through its second multiparty elections in December 1997, long after democratic transitions theories predict. Like Chapter Five, the chapter argued that two changes in national and international political opportunity structures --- (1) the regime's opening in December of 1991 and lowered state barriers to independent organization, and (2) financial and technical support by foreign-based human rights organizations, private foundations and donor state aid agencies-- catalyzed the emergence of new mobilizing structures in the form of formal social movement organizations (SMOs). It was these SMOs that then enabled the movement to create a more enduring organizational structure than it otherwise could have and, in so doing, allowed it to sustain democratization efforts much longer than democratic transitions theory anticipates.

In addition, by continuing to frame movement demands in terms of human and democratic rights, and "mobilizing" Kenyan constitutional and international human rights law to legitimate these demands, leaders of Kenya's human rights and democracy movement were able to: (1) sustain a common reform agenda and sense of shared identity among diverse national and international actors; (2) expose contradictions between regime rhetoric and practice to promote reforms and ensure their implementation, or, at the very least, ensure that violations were highly publicized; (3) increase general awareness among Kenyans of their constitutionally and internationally recognized rights,

and the role of state institutions in protecting them; (4) facilitate democratic institution-building at state and societal levels to promote rights protections; and (5) ultimately force the resistant Moi-KANU regime to concede deeper democratic reforms than it otherwise would have.

Finally, like Chapter Five, this chapter has also argued that an important, but largely neglected, variable in explaining Moi-KANU victories in both 1992 and 1997, as well as the political violence leading up to these elections, was Kenya's majoritarian electoral system. As electoral system theorists have argued, not only do majoritarian systems with single-member plurality districts, like Kenya's, tend to overrepresent large parties and create high thresholds for representation of emergent small parties, but they also lend themselves to partisan malapportionment and gerrymandering, as was witnessed prior to both the 1992 and 1997 elections in Kenya. Moreover, as the chapter demonstrated, Kenya's single-member district plurality elections created institutional incentives for parochial voting and group polarization, which ultimately resulted in large-scale political violence leading up to both the 1992 and 1997 elections. As was argued in Chapter Five, if, instead, Kenya introduced larger multi-member constituencies and proportional representation, thresholds to representation would be reduced, votes more accurately translated into parliamentary seats, and the stakes for winning seats also reduced. As a consequence, regional polarization in Kenya would likely be attenuated, multi-ethnic coalitions facilitated and, in the long term, greater toleration of different ethnic communities encouraged. Under these conditions, since minorities are guaranteed proportional representation at

the national level regardless of the “majority” influence in their constituency or region, elections would also likely be less of a zero-sum game in Kenya.

**Table 6.1: Kenya's 1997 Presidential Elections  
Provincial Distribution of Votes by Candidate and Party<sup>279</sup>**

Province	Moi/KANU	Kibaki/DP	Raila/NDP	Wamalwa/FORD-K	Ngilu/SDP	Vote Totals
Nairobi	75,272 (20.6%)	160,124 ( <b>43.7%</b> )	59,415 (16.2%)	24,971 (6.8%)	39,707 (10.9%)	366,049
Central	56,367 (5.6%)	891,484 ( <b>28.2%</b> )	6,869 (0.7%)	3,058 (0.3%)	30,535 (3.0%)	1,005,757
Eastern	370,954 ( <b>35.3%</b> )	296,335 ( <b>28.2%</b> )	7,787 (0.7%)	7,017 (0.7%)	349,754 ( <b>33.3%</b> )	1,050,894
North East	70,506 ( <b>72.9%</b> )	20,404 (21.1%)	311 (0.3%)	4,431 (4.6%)	440 (0.6%)	96,726
Coast	257,056 ( <b>63.1%</b> )	51,909 (12.7%)	24,844 (6.1%)	11,306 (2.8%)	38,089 (9.4%)	407,449
Rift Valley	1,140,109 ( <b>69.4%</b> )	343,529 (20.9%)	36,022 (2.2%)	102,178 (6.2%)	11,345 (0.7%)	1,643,456
Western	314,669 ( <b>46.0%</b> )	9,755 (1.4%)	13,458 (2.0%)	338,120 ( <b>49.4%</b> )	3,429 (0.5%)	684,834
Nyanza	215,923 (23.5%)	138,202 ( <b>31%</b> )	519,180 ( <b>56.6%</b> )	14,623 (1.6%)	15,301 (1.7%)	918,006
<b>Total</b>	2,500,856(40.5%)	1,911,742 (31.0%)	667,886 (10.8%)	505,704 (8.2%)	488,600 (7.9%)	6,173,171

<sup>279</sup> Vote tallies are given for the top five candidates only. Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, pp. 200 - 214. Provincial vote totals that reach or exceed the 25 percent minimum threshold are in bold print. Compared to the 1992 elections, the DP's candidate, Mwai Kibaki, exceeded the 25 percent threshold in two additional provinces --Nairobi and Nyanza. Overall voter turnout was approximately 65.6 percent, compared to approximately 70 percent in the 1992 elections. Ibid.

**Table 6.2: Kenya's 1997 Parliamentary Elections**

Party	Seats <sup>280</sup>	% of Seats <sup>281</sup>	% of Vote <sup>282</sup>
KANU	107 / 113	51.0 / 50.9	38.6
DP	39 / 41	18.6 / 18.5	21.7
NDP	21 / 22	10.0 / 9.9	11.3
FORD-Kenya	17 / 18	8.1 / 8.6	10.3
SDP	15 / 16	7.1 / 7.2	8.3
Safina	5 / 6	2.4 / 2.7	4.0
FORD-People	3 / 3	1.4 / 1.4	1.9
SPK	1 / 1	0.5 / 0.5	0.4
KSC	1 / 1	0.5 / 0.5	0.4
FORD-Asili	1 / 1	0.5 / 0.5	1.5
TOTAL	210/222		

<sup>280</sup> The first number indicates the number of seats won by each party, and the second is the total number of seats held after Kenya's twelve nominated seats were distributed. Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, p. 197. As is discussed in Chapter Six, as a result of the movement-supported IPPG reforms, nominated seats were distributed based on parties' proportional representation in parliament. Prior to this, all twelve nominated seats went to KANU.

<sup>281</sup> The first number is seat percentage based on Kenya's 210 elected parliamentary seats, and the second number is seat percentage based on the total 222 seats in parliament, after the twelve nominated seats were distributed.

<sup>282</sup> Percentage of vote earned is computed from election results posted by Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, pp. 135 – 167.



## Chapter Seven

### Developing Democracy and the Defeat of KANU: Constitution-Making, Pact-Making and Institution-Building, 1998 - 2002

Before . . . you [had] to vote for KANU and if you didn't . . . it [was] like . . . asking for war.  
You [were] actually spoiling for the chief, but now you know you vote for the person you  
want . . . you listen for the one that impresses you, and you go to that side.

-- Civic education workshop participant, 2002

We want to bring back the culture of due process, accountability, transparency  
in public office...Government will no longer be run on the whims  
of individuals...My government's decisions will be guided by teamwork  
and consultations...The authority of parliament and the independence  
of the judiciary will be restored and enhanced as part of the democratic process  
and culture that they have undertaken to bring and to foster.

-- Mwai Kibaki, leader of NARC, President of Kenya  
Inauguration Speech, January 2003

#### Introduction:

On Friday, 27 December 2002, the only ruling party that Kenyans have known in nearly forty years of independence and a decade of multiparty elections, the Kenyan African National Unity party (KANU), was resoundingly defeated by a coalition of fifteen opposition parties and organizations known as the National Rainbow Coalition (NARC). Not only did NARC's presidential candidate, Mwai Kibaki, win a landslide victory in Kenya's presidential race, receiving more than 60 percent of the national vote, but NARC candidates also swept 60 percent of the seats in Kenya's parliament.<sup>1</sup> NARC's political platform firmly embraced human and democratic rights reforms advanced by Kenya's reform movement, and numerous movement leaders ultimately

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<sup>1</sup> See tables 7.1 and 7.2 at the end of this chapter for a summary of Kenya's presidential and parliamentary elections results.

renounced earlier apolitical stances and either actively campaigned for NARC candidates, or ran for political office themselves under the NARC umbrella. Significantly, whereas Kenya's 1992 and 1997 elections were characterized by widespread pre- and post-election violence, the 2002 elections were Kenya's most peaceful to date. As a consequence, these elections were described by domestic and international observers alike as "[b]y far the freest and fairest elections that Kenyans experienced to date"<sup>2</sup> and as "contribut[ing] to [a] quantum leap in democracy" in Kenya.<sup>3</sup> Thus, the central political puzzle addressed in this chapter is: What explains this electoral victory of Kenya's pro-democracy forces, after two failed attempts in Kenya's first and second multiparty elections, as well as the advance of human and democratic rights protections through Kenya's 1998 – 2002 electoral cycle?

The chapter argues that this puzzle is largely explained by the success of Kenya's human rights and democracy movement in three main areas: (1) winning significant regime concessions regarding both the process and proposed substance of constitutional reform; (2) facilitating the emergence of a formal opposition unity pact that held through the election period; and (3) continuing institution-building efforts to provide for a more free and fair electoral process, as well as the expansion of Kenyans' human and democratic rights protections. Like the previous two chapters, this chapter also demonstrates the analytical value of the social movements concepts

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<sup>2</sup> The Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, Nairobi: The Institute for Education in Democracy, 2003, p. 143.

<sup>3</sup> *Ibid.*, p. 33.

*political opportunity structures, mobilizing structures, and framing processes*, as well as legal mobilization strategies, to explain the further development and political impact of Kenya's reform movement during this period.

The chapter is comprised of four main sections. The first, "The Politics of Constitution-Making," focuses on the role of Kenya's human rights and democracy movement in advancing its constitutional reform agenda through the 1998 – 2002 electoral cycle. This section examines why and how Kenya's reform movement was able to win significant political concessions from the Moi-KANU regime both in terms of the *process* by which Kenya's constitution would be reformed, as well as the proposed *substance* of these reforms. Regarding the process of reform, movement leaders won two key concessions from the regime. First, against the regime's wishes of keeping the constitutional reform process confined to the KANU-dominated parliament, the movement succeeded in guaranteeing broad-based participation by Kenyan citizens through advancing a "three-tiered" structure of reform. This structure provided for citizen participation at local, district, and national levels to ensure that the process was "people-driven," rather than "parliamentary-driven" as the regime desired.<sup>4</sup> Second, movement leaders successfully lobbied for institutional guarantees to ensure that the constitutional reform commission remained independent from Kenya's executive office. Both of these demands had been consistently resisted by the

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<sup>4</sup> As discussed below, whether Kenya's constitutional reform process was "people-driven," as the human rights and democracy movement demanded, or "parliamentary-driven," as representatives of the KANU regime insisted, became the central issue dividing the constitutional reform process during the 1998 – 2002 electoral cycle.

KANU regime since the movement first launched its constitutional reform agenda in the wake of Kenya's 1992 elections.

Kenya's human rights and democracy movement also won significant regime concessions in terms of the proposed *substance* of constitutional reform. As discussed in Chapter Five, from the time movement leaders first turned their attention to comprehensive constitutional reform just after Kenya's 1992 elections, central demands focused on introducing national level institutions characteristic of consensus democracy.<sup>5</sup> Specifically, movement leaders advocated seven of ten institutional features that Arend Lijphart describes as distinguishing consensus democracy: (1) executive power-sharing and coalition government;<sup>6</sup> (2) executive-legislative balance

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<sup>5</sup> This is documented not only in movement statements and press releases, but also in all formal written proposals that movement leaders put forth in the constitutional review process. This includes the movement's first proposal, *Kenya Tuitakayo* in 1994, its interim proposal to the Ufungamano's People's Commission of Kenya (PCK) in 2000, as well as its final proposal to the Constitution of Kenya Review Commission (CKRC) in 2002. As Arend Lijphart explains, "consensus" democracy differs from "majoritarian" democracy in that "it accepts majority rule only as a *minimum* requirement: instead of being satisfied with narrow decision-making majorities, it seeks to maximize the size of these majorities. Its rules and institutions aim at broad participation in government and broad agreement on the policies that the government should pursue." The "majoritarian" model of democracy, on the other hand, "concentrates political power in the hand of a bare majority –and often even merely a plurality instead of a majority . . . whereas the consensus model tries to share, disperse, and limit power in a variety of ways." Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 2.

<sup>6</sup> As is discussed in greater detail below, this central characteristic of consensus democracy was only *partially* met by movement reform proposals. Although Kenya's human rights and democracy movement strongly advocated the creation of multiple positions of executive power and coalition government, it was not until just prior to the 2002 elections that an executive power-sharing formula was made explicit. Moreover, this proposal only named specific *individuals* who were broadly representative of dominant ethno-political and party interests in Kenya to its proposed executive posts, and it only informally agreed that power would be shared among these interests in the cabinet. Specifically, it recommended that the offices of prime minister and two deputy prime ministers be created, in addition to maintaining the existing offices of president and vice president, albeit with greatly reduced powers. The prime minister was to be head of government, the president was to be head of state, one of the deputy prime ministers was to be responsible for government administration, and the other the administration of parliamentary affairs. In addition, movement leaders at one time also recommended creating the office of executive vice president with authority over the ministries of finance, agriculture, transportation and communication, but this proposition was later dropped.

of power; (3) multipartyism; (4) proportional representation; (5) bicameralism; (6) constitutional rigidity; and (7) judicial review.<sup>7</sup> Thus, the fact that Kenya's state-mandated constitutional reform commission, after collecting more than 1800 pages of recommendations from Kenyan citizens,<sup>8</sup> ultimately drafted a constitutional reform bill, the Constitution of Kenya Constitutional (Amendment) Act of 2002, that incorporated nearly all of the institutional features advocated by movement leaders, provides evidence of the movement's impact, especially given that Kenya's extant Constitution remained highly majoritarian character.

The promotion of this constitutional reform agenda by Kenya's human and democratic rights movement was significant in advancing democratic development in Kenya during the 1998 – 2002 electoral cycle in at least two respects. First, it made possible the emergence of Kenya's first successful opposition unity pact since the introduction of multipartyism in Kenya more than a decade earlier. Although the

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Although it was always *assumed* that these positions would be shared among dominant party leaders, it was late in the pact-making process before an executive power-sharing formula was made explicit. Thus, a specific executive power-sharing formula, which could be used in future elections and entrenched in Kenya's reformed constitution, was *not* part of the movement's constitutional reform proposal. It should also be mentioned here that promotion of coalition government was a central movement demand since Kenya's political opening in December 1991. Mobilization on this particular issue became especially focused in late 1992, when Kenya's KANU-dominated parliament enacted a constitutional amendment explicitly *prohibiting* coalition government. As was discussed in Chapter Four, this amendment required that Kenya's executive form a cabinet solely from his or her own party, whether this party received a parliamentary majority or not. As movement leaders argued at the time, and as in fact was the case, the amendment was a deliberate regime strategy to prevent opposition parties from forming a broad electoral alliance to defeat the Moi-KANU regime. Although repeal of this amendment was a top movement priority through the 1993 – 1997 electoral cycle, it was not until early November 1997 that the movement finally succeeded in having it repealed as part of the Constitution of Kenya (Amendment) Bill of 1997.

<sup>7</sup> See Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 34 – 41.

<sup>8</sup> "Draft Bill: Ghai Attacks Chunga," *The East African Standard*, Nairobi: Africa News, October 1, 2002.

constitutional draft produced by Kenya's constitutional reform commission had yet to be formally enacted, by February 2002, when Kenya's opposition pact first emerged, most opposition party leaders believed that it would be, if not prior to the 2002 elections, then shortly afterwards.<sup>9</sup> Of particular importance was the fact that the movement's constitutional reform agenda, which was endorsed by all pact members, recommended the creation of multiple positions of executive power, which could then be shared among opposition party leaders. Also of significance, however, were movement proposals for executive-legislative balance, proportional representation, the creation of a second legislative chamber to protect minority group interests, judicial review, and decentralized government.<sup>10</sup> As Kenyan political analyst Stephen Ndegwa has argued: "Had the constitutional reform process not been going on at the time of the [2002] campaign, it is virtually inconceivable that any opposition leader would have agreed to give up his or her slim chance at imperial presidency and settle for the certainty of exclusion in its shadow."<sup>11</sup>

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<sup>9</sup> It should be noted here that although it was *anticipated* that constitutional reforms would be enacted either prior to elections or shortly afterwards, for reasons discussed in the study's "Postscript," this did not happen. The argument made in this chapter, however, is simply that the general *expectation* that constitutional reforms were imminent, and that these reforms would include executive power-sharing, an empowered legislature, proportional representation and decentralized government, among other reforms, provided a necessary incentive for opposition parties to come together to form a pre-election pact. As discussed in the following section on pact-making, O'Donnell and Schmitter also note that pre-election political pacts are often characterized by formal or informal agreements about sharing executive power, in particular. Specifically, they note that the "capstone" of a political pact "may be a 'grand coalition' in which all the contracting parties simultaneously share in executive office, or a rotational scheme under which they . . . sequentially occupy it." O'Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, p. 41.

<sup>10</sup> These are some of the central institutions of consensus democracy that were advocated by movement leaders, as is discussed above.

<sup>11</sup> Stephen Ndegwa, "Kenya: Third Time Lucky?" *Journal of Democracy*, vol. 14, no. 3, 2003, p. 154.

Second, the movement's advocacy of consensus institutions also contributed, among other factors,<sup>12</sup> to the virtual elimination of pre- and post-electoral violence in Kenya's 2002 elections. As argued in Chapters Five and Six, two variables are important in explaining the large-scale political violence leading up to and immediately following Kenya's 1992 and 1997 elections: (1) successful framing efforts by a regime-supported countermovement,<sup>13</sup> and (2) Kenya's single-member district (SMD), plurality electoral system.<sup>14</sup> Although Kenya's reform movement ultimately was unable to change Kenya's majoritarian electoral system prior to the 2002 elections,<sup>15</sup> it largely succeeded in undermining countermovement framing efforts by extending Kenyans' freedoms of speech, movement, association, and assembly and, in so doing, breaking the regime's monopoly on information, especially

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<sup>12</sup> These factors included: (1) educational outreach programs by movement organizations, (2) a large presence of highly trained long and short term election monitors, (3) the establishment of "peace committees" in each of Kenya's 210 constituencies, as well as (4) a greatly strengthened national electoral commission that, for the first time in Kenyan history, began to aggressively enforce Kenya's Electoral Code. Each of these factors is discussed in detail below.

<sup>13</sup> "Countermovements" are defined by social movement theorists simply as those movements that "make contrary claims simultaneously to those of the original movement." Meyer and Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity," *American Journal of Sociology*, v. 101, no. 6, May 1996, p. 1631. As discussed in Chapter Five, the regime-supported countermovement emerged during the last quarter of 1991 in response to reform movement demands for multiparty politics and greater protections for Kenyans' human and democratic rights.

<sup>14</sup> As electoral system theorists have argued, single member district, plurality electoral systems, such as Kenya's, tend to create high thresholds to representation, encourage parochial voting, exacerbate group polarization and, in ethnically divided societies such as Kenya's, can lead to electoral violence. As chapters Five and Six document, political violence leading up to and immediately following Kenya's 1992 and 1997 elections was largely concentrated in constituencies that were either KANU-dominated or considered strategically important swing constituencies for KANU.

<sup>15</sup> Although most Kenyans believed that Kenya's draft constitution, which recommended a reformed system of proportional representation, would be enacted prior to the 2002 elections, as is discussed below, the Moi-KANU regime was ultimately able to stall the constitutional reform process until after the elections.

in many of Kenya's rural areas. Whereas prior to the 1998 – 2002 electoral cycle, countermovement leaders had effectively framed Kenya's reform movement as merely a thinly veiled attempt by representatives of Kenya's larger ethnic groups to exclude smaller groups from political power,<sup>16</sup> by the 2002 elections, movement representatives were able to reach Kenyans in former "KANU zones"<sup>17</sup> and effectively discredit these countermovement claims. As a consequence, many rural Kenyans for the first time came to understand that not only did the movement's reform proposals not exclude minority interests, but, in fact, they better protected them, despite regime claims to the contrary. Thus, the fact that the movement's reform agenda promoted institutions central to consensus democracy helped remove an important impetus for members of minority ethnic groups to engage in election-related violence.<sup>18</sup>

The second section of the chapter focuses on the role of Kenya's human rights and democracy movement in promoting Kenya's first successful opposition coalition since the introduction of multipartyism more than a decade earlier. Although

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<sup>16</sup> As discussed in chapters Five and Six, KANU's ruling coalition was comprised primarily of representatives of Kenya's smaller ethnic groups, which tended to be marginalized during Kenya's first independence regime, the Kenyatta regime (1963 – 1978). During these years, two of Kenya's larger ethnic groups, the Kikuyu, who comprise approximately 22 percent of Kenya's population, and the Luo, who comprise approximately 13 percent, tended to dominate national politics, but not exclusively so. See chapters Three, Five and Six, where Kenya's ethno-politics are discussed in greater detail.

<sup>17</sup> As a Kenyan political analyst Stephen Ndegwa explains, in "KANU zones," "advocates of multiparty democracy and opposition politicians were banned from campaigning, and nonnative residents were cautioned against voting for opposition politicians." Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics," p. 610.

<sup>18</sup> As is discussed in greater detail below, there were several variables that ultimately contributed to the dramatic decline in electoral violence leading up to, during and following Kenya's 2002 elections. The point I try to make here is that the fact that Kenya's reform movement advocated institutions central to consensus democracy mattered to representatives of smaller ethnic groups in Kenya. This, together with other factors discussed below, worked to effectively delegitimize regime claims to the contrary and remove an important impetus for political violence.



democratic transitions theory does not offer what might be considered “necessary and sufficient” conditions for successful pact-making, it finds that three conditions greatly facilitate the emergence of successful pacts: (1) “conflicting or competing groups are interdependent, in that they can neither do without each other nor unilaterally impose their preferred solution on each other if they are to satisfy their respective divergent interests”;<sup>19</sup> (2) competing groups focus on “distribution of representative positions and on collaboration between political parties in policy-making”;<sup>20</sup> and, finally, (3) competing groups make “a commitment for some period to resolve conflicts arising from the operation of the pact by renegotiating its terms, not by resorting to the mobilization of outsiders or the elimination of insiders.”<sup>21</sup>

Analysis of the Kenyan case reveals that each of these conditions was important to the success of the 2002 unity pact, in addition to three others. First, it mattered that Kenya’s 2002 pact was “formal” in the sense that its terms and conditions, including its organizational and decision-making structures, procedures for reconciling emergent conflicts and penalties for defection, were explicitly written into its memoranda of understanding (MoUs), and that the leadership of member parties publicly signed and committed themselves to these agreements.<sup>22</sup> Second, the fact that the 2002 pact emerged gradually over a ten-month period and focused first on areas of

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<sup>19</sup> O’Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, p. 38

<sup>20</sup> *Ibid.*, p. 40.

<sup>21</sup> *Ibid.*, p. 41.

<sup>22</sup> As is discussed in the section on pact-making, there were actually a series of MoUs that defined the 2002 unity pact.

common agreement, deferring more contentious issues until later in the pact-making process, when considerable trust had been established between parties, was also important. Finally, third, the fact that the 2002 pact made explicit a *process* for choosing its leadership and candidates, with a clear understanding that multiple positions of executive power would be shared among key opposition leaders, without actually naming or electing these individuals until a great degree of trust had been built through the coalition, was also important to its ultimate success. As was the case in promoting its constitutional reform agenda, the success of movement organizations in promoting the opposition unity pact was also importantly facilitated by the continued support of Kenya's dominant church organizations and international donors, as well as movement efforts to frame its demands in terms of human and democratic rights recognized under national and international law.

The chapter's third section examines the reform movement's continued role in institution-building to provide for a more free and fair electoral process in Kenya, and expanded human and democratic rights protections for Kenyans. As Kenyan political analyst Stephen Ndegwa has argued, in order for the KANU regime to be defeated and Kenya's democratic agenda advanced, "it was not enough to build a coalition: A way had to be found to make sure that the votes which Kenyans cast for it would count."<sup>23</sup> As this section documents, continued institution-building efforts by movement organizations, at both state and societal levels, were critical to ensuring that Kenya's 2002 elections were its most democratic to date. At the societal level, continued

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<sup>23</sup> Stephen N. Ndegwa, "Kenya: Third Time Lucky?" p. 154.

development of two movement-supported programs, initially established just prior to Kenya's 1992 elections, were especially important: (1) educational outreach programs designed to improve the likelihood that citizens would recognize and report rights violations, as well as actively participate in the constitutional reform process in an informed way; and (2) programs focused on training and deployment of domestic election monitors to ensure that voter registration, candidate nomination, campaign, polling, and counting processes were free and fair. At the state level, the role of movement organizations in promoting greater institutional capacity and independence of Kenya's national electoral commission, and in finally establishing Kenya's first national commission on human rights, were also important in promoting Kenya's most free and fair elections to date, and generally expanding human and democratic rights protections of Kenyans during the 1998 – 2002 cycle.

As was the case in forcing regime concessions on constitutional reform, and in facilitating Kenya's opposition unity pact, the success of Kenya's human rights and democracy movement in state and societal institution-building during the 1998 – 2002 electoral cycle was also made possible by the continued support of Kenya's dominant church organizations, international donors, as well as its use of legal mobilization strategies. By continuing to expose and publicize regime violations of its domestic and international legal obligations, movement organizations succeeded not only in further delegitimizing the KANU regime, but also in significantly advancing its own human and democratic rights agenda. Moreover, by forcing the regime to concede significant ground on constitutional reform, successfully promoting an opposition

unity pact, and ensuring that Kenya's 2002 electoral process was its most free and fair to date, Kenya's human rights and democracy movement succeeded not only in guaranteeing the KANU regime's defeat in 2002, but also in significantly deepening processes of democratic development in Kenya.

Finally, the chapter's fourth section, "The 2002 Elections," provides an analysis of the 2002 election results in Kenya. It finds that regime malapportionment and gerrymandering made possible by Kenya's majoritarian electoral system continued to benefit KANU in these elections. Specifically, in the two provinces where KANU won the most seats -- Rift Valley, where it won 30 seats, and North East Province, where it won 10 seats-- the average number of votes per seat was 16,347 and 6,546, respectively.<sup>24</sup> NARC, on the other hand, won all eight seats in Nairobi Province, but the average number of votes per seat in this province was 32,920 --or more than twice the number of votes per seat won by KANU in Rift Valley, and more than *five times* the number of votes per seat won by KANU in North Eastern Province.<sup>25</sup> Even within Rift Valley, however, the difference in representation between districts that were KANU-loyalist versus pro-opposition was significant. Here it also took more than twice as many votes to win a NARC seat as opposed to a

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<sup>24</sup> These numbers are calculated from "Table 9.2: Election Results by Party and Province" and "Table 9.6: Parliamentary Seats by Province," Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, Nairobi: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, 1998, pp. 103 and 107.

<sup>25</sup> Ibid.

KANU seat.<sup>26</sup> Despite this electoral distortion, the section argues that it was the NARC coalition, as Kenya's largest "party,"<sup>27</sup> that benefited most from Kenya's majoritarian electoral system. Not only did its 50 percent of the vote share translate into nearly 60 percent of the seats in parliament, but NARC parliamentary candidates also likely benefited from NARC's landslide victory in the presidential race.<sup>28</sup>

### **The Politics of Constitution-Making:**

In the immediate aftermath of Kenya's December 1997 elections, where pro-democracy forces experienced a second electoral defeat to the Moi-KANU regime, Kenya's human rights and democracy movement redoubled its efforts to promote comprehensive constitutional reforms prior to Kenya's 2002 elections. As movement leaders had insisted since Kenya's first multiparty elections in December 1992, Kenyans' human and democratic rights would remain vulnerable, and political power

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<sup>26</sup> NARC's 18 seats in Rift Valley Province were won with an average of 32,612 votes per seat, whereas KANU's 30 seats were won with an average of 16,347 votes per seat. Calculated from "Table 9.2: Election Results by Party and Province" and "Table 9.6: Parliamentary Seats by Province," Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, Nairobi: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, 1998, pp. 103 and 107.

<sup>27</sup> Although NARC registered as a political party with Kenya's Registrar of Societies, as required by Kenyan constitutional law, it was more accurately a coalition of parties, as is discussed below.

<sup>28</sup> As electoral systems theorists point out, and as discussed in chapters Five and Six, "[b]ecause the presidency is the biggest political prize to be won and because only the largest parties have a chance to win it, these large parties have a considerable advantage over smaller parties that tends to carry over into legislative elections." Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 155. Moreover, this effect "is especially strong when the presidential election is decided by plurality instead of majority-runoff (where small parties may want to try their luck in the first round) and when the legislative elections are held at the same time or shortly after the presidential elections. Ibid. As discussed above, both of these conditions held in the Kenyan case.

would continue to elude pro-democracy forces, until Kenya's Constitution was *comprehensively* reformed. As mentioned above, the substance of the movement's constitutional reform proposals largely incorporated central institutional features of consensus democracy. Specifically, movement leaders promoted seven of ten institutions that Arend Lijphart lists as fundamentally distinguishing consensus and majoritarian models of democracy: (1) executive power-sharing and broad coalition government;<sup>29</sup> (2) executive-legislative balance of power; (3) multipartyism; (4) proportional representation; (5) bicameralism; (6) constitutional rigidity; and (7) judicial review.<sup>30</sup>

Before there could be meaningful national discussion of the *substance* of constitutional reform, however, Kenya's human rights and democracy movement faced the formidable task of forcing the resistant Moi-KANU regime to commit to a *process* of reform that would allow for meaningful participation by representatives of Kenyan civil society and remain independent from regime influence. This section examines why and how the movement was able to win significant concessions from the regime regarding both the process and substance of constitutional reform, and how this impacted the development of human and democratic rights protections through Kenya's 1998 – 2002 electoral cycle.

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<sup>29</sup> As is discussed above, this institutional characteristic of consensus democracy was only *partially* met in movement reform proposals. See footnote 10 above.

<sup>30</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 34 – 41.

The section argues that the success of Kenya's human rights and democracy movement in promoting its constitutional reform agenda through the 1998 – 2002 electoral cycle is best understood through the social movement concepts of *political opportunity structures*, *mobilizing structures* and *framing processes*, as well as its use of legal mobilization strategies. As will be seen below, movement mobilizing structures in the form of social movement organizations, or SMOs, were at the forefront of advancing constitutional reforms through employing legal mobilization strategies. The success of these SMOs and their reform strategies, however, was ultimately contingent on favorable national and international political opportunity structures. First, international institutions and organizations remained opened to and supportive of movement demands. As is documented below, these organizations continued to provide material, technical and moral support to Kenya's movement. Second, although there continued to be regime violations of the 1997 Inter-Party Parliamentary Group (IPPG) reforms,<sup>31</sup> expanded democratic space made available by

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<sup>31</sup> As is discussed in detail in Chapter Six, the IPPG reform package consisted of three major bills. The first, the Constitution of Kenya (Amendment) Bill of 1997, effected five major constitutional changes demanded by Kenya's reform movement. First, it allowed the formation of coalition government. Second, it made Kenya's Electoral Commission (relatively) more independent and impartial by enlarging the Commission to a new constitutional maximum of twenty-one, ten of whom were to be appointed from lists submitted by opposition political parties. Third, it required that Kenya's twelve nominated parliamentary seats be allocated to parliamentary parties on the basis of their proportional strength in parliament. Fourth, it constitutionally entrenched Kenya's status as a "a multi-party democratic state." And finally, fifth, it prohibited discrimination on the basis of sex. The second bill, the Statute Law (Repeals and Miscellaneous Amendment) Bill, addressed twenty-eight statutory laws that movement leaders had targeted as violating Kenyans' fundamental political and civil rights. The third bill, the Constitution of Kenya Review Commission Bill, for the first time committed the government to a process of *comprehensive* constitutional reform, rather than minimal reforms. Finally, a series of administrative reforms were also enacted as part of the IPPG reform package; these included four major concessions to Kenya's reform movement. First, the government committed itself to review all cases of detainees in Kenya serving sentences for sedition and all other "political" offenses. Second, the regime promised to immediately register all pending applications by opposition political parties under the Societies Act, or inform parties of the legal basis for denying registration. Third, all provincial

forcing at least partial regime compliance made a significant difference in allowing Kenya's reform movement to advance its constitutional reform agenda. Third, the success of movement educational outreach programs focused on constitutional reform was also largely due to the financial and technical support of international donors, and the organizational support of Kenya's dominant church organizations. Finally, because of the regime's continued dependence on foreign aid, it remained "vulnerable" to international as well as domestic pressure, and through employing legal mobilization strategies, movement organizations were also able to effectively leverage this to force regime concessions.

Amending the 1997 Constitution of Kenya Review Commission Bill:

The movement's first step in advancing its constitutional reform agenda through the 1998 – 2002 electoral cycle focused on the need to either repeal or significant reform of the Constitution of Kenya Review Commission Bill of 1997.<sup>32</sup> As discussed in Chapter Six, this Bill, enacted just prior to Kenya's 1997 elections as part of the IPPG reforms, committed the resistant Moi-KANU regime, for the first time, to a process of *comprehensive*, rather than minimal, constitutional reform. Despite the fact that many analysts of Kenyan politics regarded the Bill as an

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commissioners, district commissioners, district officers, local chiefs, and police were prohibited from interfering with Kenya's electoral process. Finally, the regime also committed itself to processing all pending applications for broadcasting licenses. See Chapter Six for more details.

<sup>32</sup> As discussed above and in Chapter Six, this constitutional amendment was part of the Inter-Party Parliamentary Group (IPPG) reform package.



important win for Kenya's reform movement, as discussed in Chapter Six, movement leaders were immediately critical of it for several reasons.

First, they insisted the Bill gave too much power to Kenya's executive in the appointment of constitutional review commissioners. As a consequence, they argued the commission would suffer the fate of all so-called "reform commissions" thus far convened in Kenya in that it would serve primarily as a "public relations" exercise and a means of signaling to the international community –and some national groups-- that meaningful reforms were underway, while in fact no reforms of substance were enacted.<sup>33</sup> Second, movement leaders were highly suspicious of the Bill's requirement that the commission's report go *first* to the president, rather than proceeding directly to parliament. Especially given the movement's recent experience with the Saitoti Commission,<sup>34</sup> they feared that this structure would allow the regime to tamper with or simply ignore recommendations from Kenyans that it did not find to its liking. Third, although a timeframe was established for the completion of the commission's work, a timeframe was not specified for the actual appointment of commissioners, or for

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<sup>33</sup> This critique is based on interviews with movement leaders in Nairobi during spring and summer of 1998 and 1999.

<sup>34</sup> The Saitoti Commission was a commission established by President Moi in June 1990 in response to movement demands to amend Kenya's Constitution to allow multiparty politics. The Commission was lead by Vice President George Saitoti and was charged to tour the country and "collect and collate the views of a wide cross section of Kenyans" regarding whether Kenya's single party constitution should be reforms. Despite the fact that the vast majority of Kenyans reporting to the Commission spoke of the need for change, the Commission reported in November of 1990 that citizens were very satisfied with the status quo, and that no change was needed. Kivutha Kibwana, "Unfinished Business: The Transition to Multi-Party Democracy and Kenya's Post December 1991 Electoral Law Reforms," in *Constitutional Law and Politics in Africa: A Case Study of Kenya*, Kivutha Kibwana, ed., Nairobi: Claripress, 1998, pp. 222 – 223. Shortly after the Saitoti Commission reported its findings in November of 1990, President Moi announced that it was illegal to even discuss multiparty politics. See Chapter Four.

presidential assent to the Bill. Thus, movement leaders also feared that the KANU regime would use these loopholes to stall the reform process as long as possible and, at the very least, until they secured re-election again in 2002. Finally, fourth, movement leaders also insisted on the importance of both a national constitutional convention and national referendum to ensure sufficiently broad-based national participation in the reform process. The Moi-KANU regime consistently refused these demands and was adamant that although *some* participation by civil society would be allowed, this would be tightly controlled by the regime, and the reform process would be largely confined to Kenya's (KANU-dominated) parliament.

The movement's strategy in addressing these perceived flaws in the 1997 Review Commission Bill was three-fold. First, immediately following the 1997 elections, movement leaders initiated a massive lobbying effort to pressure Kenya's newly elected Eighth Parliament to either repeal or significantly amend the Bill. Engaging in legal mobilization, movement leaders drafted their own version of the Bill, entitled "The Kenya Constitutional Conference Act," which included careful institutional checks to ensure the reform commission remained independent from the regime, as well as provided for broad-based citizen participation. Second, movement leaders announced a series of "mass actions"<sup>35</sup> to publicize perceived deficiencies of

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<sup>35</sup> As movement leader Willy Mutunga explains, "[m]ass action took various forms: rallies, demonstrations, processions, strikes, sit-ins, vigils, prayers, and parading coffins of the dead at police stations before burials." Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 157. As he further points out, "[a]ll of these activities were in defiance of [unconstitutional] laws" and undertaken as a form of civil disobedience. Ibid. "This mass action was premised on the legal theory . . . [that] states that laws of a repressive government should not be obeyed." Ibid. By thus engaging in civil disobedience and legal mobilization, "[m]ass action challenged the legitimacy of the existing legal order." Ibid. Moreover, in response to the Moi-KANU regime's claims that the movement's aim in calling for "mass action" was simply to cause "chaos" and

the Bill and mobilize domestic and international support to pressure the regime to enact reforms. Finally, third, as mentioned in Chapter Six, the movement launched its own constitutional reform commission to parallel the work of the state-mandated commission.<sup>36</sup> Like the state-mandated commission, the movement's commission was also authorized to conduct civic education on constitutional reform,<sup>37</sup> collect reform proposals from Kenyans at grassroots levels, and ultimately produce a constitutional draft from these proposals.<sup>38</sup> The movement's strategy in forming its own commission, and producing their own draft constitution, was to expose and critique anticipated regime sleight-of-hand in the reform process.<sup>39</sup>

Although the movement's parliamentary lobbying efforts persuaded many opposition MPs of their cause in the months immediately following the 1997 elections, given KANU's majority in parliament, the movement's mass action

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"violence" in Kenya, movement leader, Kivutha Kibwana insisted that the movement "has categorically said it cannot support violence and indeed, we have stated over and over again that mass action is not violence. It is one way of expressing yourself as a citizen. It is a right that you have to really tell Government that it is not doing certain things, a way of convincing Government that it needs to do citizens' bidding. ... Within constitutional law, it's known that mass action, as exemplified by men like Mahatma Gandhi and Martin Luther King, is peaceful civil action. If you look at all our public statements, NCEC [National Convention Executive Council] has consistently emphasized non-violence and the rule of law..." Kivutha Kibwana, "Kibwana: Beware of Government's Intentions," *The Daily Nation*, April 5, 1998.

<sup>36</sup> As discussed in Chapter Six, this was decided at the movement's third plenary on constitutional reform in late October 1997.

<sup>37</sup> This mandate came from the movement's Third Plenary for constitutional reform, convened October 26th – 28th, 1997, just prior to the 1997 elections.

<sup>38</sup> The decision to form a parallel constitutional reform commission was reached at the movement's Third Plenary for constitutional reform, convened October 26th – 28th, 1997, just prior to the 1997 elections. At the movement's Fourth Plenary, convened February 26 – 28, 1998, the reform commission was launched.

<sup>39</sup> Interviews with representatives of movement organizations, Nairobi, Kenya, 1998 and 1999.

campaigns ultimately proved much more effective in mobilizing support for amending the 1997 Review Commission Bill. The first post-election movement demonstration was scheduled for Saturday, March 14, 1998, two and a half months after the December 1997 elections, at the historic Kamukunji grounds just outside of Nairobi.<sup>40</sup> This rally was then to be followed by a nationwide strike on April 3, and further strikes during the first weeks of May and June, depending on the regime's response. If the regime failed to effectively respond to movement demands by the end of June, movement leaders threatened weekly strikes beginning with *Saba Saba* Day demonstrations<sup>41</sup> on July 7, 1998, until its demands were met.

As historically was the case, to discourage citizen participation at the Kamukunji rally, the Moi regime issued warnings of violence and “chaos” to Kenyans over Kenya's Public Broadcasting Corporation (KBC), should they dare to attend.<sup>42</sup> Despite these warnings, the rally was well attended, not only by movement activists, but also by opposition members of parliament.<sup>43</sup> Significantly, for the first time since

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<sup>40</sup> As discussed in earlier chapters, Kamukunji grounds outside of Nairobi were made famous during Kenya's colonial period for anti-colonial demonstrations.

<sup>41</sup> “*Saba*” is the Kiswahili word for seven; thus, “*Saba Saba*” Day refers to the seventh day of the seventh month – July 7<sup>th</sup>. As discussed in Chapter Four, *Saba Saba* Day demonstrations have special significance for Kenya's human rights and democracy movement because of the massive demonstrations that were held on July 7, 1990 demanding the Moi-KANU regime respect and protect Kenyans' fundamental human and democratic rights. The regime responded to this mobilization violently and at least twenty Kenyans were killed and hundreds injured and arrested. To commemorate the lives lost demonstrating peacefully for democracy and human rights that day, the movement continued to hold a vigil and/or additional demonstrations each *Saba Saba* Day since July 7, 1990.

<sup>42</sup> It should be noted that this was in violation of the IPPG reforms regarding use of the KBC.

<sup>43</sup> These included: Charity Ngilu, James Orengo, Paul Muite, Peter Anyang' Nyong'o, Stephen Ndichu, George Nyanja, Moses Muihia, Muturi Kigano, Ngengi Mungai, Ngonya wa Gakonya, Mr Kabando wa Kabando, Dennis Akumu, Kamau Icharia and Kenneth Matiba, in addition to movement leaders and constitutional lawyers Kivutha Kibwana, Gibson Kamau Kuria and Pherozee Nowrojee. The

the mass movement's emergence in 1990, the regime did not send riot police to disrupt the rally, however. Consequently, it was also the first public rally organized by the movement that proceeded without violence. The purpose of the rally was threefold: (1) to publicize the movement's critiques of the 1997 Review Commission Bill, (2) to make known the substance its revised "Constitutional Conference Act," and (3) to advocate a boycott of the state-mandated constitutional review commission until movement demands were met. At the demonstration's conclusion, participants endorsed a series of demands, referred to as the "Kamukunji Resolutions." Of these, two were considered central: (1) institutional checks to ensure that the constitutional reform commission remained independent from executive influence, and (2) provisions for broader participation in the reform process by Kenyans through the institutions of a national convention and national referendum.<sup>44</sup>

Although Kenya's police ultimately did not disrupt the movement's first post-1997 election Kamukunji rally, in response to the amount of public attention and support it generated, the Moi regime threatened to de-register three leading movement organizations (SMOs) responsible for its organization: the Citizens Coalition for Constitutional Change (4Cs), Kenya Human Rights Commission (KHRC) and Kituo cha Sheria (Kituo).<sup>45</sup> Moreover, ten days later, on March 24, 1998, Kenyan police

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demonstration was called "The People's Rally." Andrew Kuria and Kipkoech Tanui, "Rally Sets Agenda for Mass Action," *The Sunday Nation*, March 15, 1998.

<sup>44</sup> Ibid.

<sup>45</sup> These movement organizations are all discussed in chapters Four, Five and Six.

broke into the movement's National Convention Executive Council (NCEC)<sup>46</sup> offices, confiscated movement documents and briefly arrested three NCEC staff members for questioning.<sup>47</sup> Engaging in legal mobilization, movement leaders immediately called a press conference and denounced the regime's actions not only as "contraven[ing] Kenyan law and international human rights laws which Kenya had ratified,"<sup>48</sup> but also as a blatant violation of Kenya's newly passed IPPG reforms.<sup>49</sup> Other movement organizations were also quick to denounce the regime's repressive threats. The chairperson of FIDA, Nancy Baraza, for example, issued the following public statement on behalf her organization: "We are appalled by this treatment because it not only constitutes open intimidation of NGOs prepared to engage the government over the need to participate in legal and constitutional reforms, but it is also a threat to the right to free association in the country."<sup>50</sup> Other movement organizations, including the Law Society of Kenya (LSK), the International Commission of Jurists-Kenya (ICJ-K), Rescue Political Prisoners (RPP) and the Legal Resources Foundation (LRF) all also issued similar public statements in support of the targeted SMOs and in support of

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<sup>46</sup> National Convention Executive Council (NCEC) is the leadership council that movement members elected at its First Plenary for a National Convention, April 3 – 6, 1997, to carry its demands for constitutional reform forward. It is discussed in detail in Chapter Six.

<sup>47</sup> Kariuki Waihenya, "Four NGOs Scoff at Moi's Threat," *The Daily Nation*, March 20, 1998. Moreover, in addition to a threat made to also deregister the NCEC, engaging in legal mobilization, movement leaders responded: "The NCEC is a coalition of people and organisations whose mandate is to influence public policy on matters concerning Kenyans. We would like to draw your attention to the fact that lobby groups do not require registration . . . nor can it be de-registered." Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> See Chapter Six for a thorough discussion of the substance of these reforms.

<sup>50</sup> "Moi Threat to NGOs Angers Lawyers' Body," *The Daily Nation*, March 24, 1998.

constitutionally and internationally protected freedoms of speech and association in Kenya.<sup>51</sup>

Internationally, Article 19<sup>52</sup> also engaged in legal mobilization to put pressure on the Moi regime, and published the following open letter to President Moi:

Article 19 is very concerned by reports that the [Kenyan government] is considering ‘de-registering’ three non-governmental organizations . . . The objections Article 19 has to the targeting of these organizations are based on Kenya’s obligations to freedom of expression and freedom of association under international and regional law, as well as under Section 80 of the Kenyan Constitution. These guarantees exist to protect peoples’ rights to express their opinions peacefully, [and] to freely associate. . . The part which non-governmental organisations, such as those under threat, play in informing people of their rights and helping to attain them is vital. Groups like these encourage debate and democratic participation and as such are vital parts of a healthy democracy. We urge you to guarantee that the Kenyan people’s fundamental human rights are protected by allowing the organisations which represent them to carry out their mandate free from official interference.<sup>53</sup>

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<sup>51</sup> Interviews with representatives of movement organizations, Nairobi, May – June 1998, as well as review of movement documents. Each of these movement organizations is discussed in detail in earlier chapters.

<sup>52</sup> As discussed in Chapter Six, Article 19 is a nongovernmental human rights organization that defends and promotes freedoms of expression and information, as fundamental human rights, globally. It is named for Article 19 of the Universal Declaration of Human Rights, which states: “Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.” See Article 19’s website: <http://www.article19.org/about/index.html> As discussed in Chapter Six, Article 19 had begun working closely with the KHRC in a media monitoring project of the Kenya Broadcasting Corporation prior to the 1997 elections.

<sup>53</sup> “Article 19 Letter Regarding Threats Posed to NGO’s,” *The International Freedom Of Expression Exchange Toronto*, Toronto: Article 19, March 25, 1998.

Amnesty International also issued a public statement condemning the Moi regime and its threats to the “legal activities of the human rights community in Kenya.”<sup>54</sup> In addition, both Amnesty and Article 19 launched letter-writing campaigns among their members to put increased pressure on the Moi regime. Finally, the Citizens’ Coalition for Constitutional Change (4Cs) wrote a two-page open letter to U.S. President Bill Clinton requesting his support. The letter was channeled through the U.S. ambassador to Kenya and also employed legal mobilization strategies: “We therefore petition you, Mr. President [Clinton], to . . . urge President Moi and his government to respect the obligations that Kenya has undertaken under the African Charter on Human and Peoples Rights and other international covenants protecting and promoting human rights.”<sup>55</sup> In response, President Clinton also issued a stern reminder to the Moi regime of its obligations under international and regional human rights law. As a result of this national and international pressure, the movement organizations were allowed to challenge the bans in court, and in a surprising move, Kenya’s High Court suspended the deregistrations in October.<sup>56</sup>

Also as a consequence of growing national and international pressure generated by movement organizations, as well as the fact that the movement’s threat of a national strike was only one day away, on April 2nd, President Moi announced he would meet with opposition party leaders to discuss ways of amending the 1997

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<sup>54</sup> “Write to Moi, Amnesty Tells Supporters,” *The Daily Nation*, April 4, 1998.

<sup>55</sup> Ken Opala And Mburu Mwangi, “NCEC Could Not Plot Evil Against the Government,” *The Daily Nation*, March 24, 1998.

<sup>56</sup> *Amnesty International Report 1999*, London: Amnesty International, 2000, p. 221.



Review Commission Bill to allow for broader citizen participation, as movement leaders demanded. At this meeting, it was decided that a twenty-five member inter-party parliamentary committee, which became known as the IPPC, would be established under the chairmanship of Kenya's Attorney General, Amos Wako, to decide "a way forward towards a constructive debate on constitutional reform."<sup>57</sup> The formation of this committee was considered a significant win for the movement, as its membership included such prominent opposition leaders and supporters of the movement as Richard Leaky and Paul Muite of the Safina Party, Martha Karua and Kiraitu Murungi of the Democratic Party, Prof Anyang Nyong'o and Charity Ngilu of the Social Democratic Party (SDP), and Gitobu Imanyara of Ford-Kenya.<sup>58</sup> Moreover, only nine of the twenty-five members on the committee were representatives of KANU.<sup>59</sup>

Ultimately, within a week of its formation, the committee resolved to meet the movement's central demand –to undertake "wide and extensive consultations with *all* interested parties concerned with the constitutional review process" to amend the 1997

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<sup>57</sup> "Kenya: Mixed Party Committee Set Up to Consider Constitutional Review," KBC Radio, Nairobi: Kenya Broadcasting Corporation, April 3, 1998. Reported by the BBC Worldwide Monitoring Service, April 4, 1998.

<sup>58</sup> The members of the committee were as follows: Charity Ngilu, leader of the Social Democratic Party; Raila Odinga, leader of the National Development Party; Joseph Munyao, Democratic Party; Joseph Kamotho, KANU; Richard Leakey, leader of the Safina Party; George Anyona, leader of the Kenya Social Congress; Nicholas Biwott, KANU; Dr Bonaya Godana, KANU; Kipkalia Kones, KANU; Kalonzo Musyoka, KANU; Martha Karua, Democratic Party; Wanyiri Kihoro, Democratic Party; Kiraitu Murungi, Democratic Party; Isaac Kiprono Ruto, KANU; Mark Too, KANU; Dr Mukhisa Kituyi, Ford-Kenya; Gitobu Imanyara, Ford-Kenya, Paul Muite, Safina Party; Julius ole Sunkuli, KANU; Prof Anyang Nyong'o, Social Democratic Party; John Michuki, Ford-People; Dr Adhu Awiti, National Development Party; Rashid Shakombo Shirikisho, Party of Kenya and Njeru Kathangu Ford-Asili. Ibid.

<sup>59</sup> See above. See also: "Reform Talks Win Key Support," *The Daily Nation*, Monday, June 22, 1998.

Review Commission Bill.<sup>60</sup> It was agreed that all individuals and organizations interested in participating in the review process should submit letters to this effect to the IPPC within a month's time.<sup>61</sup> The committee was then mandated to review these letters and compile a list of individuals and organizations to be invited to an "all-inclusive constitutional review meeting" scheduled for Monday, May 11th at "Bomas of Kenya," a large convention hall just outside of Nairobi.<sup>62</sup>

#### The Bomas and Safari Park Meetings:

Given this apparently major breakthrough in the reform process, movement leaders agreed to withdraw their scheduled mass action program "to give the unfolding work on consensus building on constitutional change" a chance.<sup>63</sup> As movement leader, Kivutha Kibwana explained: "We want to send a loud message to the country that the NCEC will not obstruct a *bona fide* and genuine process of constitution reform," despite regime statements to the contrary.<sup>64</sup> Much to the surprise of movement leaders, two hundred representatives of dominant civic and religious organizations in Kenya, most of whom were closely linked to Kenya's human rights and democracy movement, were invited by the IPPC to attend the May 11<sup>th</sup> Bomas meeting, in addition to all 210 of Kenya's MPs. Even more remarkable was that fact

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<sup>60</sup> "Kenya Names Constitution Review Committee Members," *Xinhua News*, April 2, 1998.

<sup>61</sup> Specifically by May 5, 1998. *Ibid.*

<sup>62</sup> Jacinta Sekoh-Ochieng, "NCEC Softens Reforms Stance," *The Daily Nation*, April 29, 1998.

<sup>63</sup> "Kenya's Opposition Lobby Group Drops Mass Action," *Xinhua News*, April 18, 1998.

<sup>64</sup> *Ibid.*

that among those invited was the entire leadership of the NCEC. Significantly, this marked the first time that the Kenyan government, as represented by the IPPC, officially recognized the NCEC as a legitimate stakeholder in the constitutional reform process. Kenya's local papers referred to the Bomas meeting as "historically unprecedented" and a huge win for Kenya's reform movement, as "renowned government critics, religious and political leaders, as well as professionals, featured prominent in the list of panelists" scheduled to speak at the forum.<sup>65</sup>

The purpose of the May 11<sup>th</sup> Bomas meeting was specifically to discuss the process, and not the substance, of constitutional reform, with the ultimate aim of substantively amending the 1997 Constitution of Kenya Review Commission Bill. Invited groups were asked to submit their proposals for the Bill's amendment together with their letters of request to participate, and from this, IPPC members organized the meeting's panels. Although movement leaders, overall, were pleased with the diversity of groups invited to the forum, as well as with the selection of panelists, they remained critical of the timeframe allowed for presentation of proposals and the fact that invitees were not allowed to participate the meeting's management, agenda-setting, or the process of compiling the meeting's resolutions into formal legislation for amending the Review Commission Bill. As movement leader Kivutha Kibwana pointed out, "presentation by 400 individuals and meaningful discussion cannot be realized in one day . . ." <sup>66</sup> Moreover, in response to the announcement that Attorney

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<sup>65</sup> "Government Critics Included in Forum on Constitutional Review," KBC TV, Nairobi: The Kenya Broadcasting Corporation, May 8, 1998. Reported by the BBC Monitoring Africa, May 8, 1998.

<sup>66</sup> Jacinta Sekoh-Ochieng, "NCEC Says Reform Meeting Flawed," *The Daily Nation*, May 10, 1998.

General Wako would preside over and moderate the forum, Kibwana insisted that “[i]t is an elementary rule of democracy that every meeting belongs to participants, who should appoint their chairman and secretary.”<sup>67</sup> Nonetheless, movement leaders largely perceived the convening of Bomas as an important victory for their reform agenda and urged all invited groups to participate to make it a success. In the words of Kibwana, despite his reservations, the meeting was a “milestone in the process of constitutional reform” in Kenya.<sup>68</sup>

At Bomas it quickly became apparent that there was a broad consensus among invited groups, with exception of KANU hardliners, on five key issues. First, it was agreed that the review commission should be made more representative by increasing the number of commissioners from the current twenty-nine to a minimum of between 50 and 100.<sup>69</sup> Second, it was agreed that the president wielded too much power in the appointment process and that commissioners should be nominated and then appointed solely by designated “stakeholders” in the constitutional reform process.<sup>70</sup> Third, there was a broad consensus that, once appointed, commissioners should have security of tenure and should be allowed to elect their own chair and deputy chair. Fourth, there was agreement that the commission should have direct budgetary allocation from

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<sup>67</sup> Maguta Kimemia, NCEC Threatens to Quit the Reform Talks, *The Daily Nation*, July 1, 1998.

<sup>68</sup> “Lobby Group Calls on Everyone To Take Part in Constitutional Forum,” *KTN TV*, Nairobi: The Kenya Television Network, May 9, 1998. Reported by the BBC Monitoring Africa, May 9, 1998.

<sup>69</sup> The number of commissioners at the time was twenty-eight plus the chairperson, making twenty-nine.

<sup>70</sup> Under the existing legislation, the 1997 Constitution of Kenya Review Commission Bill, the president was to choose twenty-nine commissioners (including the chairperson) from a list of forty-five presented by stakeholders.

Kenya's Consolidated Fund. And, finally, fifth, to ensure the reform process proceeded in a timely matter, and that reforms were enacted at least one year prior to Kenya's 2002 elections, it was also agreed that the review process should be completed within thirty-six months. Potential loopholes regarding the timeframe for appointment of commissioners and presidential assent, therefore, needed to be closed. Thus, by the end of the Bomas meeting only two issues central to movement demands remained contentious: (1) the convening of a national constitutional convention and (2) a national referendum on the penultimate constitutional reform proposal, prior to it going to parliament for ratification.

Despite this broad agreement on fundamental issues, it became clear within days of the Bomas meeting that the Attorney General was reluctant to translate this consensus into formal amendments to the Review Commission Bill. In response, movement leaders demanded that a "Bomas II" be immediately convened and that a broadly representative group of participants be selected to draft formal amendments at the conclusion of the meeting. Movement leaders, together with opposition MPs, once again threatened mass action unless their demands were met. In response, the Attorney General conceded that a second consultative forum would be convened a month later --on June 8 – 9, 1998. In order to make this meeting "more manageable" than Bomas I, however, he, together with a majority of the IPPC, insisted that representatives of only thirty-three "lead" civil society organizations be invited, as opposed to the two hundred invited to Bomas I.<sup>71</sup> Although movement leaders were

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<sup>71</sup> Kipkoech Tanui, "MPs Quit Reform Talks," *The Daily Nation*, May 14, 1998.

initially very skeptical that these thirty-three organizations would be sufficiently representative of Kenya's diverse civil society, they were pleasantly surprised when the list announced by the IPPC ultimately included many dominant movement organizations, including the NCEC, the LSK, the KHRC, FIDA-K, ICJ-K, the 4Cs, the NCKK, Kenya's Catholic Church,<sup>72</sup> the Supreme Council of Kenya Muslims, and the NGO Council.<sup>73</sup>

Bomas II was ultimately postponed until June 22 – 23 as various compromises were worked out between participating groups. Because only thirty-three civil society delegates were invited to this meeting, the venue was also changed from Bomas at Kenya to the Safari Park Hotel in Nairobi. Thus, this second round of negotiations became known as the “Safari Park” meetings. Although movement leaders continued to protest the fact that the IPPC and the Attorney General, and not a more broadly representative group, set the agenda and coordinated the meeting, they were able to negotiate a compromise with them that a more representative group would ultimately be responsible for collating and drafting final recommendations from the meeting. Much to the surprise of movement leaders, not only were civil society representatives given equal representation to political parties on this drafting committee, but also for the first time in the history of the movement's interaction with the state, all of these

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<sup>72</sup> Kenya's Catholic Church was represented by the Catholic Justice and Peace Commission.

<sup>73</sup> Kipkoech Tanui, “MPs Quit Reform Talks,” *The Daily Nation*, May 14, 1998.

civil society representatives had close ties to the movement.<sup>74</sup> Moreover, given the Democratic Party's consistent support for movement objectives, the movement ultimately ended up with majority representation on the committee. Thus, in exchange for this representation, movement leaders agreed to follow the agenda laid out by the IPPC and the Attorney General for the meeting.

When Safari Park I failed to complete its ambitious agenda, participants quickly agreed to convene a "Safari Park II" on the following Monday, June 29<sup>th</sup>. By the closure of Safari Park II, not only had delegates finally formalized the agreements reached at Bomas I, but Kenya's reform movement succeeded in winning several additional significant concessions from the regime. First, an agreement was reached to put institutional safeguards in place to ensure that the executive's role in the appointment of national commissioners was merely a formal one.<sup>75</sup> Second, a consensus was reached on what became known as the "three-tiered" structure for constitutional reform. These "three tiers" were: (1) a national level constitutional review commission, whose responsibility it was to collect citizens' views on

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<sup>74</sup> Of the ten-member committee designated to do this work, five seats were allocated to political parties and five to "civil society" representatives. Political party representatives were: (1) Julius Sunkuli (KANU), (2) Gitobu Imanyara (Ford-Kenya), (3) Raila Odinga (NDP), (4) Martha Karua (DP) and (5) George Anyona (Kenya Social Congress). Civil society representatives were: (1) Bishop Philip Sulumeti (NCCK), (2) Abida Ali (Muslim), (3) Erastus Wamugo (Youth leader and also a leader of the 4Cs), (4) Prof Kivutha Kibwana (dominant leader of the NCEC) and (5) Wanjiku Mukabi Kabira (women's group leader). Gichuru Njihia, "Little Progress in Reform Talks," *The Daily Nation*, Wednesday, June 24, 1998.

<sup>75</sup> Instead of commissioners being appointed by the executive, this power was delegated to designated stakeholders in the constitutional reform process. These individuals were to be broadly representative of civil society interests, and the executive's role in the appointment process was to simply endorse these appointments. In addition, it was agreed that commissioners had to have university level education, or its equivalent, and that the chairperson must be either a former or present judge, or a university professor of law, who had taught at a Kenyan university for a minimum of fifteen years.

constitutional review and produce a draft constitution; (2) a “District Consultative Forum” (DCF), whose responsibility it was to coordinate civic education and community participation at the district level; and, finally, (3) a National Consultative Forum (NCF), whose responsibility it was to ensure that the draft constitution presented by the national commission was, in fact, representative of the views it had collected, as well as to debate, amend and approve the final constitutional draft before it was presented to parliament.<sup>76</sup> Moreover, in a major coup for the movement, it was also agreed that the National Consultative Forum would be comprised of three representatives from each of Kenya’s sixty-four administrative districts –for a total of 192 civil society representatives, as well as the 224 members of Parliament.<sup>77</sup> In addition, as a further check on the commission’s independence, the District Consultative Forum was also given the authority to vet the commission’s constitutional draft before it was taken to the NCF.<sup>78</sup> Finally, it was also agreed that the drafting committee selected for Safari Park I, with majority representation by movement representatives, would be maintained through all future Safari Park meetings to translate agreements into formal amendments to the 1997 Review

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<sup>76</sup> A central responsibility of the NCF was to ensure that views collected from the public were in fact included in the commission’s final report. One of the greatest fears of movement leaders was that the constitutional reform commission would suffer the same fate of so many commissions in Kenya: proposals and recommendations made by the public to the commission would never find their way into the final reform proposal, no matter how broadly supported they were. As mentioned above, the most recent example of this was the 1990 Saitoti Commission, which, despite a majority of Kenyans views to the contrary, reported that Kenyans were completely satisfied with Kenya’s single party state.

<sup>77</sup> This number included the 210 elected members, twelve appointed members, as well as the Speaker of the House and Attorney General as *ex officio* members. “Key Areas of Agreement and Consensus on Recommendations,” *The Daily Nation*, June 30, 1998.

<sup>78</sup> Emman Omari, “Key Agreement at Reform Talks,” *The Daily Nation*, June 30, 1998.



Commission Bill.<sup>79</sup> Thus, by the end of Safari Parks I and II, almost all of the movement's central demands had been met, and the only remaining issues to be resolved were the exact size of the commission and the process by which commissioners would be selected. For this reason, Safari Park III was scheduled less than six weeks later, on August 10<sup>th</sup>.

A week prior to the scheduled start of Safari Park III, however, employing a well-trying regime strategy of granting concessions then immediately retracting them, President Moi suddenly announced that a special meeting of KANU's parliamentary group, which he had convened and chaired, decided it was opposed to the three-tiered constitutional reform structure agreed to at Safari Parks I and II, as well as the dominant role of civil society representatives in the reform process. Moreover, he insisted that all 112 KANU MPs would participate in Safari Park III to ensure that these proposals were repealed. In response, movement leaders and opposition MPs threatened to pull out of the talks and again engage in mass action demonstrations, unless KANU acknowledged and abided by its previous agreements.

Before this issue could be ultimately resolved, however, a car bomb attack on the U.S. Embassy in Nairobi on August 7<sup>th</sup> devastated the country.<sup>80</sup> Two hundred

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<sup>79</sup> That is, the committee comprised of five political party representatives and five civil society representatives; however, two additional women were added to the committee in response to women's groups' successfully demanding that their representation on the committee be increased from three of ten to five of twelve. This committee was maintained largely because of movement pressure and the need for the government to have movement support for the talks to be perceived as legitimate, as well as because of the legal expertise among movement leaders, which was helpful in translating recommendations into formal legislation.

<sup>80</sup> It should be noted that this attack had nothing to do with domestic politics in Kenya, or Kenya's relationship to the United States. On the same day as the Kenya bombing, the U.S. Embassy in Tanzania was also bombed, and the U.S. government claimed that intelligence reports indicated that the

and thirteen Kenyans were killed and more than five thousand others injured as office buildings near the U.S. Embassy collapsed and windows within a several block radius were shattered. As a consequence, Safari Park III was rescheduled for two weeks later, on Monday, August 24. The one-day meeting was attended by almost all MPs, including the Speaker of Parliament, as well as the thirty-three representatives of civil society groups selected for Safari Parks I and II. Despite the threats by KANU hardliners to subvert agreements reached previously at Safari Parks I and II, in yet another win for the movement, Safari Park III ultimately endorsed both the three-tiered structure and the dominant role of civil society organizations in the review process. Moreover, an agreement was also finally reached on the size of the review commission. Although several proposals had been put forward for enlarging the commission to make it more representative, in the end, a twenty-five-person commission was agreed to with strict guidelines to ensure that appointees were broadly representative of Kenya's diverse political and civil society groups.<sup>81</sup> Thus, the only major issue left unresolved at the end of Safari Park III was the contentious issue of the exact method of choosing commission members. To address this, Safari Park IV was scheduled for October 5<sup>th</sup>.

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international terrorist network, Al Qaeda, and its dominant leader, Osama bin Laden, were responsible. In late Fall 1998, four members of Al Qaeda were indicted by U.S. courts, none of whom were Kenyan citizens. All four were eventually brought to trial in a U.S. District Court in New York City in January 2001 and ultimately were convicted in May 2001. See Oriana Zill, "The U.S. Bombing Trail –A Summary." <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>

<sup>81</sup> This smaller number was agreed to primarily because of the exorbitant costs involved in sustaining a larger commission.

By the commencement of the October 5<sup>th</sup> Safari Park meeting, the movement-dominated drafting committee<sup>82</sup> proposed a formula for choosing commissioners that was ultimately accepted by a majority of participants at Safari Park IV. The formula proposed that thirteen of the twenty-five commissioners be nominated by parliamentary parties and that, of these thirteen, KANU would appoint five individuals, the DP would appoint three, the NDP would appoint two, and FORD-Kenya and the SDP would appoint one each.<sup>83</sup> Minority parties in parliament –Safina, FORD-People, FORD-Asili, the KSC and Shirikisho—would jointly be allowed to nominate one person.<sup>84</sup> The remaining twelve commissioners, despite KANU hardliners protests, were all to come from civil society groups. Each of Kenya’s major religious groups –Protestants, Catholics and Muslims-- was allowed to nominate one individual through their main leadership organizations. Of the remaining nine commissioners, “women’s organizations” were allowed to nominate five individuals and “civil society” four.<sup>85</sup> Thus, by the end of Safari Park IV, almost all of the movement’s central demands for amendment of the 1997 Review Commission Bill had been met. By October 12<sup>th</sup>, the Attorney General’s office had completed drafting the 1998 Constitution of Kenya Review Commission (Amendment) Bill; it was passed

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<sup>82</sup> As noted above, it was agreed at Safari Park I that this broadly representative group would continue as the drafting committee for all future Safari Park meetings.

<sup>83</sup> Emman Omari, “Review Team Deal Struck,” *The Daily Nation*, October 6, 1998.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

by parliament on December 8<sup>th</sup>, and finally signed into law by President Moi on December 24, 1998.

Impasse on Constitutional Reform and Movement Mass Action:

According to the 1998 Constitution of Kenya Review Commission (Amendment) Bill, parliamentary parties had until February 8, 1999 to submit their nominations for commissioners to Kenya's Attorney General. By late January 1999, however, a major dispute again arose between opposition parties and KANU regarding the exact appointment formula for nominees. Although representatives of KANU had agreed to the aforementioned nominating formula at Safari Park IV, as the deadline for submission of nominations grew closer, KANU's leadership announced that the formula was discriminatory and that party representation on the commission should instead reflect parties' proportional representation in parliament.<sup>86</sup> Thus, KANU ended up forwarding *seven* nominees to the Attorney General, instead of the five they were allowed by the Safari Park IV agreement. In addition, minority parties —Safina, FORD-People, FORD-Asili, the KSC and Shirikisho, which were *jointly* to nominate one person, each nominated one person, because they failed to reach agreement on a nominee. Thus, the Attorney General ended up with seven additional nominees for political parties' thirteen seats on the commission.

According to the 1998 Review Commission Bill, after nominations were received, the Attorney General then had ten days to confirm that nominees met with

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<sup>86</sup> Movement representatives were opposed to this because of the extent to which KANU was over-represented in parliament as a consequence of Kenya's majoritarian electoral system.

nominating criteria and to address any anomalies in the nominating process.<sup>87</sup> Asserting uncharacteristic independence from the regime, Attorney General Wako requested that each of Kenya's parliamentary parties select two individuals to represent them in consultative talks, which he would moderate, in order to resolve the dispute on party representation. As many anticipated, however, KANU argued that the Attorney General's representational formula for the talks was also discriminatory and instead sent *twenty-one* representatives, including eleven cabinet ministers and Kenya's vice president.<sup>88</sup> For perhaps the first time since his appointment, however, the Attorney General refused to bow to the regime's strong-arm tactics. Instead, he indefinitely adjourned the meeting and announced it would not be reconvened until all parties agreed on the question of representation.<sup>89</sup> He advised parties to immediately convene a meeting to decide the distribution of seats on the commission, and then inform him of their decision.

Although many movement leaders faulted the Attorney General for not taking a greater leadership role in resolving the constitutional reform impasse, their own efforts to either force the regime to abide by the Safari Park agreements, or reconvene a meeting of delegates to renegotiate the agreement, also largely failed. Ultimately, it

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<sup>87</sup> In addition to having a minimum university level education, or its equivalent, it was required that each of Kenya's eight provinces had a minimum of two representatives each on the 25-member commission.

<sup>88</sup> Emman Omari and Njeri Rugene, "KANU Derails Constitutional Review Talks," *The Daily Nation*, Friday, February 19, 1999.

<sup>89</sup> Others, however, argued that the regime's plan all along was simply to indefinitely stall the constitutional reform process; so, in this respect, Wako was perceived as complicit in the regime's agenda.

was not until almost four months later, in late May of 1999, just after President Moi announced that parliament should simply take over the reform process as “the only legitimate constitution-making forum,” that movement leaders finally announced a definite plan for mass action to protest the regime’s position. In response to the president’s announcement, movement leaders immediately issued the following press statement:

We totally reject Parliament as the only forum for constitution making. We do not recognise it as representative of all the voices in Kenya . . . We do this appreciating that there already is a stated national consensus that the Constitution properly belongs to all people of Kenya. We unequivocally re-state that the constitutional review process is irreversible and must be people-driven.<sup>90</sup>

A series of protests were then organized by the movement to demonstrate the degree of public support for their position. With the approach of “Budget Day” in mid-June, similar to the 1997 Budget Day protests,<sup>91</sup> movement leaders organized opposition MPs to disrupt the budget reading in parliament by shouting “No Reform, No Budget” and “No Taxation Without Representation.”<sup>92</sup> Simultaneously, street demonstrations

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<sup>90</sup> “Leaders Dismiss Moi’s Prescription for Constitutional Review,” *The Daily Nation*, May 24, 1999. This was a joint statement by opposition party leaders including: Raila Odinga, Paul Muite, Beth Mugo, and Tabitha Seii. The statement was also signed by movement leaders including: Kivutha Kibwana (NCEC), Wangari Maathai (Green Belt), Gibson Kamau Kuria (Law Society chairman), and Reverend Timothy Njoya (Presbyterian Church). In saying that “there already is a stated national consensus that the Constitution properly belongs to all people of Kenya,” movement and opposition leaders were referring to the agreements reached at the Bomas and Safari Park meetings, and, ultimately, the enactment of the Constitution of Kenya Review Commission (Amendment) Act in December 1998.

<sup>91</sup> See Chapter Six. The 1997 Budget Day protest marked the first time in Kenya’s post-independence history that parliamentarians protested the reading of Kenya’s national budget. As discussed in Chapter Six, the protest was organized by movement leaders in an effort to ensure that substantive reforms were enacted prior to the 1997 general elections.

<sup>92</sup> Mugambi Kiai and Willy Mutunga, “Law Review: The Church Has Abandoned The Flock,” *The Daily Nation*, July 25, 1999.

were organized outside parliament demanding that the regime “respect the laws of the land” and abide by the 1998 Review Commission Act or face sustained mass action. As movement leader James Orengo announced, the Budget Day demonstration is only “the first stage of mass action. Stage Two will be *Saba Saba* and *Nane Nane* [Kiswahili for July 7<sup>th</sup> and August 8<sup>th</sup>, respectively], until KANU and the government raise their arms in surrender to the will of the people.”<sup>93</sup>

As promised, when the regime did not respond to the Budget Day protests, movement leaders began planning the 1999 *Saba Saba* Day demonstrations to be held three weeks later. The theme of the 1999 *Saba Saba* rallies were “Katiba Mpya,” Kiswahili for “New Constitution” and an estimated 10,000 supporters gathered for the five-hour demonstration at Nairobi’s Kamukunji grounds.<sup>94</sup> Engaging in legal mobilization, movement and opposition leaders insisted that unless urgent action was taken to resolve the stalemate on constitutional reform, the movement would “immediately apply the Constitution of Kenya Review Act” itself and ensure that “the people of Kenya [and not parliament] . . . review[ed] . . . the Constitution in accordance with the Act.”<sup>95</sup> As was the case with other movement rallies at Kamukunji, a “Kamukunji Declaration” was passed. In this case, the Declaration demanded that a

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<sup>93</sup> “Beatings Spark Waves of Anger,” *The Daily Nation*, June 12, 1999. As discussed in chapters four, five and six, movement demonstrations had been convened on *Saba Saba* day since 1991. With the approach of Kenya’s 1997 elections, and continued regime foot-dragging on reform, as discussed in Chapter Six, the movement organized *Nane Nane* and *Kumi Kumi* (October 10<sup>th</sup>) demonstrations.

<sup>94</sup> George Mwangi, “Kenya Police Fire Live Ammunition to Disperse Demonstrators,” *The Daily Nation*, July 7, 1999.

<sup>95</sup> “The Reform Plea for Saba Saba,” *The Daily Nation*, July 7, 1999.

“People’s Constitution” and a “Citizen Constitution Making Campaign” be established to counter regime efforts to refer the constitutional reform process back to parliament.<sup>96</sup> The Declaration explicitly gave movement leaders the mandate to “consult with Kenyans countrywide to build support to get the constitutional process rolling, culminating in a national conference.”<sup>97</sup> Also engaging in legal mobilization, movement leader Kivutha Kibwana insisted that “[t]he people of Kenya have the sovereign right to save their country by withdrawing support from a regime that has violated all its terms of the social contract with the Kenyan people.”<sup>98</sup>

It was not until early November 1999, however, that the movement’s leadership made public a detailed plan for ending the constitutional review impasse. Again engaging in legal mobilization, movement leaders argued in a concept paper entitled “Katiba Mpya – Maisha Mapya: A Vision for National Renewal” that since the regime refused to implement the 1998 Review Commission Bill, enacted almost a year earlier, they were forced to begin implementing the Bill themselves to promote rule of law in Kenya.<sup>99</sup> Consequently, they announced they would establish their own constitutional review commission, using the guidelines laid out in the 1998 Bill, in order to move the reform process forward --with or without the regime’s support. If the regime continued to thwart efforts to implement the Bill, they insisted they would

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<sup>96</sup> “The Kamukunji Declaration,” *The Daily Nation*, July 7, 1999.

<sup>97</sup> Katy Salmon, “Calm Returns, After Chaotic Day of Demonstration,” *The Daily Nation*, July 9, 1999.

<sup>98</sup> Mugambi Kiai and Willy Mutunga, “Law Review: The Church Has Abandoned The Flock,” *The Daily Nation*, July 25, 1999.

<sup>99</sup> “Katiba Mpya – Maisha Mapya: A Vision for National Renewal,” Nairobi, November 1999.



form a “transitional caretaker government” “to enable a democratic constitutional review; tackle the country's most urgent political, social and economic problems; and ensure a smooth and peaceful transition to the new constitution.”<sup>100</sup> They assured Kenyans that “all sectors” would be consulted in the establishment of the transitional government, and that it would be “broadly representative” of these sectors.<sup>101</sup> Depending on the regime’s response to their demands, movement leaders also announced another mass action to be convened a month later, on December 12 – Kenya’s Independence Day. Specifically, they insisted that if the regime failed to begin implementing the Act by December 1st, they would organize Kenyans to boycott Kenya’s official Independence Day celebrations,<sup>102</sup> and instead to “celebrate independence by being independent”<sup>103</sup> and attend a parallel movement-organized protest rally at Nairobi’s Kamukunji grounds.

#### The Parliamentary Select Committee on Constitutional Reform:

The regime immediately condemned the movement’s threat of forming a transitional government as treasonous and threatened to detain anyone who actively

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<sup>100</sup> Chege wa Gachamba, “Military Proposed for Kenya’s Reform Government,” *The Daily Nation*, November 5, 1999.

<sup>101</sup> “Lobby Group Says It Will Spearhead Formation of Parallel Government,” *KTN TV*, Nairobi: The Kenya Television Network, November 4, 1999. Reported by BBC Summary of World Broadcasts, November 4, 1999.

<sup>102</sup> These, historically, are presided over by Kenya’s president and, thus, would be a great embarrassment to the regime if it was subverted by a parallel movement demonstration, as is discussed below.

<sup>103</sup> “Rival Rally Leaflets on Streets,” *The Daily Nation*, December 10 1999,

promoted it. The movement's actions put sufficient pressure on the regime, however, that it realized it needed to soon announce its own plan for restarting the constitutional review process, or risk losing further legitimacy in the eyes of Kenyans. To prevent this, KANU ended up supporting an emergent parliamentary movement, led by Raila Odinga of the National Democratic Party (NDP), which called for the establishment of a Parliamentary Select Committee (PSC) on constitutional reform. The mandate of the Committee was to research and put forward the necessary amendments to the 1998 Review Commission Bill to end the impasse on constitutional reform.

Although Raila insisted that his sole motivation in forming the PSC was to restart the reform process, movement and other opposition party leaders remained suspicious. Raila had recently begun working with KANU on other legislation in parliament, clearly with a strategic eye on the 2002 elections. Thus, many suspected that the proposed PSC would simply promote the regime's agenda of referring the constitutional reform process back to parliament –contrary to agreements reached at Bomas and Safari Park. As it turned out, these suspicions were well founded. By the time Raila moved his motion to establish the Parliamentary Select Committee, its mandate was defined such that it had the power to potentially amend the 1998 Review Commission Bill entirely to the regime's demands.

To protest the tabling of the NDP-KANU sponsored bill, on Thursday, December 9<sup>th</sup>, fifty-two opposition MPs staged a mass walk out in parliament and declared solidarity with the movement's "people-driven" constitutional reform initiative against the regime's "parliamentary-driven" initiative. Opposition MPs

insisted: “Parliament cannot do this constitutional review. It must be [an all inclusive] commission . . . We should go out and listen to people, get the voice of the people, [and abide by] what they want.”<sup>104</sup> Engaging in legal mobilization, they insisted, “we should be represented [on the commission] the way that the law which we passed [the 1998 Review Commission Act] said.” Specifically, they insisted, “we are prepared for KANU to have their own five seats [on the commission], and we [will] share the other seven.”<sup>105</sup>

The following day, Friday, December 10th, in an eleventh hour attempt to prevent the embarrassment of a massive boycott of official independence celebrations two days later, President Moi called for an emergency meeting of the leadership of all parliamentary parties. Not surprisingly, this meeting also ended in a stalemate, however. KANU and the NDP continued to insist on the power of the PSC to refer the constitutional reform process back to parliament, and all other parliamentary parties continued to insist on the importance of an “all inclusive commission,” as mandated by the Bomas and Safari Park agreements. Consequently, for the first time in Kenya’s post-independence history, two parallel rallies were convened in Nairobi for Kenya’s Independence Day celebrations –an official celebration, sponsored by the Moi regime, and a protest celebration, sponsored by Kenya’s human rights and democracy movement. As opposition MP Adolf Muchiri maintained at the movement’s demonstration: “Kenyans have nothing to celebrate about *Jamhuri* because they have

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<sup>104</sup> “Opposition MPs Hold Parallel Jamhuri Day Celebration,” *KTN TV*, Nairobi: Kenya Television Network, December 12, 1999. Reported by BBC Summary of World Broadcasts, December 12, 1999.

<sup>105</sup> Ibid.

been oppressed and their rights hijacked.”<sup>106</sup> Despite these protests, KANU-NDP commanded a sufficient majority in parliament to ensure that Raila’s bill was passed and, on Wednesday, December 15<sup>th</sup>, the Parliamentary Select Committee was established with the authority to amend the 1998 Review Commission Bill as it saw fit to restart the constitutional review process.

The Ufungamano “People-Driven” Constitutional Reform Initiative:

At the same time that parliament was meeting to discuss and vote on the KANU-NDP sponsored bill, the leadership of Kenya’s dominant religious organizations called an urgent meeting to protest the bill and reaffirm its solidarity with the leadership of Kenya’s human rights and democracy movement. When it was announced that the Parliamentary Select Committee Bill had passed, the religious leaders, who happened to be meeting at Ufungamano House in Nairobi at the time, immediately committed full material, organization and leadership support to the movement’s “people-driven” constitutional reform initiative. Together with movement leaders, they also announced a specific plan to restart the constitutional reform process and keep it “citizen-controlled.” This plan included: (1) lobbying Kenyans to boycott the Parliamentary Select Committee and any review commission it established; (2) launching their own constitutional review process, by using the churches’ infrastructure and resources, together with the movement’s educational outreach materials and legal expertise; and (3) engaging in legal mobilization by

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<sup>106</sup> “Rally Showdown as Police Ban Remains,” *The Daily Nation*, December 12, 1999. “Jamhuri” is the Kiswahili word for “independence.”

putting forth their own amendments to the 1998 Review Commission Bill with the aim of ending the current impasse and keeping the review process “people-driven,” as mandated by the Bomas and Safari Park meetings.

Thus, by December 15, 1999, two parallel constitutional reform efforts had been formally established in Kenya. Because the movement’s initiative was so dependent on the organizational, material and leadership support of Kenya’s dominant religious organizations, and because this support had been announced from Ufungamano House in Nairobi, it became known as the “Ufungamano People-Driven Initiative.” The other reform initiative, controlled by the KANU-NDP dominated Parliamentary Select Committee, became known as the “Parliamentary-Driven Initiative,” or the “Raila-led Initiative,” for the dominant role played by Raila Odinga in establishing the Committee.

The next major movement rally was convened at Uhuru Park in central Nairobi on January 10, 2000 to further publicize the founding of its constitutional reform initiative. Its keynote address was entitled “The Establishment of the People-Driven Constitutional Review Process” and prominent speakers included opposition party leaders as well as the movement’s leadership.<sup>107</sup> Speakers emphasized their resolve “to push for a people-driven constitutional review” and urged Kenyans to reject the work and recommendations of Raila’s Parliamentary Select Committee (PSC).<sup>108</sup> As they argued, the newly established PSC was illegitimate “because it was picked by a

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<sup>107</sup> “Reformists Call for Support as Rally Seems Inevitable,” *The Daily Nation*, January 10, 2000.

<sup>108</sup> *Ibid.*

political clique and not elected by wananchi.”<sup>109</sup> This point was further emphasized by movement leader Reverend Timothy Njoya, who stated: “People will today celebrate the realization that they are the ones who constitute Kenya and not parliament or the government.”<sup>110</sup> Engaging in legal mobilization, opposition party leader Mwai Kibaki also announced: “We want to promote the rule of law [by abiding by the 1998 Constitution of Kenya Review Commission Bill] and Raila’s committee is acting as if it’s beyond the law [by refusing to acknowledge the Bill and agreements made at Bomas and Safari Park].”<sup>111</sup> In addition, movement leader, and current chair of Kenya’s professional legal association, the Law Society of Kenya (LSK), Gibson Kamau Kuria, also employed legal mobilization strategies to promote the Ufungamano Initiative and delegitimize the Raila Initiative by emphatically stating: “The authority to comprehensively review the laws of the land is called constituent power which only resides in the people . . . not parliament or any of its committees.”<sup>112</sup>

To protest the establishment of the PSC, movement leaders not only publicized its lack of legitimacy, due to its failure to represent critical stakeholders in the constitutional review process, but they also demonstrated outside parliament and organized an effective boycott of PSC’s efforts to collect views on amending the 1998 Review Commission Bill. For example, the chair of FIDA,<sup>113</sup> Martha Koome, insisted

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<sup>109</sup> Ibid. “Wananchi” is a Kiswahili word meaning “the people” or “the nation.”

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Owino Opondo, “Lawyers Give Views to House Law Team,” *The Daily Nation*, January 14, 2000.

<sup>113</sup> The Federation of Kenya Women Lawyers, a central movement organization. See Chapter Four.

that the PSC was established “unilaterally and illegally.”<sup>114</sup> Thus, “[w]e are not in a position to validate the Parliamentary Select Committee by submitting our views.”<sup>115</sup> FIDA also submitted an open letter to the clerk of the National Assembly stating that Committee members should “immediately constitute a stakeholders meeting to deliberate on whether the PSC [is authorized] to carry out amendments [to the 1998 Review Commission Act].” Also engaging in legal mobilization, Koome stated that “the [1998] Constitution of Kenya Review Act . . . was a negotiated piece of legislation by various groups at Bomas of Kenya and Safari Park [and, thus,] any suggested amendments must emanate from the same stakeholders.”<sup>116</sup> As she continued, “in our humble view, the stakeholders need to be called together in a forum where the modalities of nominating the commissioners can be discussed. . . Parliament cannot usurp the role and interest of the stakeholders and take it upon itself to amend the Act and provide for the modalities of the nomination of Commissioners and other amendments.”<sup>117</sup>

On Thursday, 6 April 2000, the Parliamentary Select Committee made public its first set of recommendations for amending the 1998 Review Commission Bill and ending the impasse on constitutional reform. As movement leaders had predicted, and contrary to the agreements reached at Bomas and Safari Park, the PSC’s proposals

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<sup>114</sup> “FIDA Rejects Review Invitation,” *The Daily Nation*, January 19, 2000.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

strictly limited the role of Kenya's civil society representatives in the constitutional review process and placed ultimate power in the hands of parliament and the president. Key recommendations included that "President Moi should personally appoint fifteen Commissioners . . . from a list of twenty-one names given to him by parliament," and that he be authorized to appoint both the chair and vice-chair of the commission.<sup>118</sup> In addition, the report recommended that civil society participation in the National Consultative Forum (NCF) be limited to only ten percent of attending delegates, and the remaining ninety percent be either MPs or civil servants.<sup>119</sup> Moreover, it insisted that the commission itself should ultimately select *all* civil society delegates.<sup>120</sup> Finally, the report recommended that the PSC be empowered to "supervise" the work of the commission and, if the commission should fail to complete its work on comprehensive reforms prior to the 2002 elections, provisions be made for "minimal," rather than comprehensive, constitutional reforms.<sup>121</sup>

Movement leaders immediately condemned the report, noting that not only did it completely disregard agreements reached at Bomas and Safari Park, but also that it entirely "excluded the people from the constitution-making process," as they had predicted.<sup>122</sup> By giving the president unchecked power to appoint commissioners,

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<sup>118</sup> "LSK: Limit Moi Role In Reform," *The Daily Nation*, April 11, 2000.

<sup>119</sup> Chege wa Gachamba, "Reject This Report, The NCEC Advises," *The Daily Nation*, April 8, 2000.

<sup>120</sup> *Ibid.*

<sup>121</sup> These recommendations were approved, virtually unchanged, by parliament in July 2000 with the enactment of the Constitution of Kenya Review Commission (Amendment) Bill of 2000.

<sup>122</sup> Chege wa Gachamba, "Reject This Report, The NCEC Advises," *The Daily Nation*, April 8, 2000.



their chair and vice-chair, in addition to strictly limiting the role of civil society in the National Consultative Forum, the commission and its work was virtually guaranteed to be dominated by the regime. As movement leader Kivutha Kibwana pointed out, “[t]he report excludes civil society, the youth, the common [citizen]. It leaves the process wholly in the hands of politicians and civil servants with President Moi calling the shots. Kenyans must be mobilized to reject this nonsense.”<sup>123</sup> Moreover, by including a clause allowing for “minimal” reforms prior to elections, movement leaders argued that the regime clearly revealed its intentions of stalling on comprehensive reforms through yet another election.

In response to the PSC’s draft amendments, the LSK, engaging in legal mobilization, drafted two bills aimed specifically at “underpin[ing] the involvement of Kenyan citizens in the review process.”<sup>124</sup> The bills made provisions for explicit institutional checks to ensure that the commission was completely independent from the executive and to ensure “the widest participation possible” by Kenyans.<sup>125</sup> The LSK not only publicized the bills in press statements, but they also forwarded copies to the Office of the President, Kenya’s Attorney General, the Head of Kenya’s Civil Service and all members of the Ufungamano Initiative, which, by this time, included representatives of all groups who participated in the Bomas and the Safari Park

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<sup>123</sup> Ibid.

<sup>124</sup> “LSK: Limit Moi Role in Reform,” *The Daily Nation*, April 11, 2000.

<sup>125</sup> “Let Us Give LSK Proposals A Chance,” *The Daily Nation*, April 12, 2000.

meetings, with the exception of the NDP and KANU.<sup>126</sup> In addition, movement leaders also began convening “provincial convention assemblies” in each of Kenya’s eight provinces “to prepare the ground for the Ufungamano-Wanjiku Initiative.”<sup>127</sup> Finally, movement leaders also announced that, in light of the Parliamentary Select Commission’s recommendations, sustained movement mass actions were inevitable.<sup>128</sup>

By April 2000, the Ufungamano Initiative had completed its selection of its review commission, the People’s Commission of Kenya (PCK). The PCK assured Kenyans that they “would conduct their business as stipulated by the Safari Park forum”<sup>129</sup> and, thus, the reform process would move forward as envisioned by the broadly inclusive Bomas and Safari Park meetings. Although movement and religious leaders foresaw potential legal problems in ultimately implementing the draft Constitution they produced, they invoked the South African constitution-making process as their model. As Anglican Archbishop David Gitari of the NCCCK explained: “We want to lead the way just like Bishop Desmond Tutu did and then hand over power to the leaders.”<sup>130</sup> Thus, religious leaders in Kenya justified their highly visible leadership role in the overtly political process of constitution-making by insisting that they could, in fact, play a very unique role since they had “no ambition

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<sup>126</sup> “LSK: Limit Moi Role in Reform,” *The Daily Nation*, April 11, 2000.

<sup>127</sup> Chege wa Gachamba, “Reject This Report, The NCEC Advises,” *The Daily Nation*, April 8, 2000. “Wanjiku” is a term often used in Kenya to refer to “the common citizen.”

<sup>128</sup> Movement leader Kibwana’s exact words were: “Mass action will be inevitable if KANU and the National Development Party insist on destroying Kenya.” *Ibid.*

<sup>129</sup> “Sunkuli Dismisses Demo Call,” *The Daily Nation*, April 28, 2000.

<sup>130</sup> “Ufungamano Dismisses NCEC,” *The Daily Nation*, November 18, 2000.

to take over [political] leadership” in the country, but instead were “out to fight for true democracy.”<sup>131</sup>

At the end of September 2000, the PCK finally announced its timetable for constitutional reform. The process began by convening public meetings in each of Kenya’s eight provinces. The purpose of these meetings was three-fold: (1) to explain the Ufungamano Initiative’s objectives, (2) to serve as a forum for educating the public on constitutional reform, and (3) to begin collecting Kenyans’ reform proposals.<sup>132</sup> Following provincial level meetings, representatives of Kenya’s dominant church organizations also agreed to combine their grassroots infrastructures and work closely with movement organizations to promote civic education on constitutional reform at the constituency level.<sup>133</sup> As is discussed in the section below, international donors were major financial and technical supporters of these activities. Once civic education had been carried out at the constituency level by lead movement organizations (SMOs), the PCK began collecting citizen views at the district level. Constituency and district level citizen proposals were then used to prepare a draft constitution. This draft was then to be presented to a National Consultative Forum, as agreed by the Bomas and Safari Park talks, before being introduced into parliament for ratification.<sup>134</sup>

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<sup>131</sup> Ibid.

<sup>132</sup> Njeri Rugene and Michael Njuguna, “Timetable Released for Law Review,” *The Daily Nation*, September 29, 2000.

<sup>133</sup> Specifically, Protestant, Catholic, Muslim and Hindu organizations.

<sup>134</sup> Although the Ufungamano Initiative had not worked out the details of how the draft constitution would be presented in parliament, given parliament’s authorization of the Raila-led Initiative, they

The Constitution of Kenya Review Commission (CKRC):

In the meantime, two months after the movement announced the formation of its constitutional reform commission, in November 2000, President Moi appointed fifteen commissioners to head the state-mandated Kenyan Review Commission (KRC).<sup>135</sup> Much to the surprise of movement and KANU leaders alike, a week after appointing the commission, President Moi selected Yash Pal Ghai, an internationally known and highly respected Kenyan constitutional scholar as chair of the commission. Although the details of Ghai's selection have not been made public, it is widely believed that his appointment was largely due to the role played by Kenya's Attorney General, Amos Wako, in the selection process. Ghai had been one of Wako's most influential law professors at the University of Dar es Salaam, where he attended law school, and Wako enthusiastically supported his appointment.

By mid-December 2000, only a month after his appointment as chair of the KRC, Ghai began negotiations with the PCK in an effort to merge the two parallel reform commissions. Both commissions had interests in a merger. The KRC wanted a merger to lend greater legitimacy to its reform effort; and the PCK wanted a merger because they anticipated legal problems in introducing their constitutional draft into parliament *and* they were encountering severe financial problems. It was estimated that they would need almost Ksh240 million (approximately U.S. \$3 million) to

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assumed/hoped that they could win sufficient support from "reformists" within both the NDP and KANU for their initiative to have their draft introduced and enacted as a private member's bill.

<sup>135</sup> This was as mandated by the Constitution of Kenya Review Commission Bill of 2000. As noted above, this Bill was enacted in July 2000 with virtually no changes introduced from the recommendations that the PSC provided.

complete the review process, but they had been able to raise only Ksh8 million (approximately U.S. \$100,000) since their founding in December 1999.<sup>136</sup> As a consequence, Ufungamano commissioners had gone without pay for fourteen months.<sup>137</sup> Although movement organizations had been quite successful in gaining donor support to conduct civic education on constitutional reform, donors were reluctant to fund the movement's constitutional reform commission, especially once the Kenyan government formed their own commission. Donors' clear preference was also for the two parallel reform initiatives to merge.

By January 2001, at the human rights and democracy movement's Fifth Plenary Session for Constitutional Reform, movement leader, Kivutha Kibwana, affirmed the movement's support for a merger between the PCK and KRC, although only "if it will be done in a democratic and principled manner."<sup>138</sup> The deadline established for the merger was January 31, 2001, and by January 29, the two groups, in principle, agreed to merge. As Ufungamano leader and Catholic Archbishop, Giovanni Tonucci, stated: "What has been decided upon is a real step towards reforms."<sup>139</sup> Archbishop Ndgini, another key Ufungamano and movement leader, further supported this statement and asked Kenyans to support the merger in order to move the constitutional reform process forward.<sup>140</sup> The details of the merger were privately negotiated between

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<sup>136</sup> "Why Kenya's Clergy Accepted Merger Deal," *The East African Standard*, March 26, 2001.

<sup>137</sup> Ibid.

<sup>138</sup> "NCEC Alleges Coercion," *The Daily Nation*, January 20, 2001.

<sup>139</sup> "Raila Tells NCEC To 'Put Up Or Shut Up,'" *The Daily Nation*, January 29, 2001.

<sup>140</sup> Ibid.

representatives of the PCK and KRC over the next two months before finally being made public in March 2001.

Once the merger details were announced, Ufungamano leaders met to vote on whether the agreement should be finalized or not. Although some representatives of movement organizations within Ufungamano expressed concern that the agreement still did not contain sufficient institutional safeguards to ensure that the executive and parliament did not dominate the process,<sup>141</sup> the vast majority voted to join the official government commission under Ghai's leadership. As one member of the Ufungamano Steering Committee, Ahmed Kahlif, stated: the central objectives of the movement – that the constitutional review commission be independent from the regime and that it ultimately deliver a comprehensively reformed constitution, reflecting the wishes of Kenyans, prior to the 2002 elections—were met.<sup>142</sup> Chair of the PCK, Ooko Ombaka, who became Yash Ghai's vice chair in the merged commission, also insisted that the merger was “a milestone in the reform process.”<sup>143</sup>

By April 2001, the Parliamentary Select Committee (PSC), working together with the leadership of both the KRC and the PCK, agreed on the fundamentals of two proposed review bills to legally entrench the merger: the Constitution of Kenya Review (Amendment) Commission Bill of 2001 and the Constitution of Kenya (Amendment) Bill of 2001. Despite an eleventh hour attempt by some KANU

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<sup>141</sup> Specifically, representatives of the NCEC and LSK wanted stronger institutional safeguards.

<sup>142</sup> “Why Kenya's Clergy Accepted Merger Deal,” *The East African Standard*, March 26, 2001.

<sup>143</sup> Ibid.

hardliners sitting on the PSC to insert amendments that would curtail Chairman Ghai's powers<sup>144</sup> and (again) limit the role of civil society in the reform process, by the time the Attorney General moved the 2001 Review Commission Bill on Tuesday, April 22, 2001, it largely reflected movement demands. Ghai's powers were not reduced, the commission was institutionally independent from the regime, and a broadly participatory national constitutional conference was provided for with district and national level representation, as well as significant representation by dominant civil society organizations. It was generally agreed that these important victories for the movement were largely the result of strategic activism on the part of Kenya's human rights and democracy movement, skilled negotiating by Ufungamano representatives, and the efforts of both Yash Ghai and Amos Wako to see the merger effort succeed. Less than a month later, parliament passed the 2001 Review Commission (Amendment) Bill and President Moi signed it into law.

Shortly after the merger of the two commissions was formalized, the Ufungamano Initiative named its twelve commissioners to join the former KRC's fifteen commissioners to form the twenty-seven member Constitution of Kenya Review Commission (CKRC), as mandated by the 2001 Review Commission Bill.<sup>145</sup> Although the movement had lobbied for fifteen representatives to ensure equal representation of the two competing constitutional reform perspectives, a compromise

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<sup>144</sup> This became increasingly important to KANU hardliners as it became evident that Ghai was, in fact, committed to comprehensive constitutional reform in Kenya.

<sup>145</sup> Chege wa Gachamba, "Ufungamano Picks Commissioners," *The Daily Nation*, Saturday, April 7, 2001.

was finally struck at twelve. By the first week of December 2001, more than seven months after the parallel reform initiatives were formally merged, the CKRC finally began collecting Kenyans' views on constitutional reform. Hearings began in Nairobi and, in an important concession to Kenya's human rights and democracy movement, hearings began with key movement organizations to ensure that their "specialized" input on constitutional reform was given priority. Chairman Ghai proposed that the LSK "should be the first to present their memorandum to us because we need their professional contribution on the changes they desire."<sup>146</sup> In addition, as a consequence of movement lobbying, the CKRC organized a special national conference for all nongovernmental organizations in Kenya, the majority of whom were affiliated with the movement, to present their views on the substance of constitutional reform, as well as the content of civic education. By January 2002, the CKRC began visiting Kenya's rural districts for sixty days to collect rural citizens' proposals on constitutional reform, as mandated by the 2001 Review Commission Bill.

#### The Constitution of Kenya Draft Bill (2002):

Nine months later, despite numerous attempts by the Moi-KANU regime to undermine the process, the CKRC produced its draft constitution, the Constitution of Kenya Draft Bill (2002), on Friday, September 27, one week prior to its October 4, 2002 deadline. The draft was 280 pages long, included 292 articles, and was produced

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<sup>146</sup> "Make Your Contribution, Ghai Tells Law Society," *The East African Standard*, November 20, 2001. (end)



from over 1800 pages of recommendations from Kenyan citizens.<sup>147</sup> As mentioned above, a majority of the national institutions it recommended conformed to dominant features of consensus democracy. Although the draft did not provide a specific formula for executive power-sharing, it created multiple positions of executive power and provided for coalition government.<sup>148</sup> The draft also vastly reduced executive powers and greatly strengthened parliament's power to ensure executive-legislative balance of power. In addition, it also created a second legislative chamber, the National Council, to provide stronger representation of Kenya's eight provinces, as well as greater representation of women. Of the one hundred seats in the National Council, seventy were to be elected on the basis of single member constituencies, and thirty on the basis of multimember constituencies, where seven of Kenya's eight provinces were allocated four seats, and the eighth province, Nairobi, was allocated two.<sup>149</sup> Moreover, due to the movement's support for greater gender equity in representation, all of these thirty seats were reserved for women.<sup>150</sup>

The election rules for Kenya's lower chamber, the National Assembly, were also changed to a mixed-member proportional system, where two hundred and ten

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<sup>147</sup> "Draft Bill: Ghai Attacks Chunga," *The East African Standard*, Nairobi: Africa News, October 1, 2002.

<sup>148</sup> Specifically, it created the offices of prime minister and two deputy prime ministers, and maintained the existing offices of president and vice president. The prime minister, as movement proposals had recommended, was the designated head of government and the president the head of state. The draft also provided for a cabinet of not less than fifteen ministers and not less than fifteen deputy ministers. Republic of Kenya, *Draft Bill: The Constitution of the Republic of Kenya*, September 27, 2002, Chapter Eight, "The Executive," Parts I, II, III. The draft did not, however, provide a specific formula for power-sharing as consensus models of democracy recommend.

<sup>149</sup> *Ibid.*, Chapter Seven, "The Legislature," Part II, Section 106, (a) and (b).

<sup>150</sup> *Ibid.*, Chapter Seven, "The Legislature," Part II, Section 106, (b).

members were elected on the basis of single member constituencies and ninety additional members were elected on the basis of party lists.<sup>151</sup> Finally, the draft constitution also created a Supreme Court with explicit powers of judicial review,<sup>152</sup> it included an extensive Bill of Rights, and required a two-thirds majority of both Houses, as well as presidential assent, for constitutional amendment.<sup>153</sup> Although the draft did not recommend federal government, as is characteristic of consensus models, it recommended devolved national power to four lower tiers of government: provincial, district, locational and village levels. For each of these tiers, “legislative or policy making or supervisory council and executive authorities [were to be] elected” and “executive authorities [were to be] accountable to elected councils.”<sup>154</sup> Finally, a minimum of one-third of all council members at each level was required to be women.<sup>155</sup>

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<sup>151</sup> Parties were required to: (a) rank their nominees in order of priority of nomination; (b) alternate between women and men on lists; (c) “take into account the need for representation of the disabled, youth and minorities,” and (d) “reflect a national character.” Election instructions were simply that “[t]he distribution of seats on the party list shall be made in such a way as to achieve the highest degree of proportionality among parties,” and that “[p]arliament shall provide the method of allocating seats on the basis of the party lists for the purposes of [this].” Ibid., Chapter Seven, “The Legislature,” Part II, Sections 105 – 107.

<sup>152</sup> Ibid., Chapter Nine, “Judicial and Legal System,” Section 188, (1), (a), (iv).

<sup>153</sup> Ibid., Chapter Eighteen, “Amendment of the Constitution,” Section 295.

<sup>154</sup> Ibid., Chapter Ten, “Devolution of Powers,” Part II, Section 214, (1) (b) and (c).

<sup>155</sup> Village Councils were designated to have no less than six and no more than ten members. Locational Council consisted of two members, District Councils were to have no less than twenty members, and not more than thirty, and Provincial Councils were comprised of two members. District Councils were given the authority to “impose taxes or levies under the authority of an Act of Parliament,” and “national revenue [was to be] shared equitably between the National and Devolved Governments” Ibid, Chapter Ten, “Devolution of Powers,” Part II, Section 214, (1) (e).

Thus, seven of the ten institutional characteristics that Lijphart lists as distinguishing consensus and majoritarian models of democracy were largely present in Kenya's draft constitution,<sup>156</sup> as had been advocated by dominant leaders of Kenya's human rights and democracy movement.<sup>157</sup> Especially considering that Kenya's existing constitution was highly majoritarian in character,<sup>158</sup> the fact that Kenya's state-mandated constitutional reform commission, after collecting more than 1800 pages of recommendations from Kenyan citizens,<sup>159</sup> ultimately drafted a constitutional reform bill that embraced almost all of the institutional features advocated by movement leaders, provides clear evidence of the movement's national impact.

In addition to recommending institutions central to consensus democracy, the draft also proposed a radical restructuring of Kenya's judiciary in order to ensure its independent from the executive. As the study has documented, Kenya's regime-

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<sup>156</sup> As mentioned above, one of these seven institutional features, executive power-sharing and broad coalition government was only *partially* present in Kenya's draft constitution. See footnote 10 above.

<sup>157</sup> As discussed in Chapter Five, since the movement first launched its constitutional reform effort in the wake of the 1992 elections, its central demands focused on introducing national institutions characteristic of consensus democracy.

<sup>158</sup> As discussed in Chapter Three, central institutional features of Kenya's constitution almost since independence included six of the ten institutional features that Lijphart outlines as characteristic of majoritarian democracy: (1) concentration of executive power in one-party; (2) majoritarian and disproportional system of elections; (3) unitary and centralized government; (4) concentration of legislative power in a unicameral legislature; (5) absence of judicial review; and (6) a central bank controlled by the executive. Of course, although the constitution provided for a majoritarian form of democracy in theory, as chapters Three and Four document, both the Kenyatta regime (1963 – 1978) and most of the Moi regime (1978 – 1992) were highly authoritarian regimes in practice. Although the Moi regime gradually became more open and democratic, due to political pressure mobilized by Kenya's human rights and democracy movement, as this study documents, aside from the introduction of multipartyism in December 1991, its basic majoritarian constitutional structure was maintained.

<sup>159</sup> "Draft Bill: Ghai Attacks Chunga," *The East African Standard*, Nairobi: Africa News, October 1, 2002.

dominated judiciary was highly complicit in repressing human and democratic rights during both the Kenyatta and Moi regimes, as well as in the Moi regime's efforts to suppress movement activities since its emergence in the late 1980s.

Despite the promising features of this constitutional draft for promoting and consolidating democratic development in Kenya,<sup>160</sup> as most analysts of Kenyan politics anticipated, President Moi immediately rejected the draft and, in an interesting twist of logic, denounced it as “undemocratic” in the following terms: “By proposing a drastic reduction of presidential powers [and a consequent increase in the power of parliament], the draft in essence water[s] down the people's power, as they [are] the ones to elect the president.”<sup>161</sup> Moreover, in response to the judicial reforms proposed by the draft, two notoriously pro-regime judges, Justice Moiwo of Kenya's Court of Appeal and Justice Joseph Vitalis Juma of Kenya's High Court, filed a list of

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<sup>160</sup> As theorists of consensus democracy argue, it is especially important in ethnically plural societies, such as Kenya's, where political cleavages tend to follow ethnic cleavages, that national power is “share[d], disperse[d], and limit[ed] . . . in a variety of ways,” as consensus institutions tend to do. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 2. The central problem with majoritarian institutions in plural societies is that they tend to permanently exclude minorities from government, thus violating democracy's primary meaning, that “all who are affected by a decision should have the chance to participate in making that decision either directly or through chosen representatives.” W. Arthur Lewis, *Politics in West Africa*, London: George Allen and Unwin, 1965, pp. 64 – 65, as cited in *ibid.*, p. 31. As Lijphart has noted, “the exclusion of the minority is mitigated if majorities and minorities alternate in government,” or the policy spectrum of political parties is narrow enough that minorities' “interests and preferences are reasonable well served by the [majority's] policies in government.” *Ibid.*, pp. 31 – 32. In plural societies, however, neither of these conditions tend to be present. As Lijphart argues, “[u]nder these conditions, majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime.” *Ibid.*, pp. 32 – 33. Moreover, [i]n the most deeply divided societies . . . majority rule spells majority dictatorship and civil strife rather than democracy. What such societies need is a democratic regime that emphasizes consensus instead of opposition, that includes rather than excludes, and that tries to maximize the size of the ruling majority instead of being satisfied with a bare majority: consensus democracy.” *Ibid.*, p. 33.

<sup>161</sup> “Kenyan President Dismisses New Constitution Draft as Undemocratic,” *Agence France Presse*, September 28, 2002.

seventeen orders with Kenya's High Court to have the judiciary entirely excluded from constitutional reform,<sup>162</sup> and two pro-regime lawyers, Tom O. K'Opere and John Njongoro filed a suit to halt the constitutional reform process in its entirety.<sup>163</sup> In hearing the cases, another pro-regime judge, Justice Andrew Hayanga, barred debate on the constitutional draft until court decisions were reached on the two cases.<sup>164</sup>

Immediately, Kenya's reform movement mobilized to defend the authority and legitimacy of the CKRC, the constitutional draft it had produced, as well as the continuance of the constitutional reform process. Movement leaders encouraged Kenyans to engage in civil disobedience against the court orders and to begin discussion on the draft, as mandated by the 2001 Review Commission Bill.<sup>165</sup> The LSK promised to defend "any member of the public or the Constitution of Kenya Review Commission arrested for contempt of court"<sup>166</sup> and it also issued a professional reprimand against the two judges and the lawyers who had filed the cases against the CKRC. In addition, it also mobilized its regional and international support networks, including "sister bars, regional and international bodies such as the East African Community, the East African Legislative Assembly, the East African Court of

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<sup>162</sup> "Ghai Snubs Judge And Unveils Constitution," *The Daily Nation*, Nairobi: The Nation, September 28, 2002.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> According to the 2001 Review Commission Bill, once the CKRC published its draft, a thirty-day debating period ensued, before the month long National Constitutional Convention was convened.

<sup>166</sup> "Lawyers to Protect Ghai Team," *The Sunday Nation*, Nairobi: The Nation, September 29, 2002.

Justice, the COMESA Court, the African Union and Amnesty International.”<sup>167</sup> These organizations were asked to participate with them in a campaign “to lobby the Attorney General and the Chief Justice and form dialogue missions.”<sup>168</sup>

Parliamentarians were also lobbied to issue an official censure of judicial officers for attempting to halt the constitutional reform process. Other movement organizations, including FIDA, ICJ-K, KHRC, LRF and RPP, also issued statements in support of the LSK and threatened to organize mass action if the judiciary attempted to interfere with the constitutional reform process.

By Monday, September 30, 2002, only three days after the CKRC’s constitutional draft was published, another lead movement organization, ICJ-K,<sup>169</sup> initiated a protest petition to Kenya’s Chief Justice Bernard Chunga, which was signed by more than 1000 Kenyan lawyers.<sup>170</sup> In it, they strongly condemned the actions of the judges and lawyers who had initiated the court actions against the commission and reaffirmed their support for the CKRC. As the petition read: “We do hereby condemn these actions of some members of the Judiciary and the bar who are attempting to use the Judiciary to interfere with the drafting of a new constitution . . .”<sup>171</sup> In addition,

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> The International Commission of Jurists, Kenya Section. This movement organization is discussed in detail in Chapter Five.

<sup>170</sup> ICJ-K staff members protested in front of Kenya’s High Court building and encouraged lawyers entering the courts to sign the petition.

<sup>171</sup> “Lawyers Sign Protest Note Over Judiciary's Gag Order,” *The Daily Nation*, Nairobi: The Nation, October 1, 2002.

engaging in symbolic politics,<sup>172</sup> the LSK, ICJ-K and other movement organizations organized a “yellow ribbon” campaign, where they distributed thousands of yellow ribbons to Kenyans to wear as a signal to the regime of their support not only for the general constitutional reform process, but also, specifically, for fundamental reform of the judiciary, as outlined in the constitutional draft.

The yellow ribbon campaign ended up being successful even beyond their wildest expectations. As one movement leader commented: “The response has been phenomenal. We cannot keep up with the massive demand for yellow ribbons.”<sup>173</sup> The LSK also organized Kenya’s first nationwide court boycott to protest Justice Hayanga’s decision and put pressure on the two judges and lawyers to drop their suit. The one-day court boycott on Wednesday, October 9<sup>th</sup> virtually paralyzed Kenya’s court system and “hundreds of lawyers marched in the streets of Nairobi to show solidarity with the CKRC.”<sup>174</sup> As a consequence, the movement succeeded in ensuring that the draft’s recommendations on judicial reform remained and that debate on the draft continued, as was mandated by the 2001 Review Commission Bill.

The following week, the first week of October 2002, President Moi reconvened parliament amidst rumors that he would dissolve it early to call for elections. Given the failure of members of the judiciary to halt the constitutional process, movement

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<sup>172</sup> “‘Symbolic politics,’ or the ability to call upon symbols, actions, or stories that make sense of a situation for an audience that is frequently far away,” are discussed in the study’s theory chapter, Chapter Two. See also Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 16

<sup>173</sup> Tervil Okoko, “Kenyan Attorneys Join Call for Constitutional Reforms,” Nairobi: The Pan African News Agency (PANA).

<sup>174</sup> Ibid.

leaders predicted that this was the regime's next strategy for preventing the process from going forward. According to the 2001 Review Commission Bill, once a thirty-day debating period was complete, the chairman of the commission was to convene the National Constitutional Conference (NCC) to debate and approve the constitutional draft, before it proceeded to parliament for ratification.<sup>175</sup> Because parliamentarians constituted a critical section of the NCC delegates, however, it would be impossible for the constitutional conference to proceed without them.<sup>176</sup> Moreover, it was necessary that parliament be in session for it to debate and finally vote on the constitutional draft approved by the NCC before it could be enacted into law.

As most suspected, President Moi did dissolve parliament early, and only three days prior to the scheduled start of the National Constitutional Conference on Monday, October 28th. Delegates had already begun to arrive in Nairobi from all parts the country and conference registration had begun. Although by dissolving parliament, President Moi successfully halted Kenya's constitutional review process, he also took the additional step of declaring the Constitution of Kenya Review Commission disbanded.

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<sup>175</sup> Although the 2001 Review Commission Bill originally provided for a citizen referendum prior to the Constitutional draft proceeding to parliament, this provision was repealed by the KANU dominated parliament in August 2002. It was then reinstated by a court order in March 2004.

<sup>176</sup> Of the nearly 700 delegates invited to attend the NCC, 222 were MPs. This included the 210 elected members of parliament and the twelve appointed members. As Winluck Wahui of the International Commission of Jurists – Kenya (ICJ-K) explains: “[O]nce the National Assembly is dissolved prior to an election, the president issues writs under law to formally declare seats vacant, so that there is no longer a person considered to be an MP after that. So MPs could not have participated at the NCC. [Moreover] no budgetary vote had been made for the NCC. . . . A supplementary vote would have had to be taken while parliament was actually being dissolved. By then, KANU had already dismissed the draft through its organizing secretary Julius Sunkuli. Personal correspondence with Winluck Wahui, International Commission of Jurists – Kenya (ICJ – K), Friday, August 5, 2002.



Once again, Kenya's human rights and democracy movement immediately mobilized and insisted that the days of presidential decrees were over. Engaging in legal mobilization, movement leaders argued that because the commission was established by an act of parliament, it could only be terminated by repeal of this act by parliament. In a rare show of solidarity with the movement, Kenya's Attorney General, Amos Wako, also issued a press release affirming that only parliament had the power to dissolve Kenya's constitutional review commission.<sup>177</sup> Thus, the CKRC was not disbanded, but the constitutional review process was temporarily suspended as preparations began to be made for Kenya's 2002 elections.

Despite the fact Kenya's reform movement failed to achieve its goal of comprehensive constitutional reform prior to the 2002 elections, by advancing its constitutional reform agenda as far as it did during the 1998 – 2002 electoral cycle, it not only "played a crucial role in creating political awareness among Kenyans and facilitat[ed] their understanding of the political process,"<sup>178</sup> but, as is discussed in the following section, it also importantly facilitated the emergence of Kenya's first successful election pact, which ultimately defeated the KANU regime in the 2002 elections.

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<sup>177</sup> "Ghai Stops Review Talks Indefinitely," *The Daily Nation*, Nairobi: The Nation, October 28, 2002.

<sup>178</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p.1.

### **The Politics of Pact-Making:**

On Tuesday, 12 February 2002, movement leader Willy Mutunga, co-covener of the movement's National Convention Executive Council (NCEC), former chair of the LSK, and executive director of one of the movement's lead organizations, the Kenya Human Rights Commission (KRHC), announced the formation of a formal electoral pact committing five opposition parties and organizations to fielding and supporting common candidates in the 2002 elections. By the time Kenya's December 2002 elections were convened ten months later, this pact had grown to include fifteen opposition groups.<sup>179</sup> It ultimately carried approximately 60 percent of the popular vote in Kenya to defeat the KANU government in both presidential and parliamentary elections.<sup>180</sup> The central question addressed in this section is: What explains the success of this electoral pact, especially given the defeat of pro-democracy forces in Kenya's previous two multiparty elections of 1992 and 1997?

Democratic transitions theory defines a pact as “an explicit, but not always publicly explicated or justified, agreement among a select set of actors which seeks to define . . . rules governing the exercise of power on the basis of mutual guarantees for the ‘vital interests’ of those entering into it.”<sup>181</sup> “Political pacts,”<sup>182</sup> this theory argues,

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<sup>179</sup> These were: the Democratic Party of Kenya (DP), the Liberal Democratic Party (LDP), the National Party of Kenya (NPK), FORD-Kenya, the Social Democratic Party (SDP), FORD-Asili, Saba Saba Asili, the Mass Party of Kenya, the Labour Party of Kenya, KENDA, the Federal Party, Mazingira Green Party of Kenya, the People's Progressive Forum (PPF), the United Democratic Movement (UDM) and NCEC. “NARC Parties to Merge, Says Raila,” *The East African Standard*, July 17, 2003.

<sup>180</sup> See tables 7.1 and 7.2 at the end of this chapter for a summary of presidential and parliamentary results in Kenya's 2002 elections.

<sup>181</sup> O'Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, p. 37.

typically “involve a package deal among the leaders of a spectrum of electorally competitive parties to (1) limit the agenda of policy choice, (2) share proportionately in the distribution of benefits, and (3) restrict the participation of outsiders in decision-making.”<sup>183</sup> These pacts can be between members of incumbent authoritarian regimes and emergent opposition parties, or among opposition parties themselves. A central hypothesis of democratic transitions theory is that pacts “can play an important role in any regime change based on gradual installment rather than on a dramatic event,”<sup>184</sup> as was the case in Kenya. Moreover, the theory argues that although pacts are “not always likely or possible . . . where they are a feature of the transition, they are desirable –that is, they enhance the probability that the process will lead to a viable political democracy.”<sup>185</sup>

As John Harbeson points out, however, democratic transitions theory generally assumes that pacts “need to *precede* initial multiparty elections rather than postdate them. At the very least, they need to precede second or subsequent national multiparty elections.”<sup>186</sup> In the Kenyan case, however, it was not until the country’s third

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<sup>182</sup> O’Donnell and Schmitter suggest conceptualizing transitions from authoritarian rule as “involving a sequence of ‘moments’ . . . military, political, and economic. To each of these may correspond a different pact, or pacts, with a distinctive subset of actors negotiating about a distinctive cluster of rules.” Ibid., p. 39. Thus, here I refer exclusively to their discussion on “political pacts.” Ibid, pp. 40 – 45.

<sup>183</sup> Ibid., pp. 40 – 41.

<sup>184</sup> Ibid., p. 37.

<sup>185</sup> Ibid., p. 39.

<sup>186</sup> John W. Harbeson, “Political Crisis and Renew in Kenya –Prospects for Democratic Consolidation,” *Africa Today*, vol. 35, no. 2, April – June 1998, pp. 164 – 165.

multiparty elections that pro-democracy forces were able to forge a successful political pact to defeat the incumbent regime. Thus, a theoretical question posed by the Kenyan case is: What conditions facilitate the emergence of electoral pacts when they *postdate* initial multiparty elections, and how might this impact democratic development in historically authoritarian and dependent states? It is this question that largely structures the following discussion on pact-making and its consequences for democratization in Kenya.

#### Conditions Facilitating Kenya's 2002 Opposition Unity Pact:

Although democratic transitions theory does not offer what might be considered “necessary and sufficient” conditions of successful political pact-making in promoting democratic development, as mentioned above, it finds that three conditions, or characteristics, of pacts greatly facilitate the emergence of a successful pact: (1) “conflicting or competing groups are interdependent, in that they can neither do without each other nor unilaterally impose their preferred solution on each other if they are to satisfy their respective divergent interests;”<sup>187</sup> (2) competing groups focus on “distribution of representative positions and on collaboration between political parties in policy-making;”<sup>188</sup> and, finally, (3) competing groups make “a commitment for some period to resolve conflicts arising from the operation of the pact by

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<sup>187</sup> Ibid., p. 38

<sup>188</sup> Ibid., p. 39.

renegotiating its terms, not by resorting to the mobilization of outsiders or the elimination of insiders.”<sup>189</sup>

All three of these conditions were present in the case of Kenya’s 2002 political pact. First, although competing opposition parties, in retrospect, were dependent upon each other to defeat the KANU regime in both the 1992 and 1997 elections, ultimately it was not until Kenya’s 2002 elections that dominant opposition party leaders finally conceded *prior* to elections that an opposition unity pact was necessary to remove KANU from power. Second, as discussed above, the advancement the movement’s constitutional reform agenda, which recommended central institutions of consensus democracy, was also essential to the emergence and success of Kenya’s opposition unity pact. As Kenyan political analyst Stephen Ndegwa has commented: “Had the constitutional reform process not been going on at the time of the [2002] campaign, it is virtually inconceivable that any opposition leader would have agreed to give up his or her slim chance at imperial presidency and settle for the certainty of exclusion in its shadow.”<sup>190</sup> Finally, third, in the Kenyan case, it also was important to the 2002 political pact’s success that all parties formally agreed to “resolve conflicts arising from the operation of the pact by renegotiating its terms, not by resorting to the mobilization of outsiders or the elimination of insiders.”<sup>191</sup>

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<sup>189</sup> Ibid., p. 41. In the Kenyan case, the 2002 political pact explicitly condemned “statements or action[s] that will disrupt activities of NAC,” and mandated that any conflicts that emerged within the coalition be referred to the coordinating committee for arbitration.

<sup>190</sup> Ndegwa, “Kenya: Third Time Lucky?” p. 154.

<sup>191</sup> O’Donnell and Schmitter, p. 41.

In the case of Kenya's 2002 unity pact, however, three additional conditions also appeared necessary for its success. First, it mattered that the pact was "formal" in the sense that its terms and conditions, including its organizational and decision-making structures, procedures for reconciling emergent conflicts and penalties for defection, were clearly written into its Memoranda of Understanding (MoUs), and that the leadership of member parties publicly signed and committed themselves to these documents.<sup>192</sup> Second, the fact that the 2002 pact emerged, or evolved, *gradually* over a ten-month period and focused first on areas of common agreement, deferring more contentious issues until later in the pact-making process was also important. Finally, third, it was also key to the success of the 2002 unity pact that it made explicit a *process* for choosing its leadership and candidates, with a clear understanding that multiple positions of executive power would be shared among key opposition leaders, without actually naming or electing these individuals until a great degree of trust had been built, overtime, among pact members. The following section examines each of these conditions, as well as the role of Kenya's human rights and democracy movement in facilitating them.

#### Kenya's Human Rights and Democracy Movement and the 2002 Unity Pact:

First, although opposition unity pacts had been attempted in Kenya's two previous multiparty elections in 1992 and 1997, none of these agreements were formal written agreements and, ultimately, none succeeded. The 2002 pact, on the other

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<sup>192</sup> As is discussed below, there were actually a series of these MoUs that defined the 2002 unity pact.

hand, emerged as a series of formal written documents, Memoranda of Understanding (MoUs), which were publicly signed by its members. Specifically, the first MoU defining the 2002 pact was publicly signed by the leaders of five opposition political parties in February 2002. These parties were: (1) Kenya's largest opposition party, the Democratic Party (DP), whose presidential candidate, Mwai Kibaki, received 31 percent of the presidential vote and whose parliamentary candidates won almost 22 percent of the parliamentary vote in the 1997 elections;<sup>193</sup> (2) Kenya's second largest opposition party, the Forum for the Restoration of Democracy (FORD-Kenya), whose leader, Michael Wamalwa, received just over 8 percent of the presidential vote and whose parliamentary candidates received just over 10 percent of the vote in 1997;<sup>194</sup> (3) the National Party of Kenya (NPK), which was formed by the former leader of Kenya's third largest opposition party, the Social Democratic Party (SDP),<sup>195</sup> and which received almost 8 percent of the presidential vote and 8.3 percent of the parliamentary vote in 1997;<sup>196</sup> (4) FORD-Asili, an opposition party that no longer had

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<sup>193</sup> See tables 6.1 and 6.2 in Chapter Six for results of Kenya's 1997 presidential and parliamentary elections.

<sup>194</sup> Ibid.

<sup>195</sup> Specifically, a faction within the SDP successfully enacted a new nomination rule that future presidential candidates had to have a university degree, which Charity Ngilu, the 1997 presidential candidate, did not have. This faction wanted to nominate James Orengo, who did have a university degree, instead of Ngilu, as the party's presidential candidate. As is discussed below, by the time the 2002 elections were convened, the vast majority of the SDP's membership supported the opposition coalition, however. Orengo was still allowed to contest the presidency using the SDP's party label, and he received approximately 24,500 of approximately 6 million votes cast for president. See Table 7.1 at the end of this chapter.

<sup>196</sup> See tables 6.1 and 6.2 at the end of Chapter Six for results of Kenya's 1997 presidential and parliamentary elections. Like the SDP, it was a dominant faction of FORD-Asili that joined the NARC coalition. A minority faction refused to join, and they, like the SDP, were allowed to field candidates in the 2002 elections. Although the minority SDP faction failed to win any parliamentary seats, FORD-

a parliamentary presence, but won 26 percent of the presidential vote and 15 percent of the parliamentary vote in the 1992 elections;<sup>197</sup> and (5) Saba Saba-Asili, an emergent opposition party that did not contest either the 1992 or 1997 elections.

The February 2002 Memorandum of Understanding signed by these parties committed them to: (1) running a single slate of candidates in Kenya's 2002 elections, and (2) sharing political power if they won.<sup>198</sup> Not only did movement leaders play a prominent role in drafting this MoU, but one of the movement's most prominent leaders, Willy Mutunga, was also asked to chair the pact's executive decision-making council.<sup>199</sup> The role of the movement's leadership in the pact-making process is primarily explained by the national reputation it established over the previous decade for genuine commitment to reform, thus lending legitimacy to the pact, as well as by the number of lawyers within its ranks with established expertise in drafting formal legal documents.

Second, the February 2002 political pact was as distinctive for what it *included*, in terms of written and explicit terms and conditions of membership, as for what it *excluded*. In particular, there was no mention in the MoU of specific

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Asili won two seats in Eastern Province. Its former strong-holds of Central, Nairobi and Western provinces, where it won 60, 44 and 36 percent of the presidential vote in 1992, respectively, almost all went to NARC, however. See Table 5.1 at the end of Chapter Five.

<sup>197</sup> See tables 5.1 and 5.2 at the end of Chapter Five for results of Kenya's 1992 elections. The primary reason that Ford-Asili no longer had a parliamentary presence, after performing so well in 1992, was because its former leader, Kenneth Matiba, refused to run for president in 1997 due to intra-party divisions. See Chapter Six for a discussion of this.

<sup>198</sup> This is discussed below.

<sup>199</sup> The central decision-making body was called the National Alliance for Change Council (NACC) and is discussed in greater detail below.



individuals to be slated for specific positions in government, nor even a specific process for choosing candidates. It simply committed pact members to “forge . . . a common approach in the nomination of candidates for the presidential, parliamentary and civic elections and to share power if they [won] the polls.”<sup>200</sup> When asked who the coalition’s presidential candidate would be, a coalition representative simply stated “[w]e have not started on that yet. That would be a top-down approach. We first want to create a platform on which we can work.”<sup>201</sup> The pact did guarantee, however, that Kenya’s anticipated three top executive positions –the presidency, vice presidency and prime minister, as recommended by the movement’s constitutional reform agenda, would go to the three main opposition leaders in the alliance: Mwai Kibaki, Michael Wamalwa and Charity Ngilu. But, by signing the pact, each party agreed to accept whatever decision was made by the NAC Council<sup>202</sup> in terms of who received which position. The hope of movement leaders promoting the opposition unity pact was that “once the idea [of opposition unity became] embedded into the psyche of the ‘opposition public,’ any opposition leader who [releged on his or her commitment] would have a hard time” and would be perceived as “a spoiler.”<sup>203</sup> That is, by drafting formal MoUs that explicitly stated the terms and conditions of membership, and by

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<sup>200</sup> John Nyaga, “Kenyan Opposition Makes a Bid for Unity Ahead of Crucial Polls,” *Agence France Presse*, February 13, 2002.

<sup>201</sup> This statement was by one of the NAC leaders, Shem Ochuodho. *Ibid.*

<sup>202</sup> This was the decision-making organ of the NAC and is discussed below.

<sup>203</sup> “Now Opposition in Merger Plan.” *The Daily Nation*, Nairobi: The Nation, April 20, 2002.

making the content of these MoUs public, movement leaders believed that public pressure could then be mobilized to force members to respect their commitments.<sup>204</sup>

As part of the terms and conditions of membership, the February 2002 unity pact also created a hierarchy for decision-making and committed members to abide by decisions made through this structure. The central decision-making organ, the National Alliance for Change Council (NACC), was comprised of the leadership of all member parties, as well as three representatives from each party, and, as mentioned above, it was chaired by a prominent movement leader --Willy Mutunga. Below the NACC were three subcommittees and a coordinating committee. The primary responsibility of the coordinating committee was to implement decisions reached by the NACC, while subcommittees were designated to focus on policy planning in the areas of democratization, constitutional reform and economic development.<sup>205</sup> The pact explicitly condemned “statements or action[s] that will disrupt activities of NAC,” and mandated that any conflicts that emerged within the coalition be referred to the coordinating committee for arbitration.<sup>206</sup> The NAC Council was also authorized to make final decisions to resolve emergent conflicts, and their decision

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<sup>204</sup> Phone interview with movement leader and chair of NAC, Willy Mutunga (in Nairobi), August 24, 2005. As Mutunga explained, key to the 2002 pact holding through the election period was making its terms and conditions public. Since no formal institutions existed to force compliance, it was ultimately the credible threat that Kenyans themselves, through organized mass action, would hold opposition leaders accountable for honoring the pact that held it together.

<sup>205</sup> John Nyaga, “Kenyan Opposition Makes a Bid for Unity Ahead of Crucial Polls,” *Agence France Presse*, February 13, 2002.

<sup>206</sup> *Ibid.* Thus, this condition is similar to a condition of successful pact-making observed by O’Donnell and Schmitter: “a commitment for some period to resolve conflicts arising from the operation of the pact by renegotiating its terms, not by resorting to the mobilization of outsiders or the elimination of insiders.” O’Donnell and Schmitter, p. 41.

was to be binding on all parties. Finally, the pact was explicit in its goal of building “mutual trust and respect between member organizations,” by committing member parties to the principles of “democracy, openness, tolerance and consensus building in its activities and in implementing its covenants.”<sup>207</sup>

Following this initial pact, a second formal agreement was signed by pact members in late April 2002, which outlined a structure for executive power-sharing.<sup>208</sup> This formal agreement was also largely drafted by movement leaders. According to this structure, the NAC’s government was to be headed by a president, an executive vice president, a prime minister, as well as two deputy prime ministers –one responsible for government administration and the other for administration of parliamentary affairs.<sup>209</sup> The prime minister was to be head of government, and was to be assisted by the two deputy prime ministers; the president was to be head of state, and the “executive vice president,” was to be given “executive powers to create economic recovery,” and have authority over the ministries of finance, agriculture, transportation and communication.<sup>210</sup> Finally, the NAC’s executive structure also provided for eighteen cabinet ministers, six of whom were required to be women, in

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<sup>207</sup> John Nyaga, “Kenyan Opposition Makes a Bid for Unity Ahead of Crucial Polls,” *Agence France Presse*, February 13, 2002.

<sup>208</sup> “Now Opposition in Merger Plan,” *The Daily Nation*, Nairobi: *The Nation*, April 20, 2002. See also: “NAC to Contest Elections Under a Single Party,” *The East African Standard*, May 23, 2002.

<sup>209</sup> *Ibid.* It should be noted that this agreement was made five months prior to the CKRC’s release of its draft constitution.

<sup>210</sup> *Ibid.*

addition to thirty deputy ministers.<sup>211</sup> Cabinet ministers were to be chosen on the basis of expertise, with attention given to balance of power among parties.

Through March and April of 2002, the NACC also produced a series of policy papers stating the pact's stand on such nationally salient issues as constitutional reform and economic recovery. As movement and NAC leader Willy Mutunga stated, all pact members were committed, in writing, to "undertaking a comprehensive people-driven constitutional review process," as well as to the formation of a "government of national unity."<sup>212</sup> Significantly, as movement leaders argued, these policy statements produced by pact members, and facilitated by movement leaders, importantly contributed to making Kenya's 2002 elections the most issue-oriented elections in Kenya's post-independence history.<sup>213</sup>

On July 8<sup>th</sup>, 2002, five months after the initial February pact was signed, the NAC's leadership finally formally announced its intent to transform the coalition into an official political party, the National Alliance of Kenya (NAK). In the weeks preceding this announcement, the NACC had finally reached a consensus on the new party's constitution, including regulations for its electoral board and nomination rules. Once again, movement leaders played a crucial role in drafting these documents. It was agreed that the electoral board would be responsible for overseeing all party nominations and would be comprised of nine "respected and knowledgeable"

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<sup>211</sup> Ibid.

<sup>212</sup> Phone interview with movement leader and chair of NAC, Willy Mutunga, August 24, 2005.

<sup>213</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, pp. 75 – 78.

individuals, who would not contest elections themselves, in order to avoid potential conflicts of interest.<sup>214</sup> It was also agreed that NAK nomination committees would be established nationwide at the constituency level. Finally, it was agreed that all contested party positions would be openly advertised and nominations decided through secret ballot voting.<sup>215</sup> This method was clearly distinguished from KANU's, which continued to use the queuing method for party nominations, and which pact members condemned as fundamentally undemocratic.<sup>216</sup> As with all previous agreements, Alliance members were required to publicly sign a new Memorandum of Understanding, which bound them to the new terms and conditions of the pact. Emphasizing the pact's commitment to the principles and procedures of democracy, representative Beth Mugo, stated: "Everybody has been listened to and we have worked out a constitution together."<sup>217</sup>

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<sup>214</sup> "Alliance Sets Out Identity," *The East African Standard*, July 10, 2002. See also: "Opposition Parties Will Go to Elections As One," *The Daily Nation*, Nairobi: The Nation, July 24, 2002.

<sup>215</sup> As is discussed below, by late October 2002 NAK's membership had grown to include fifteen opposition parties and the coalition was renamed "NARC," the National Rainbow Coalition. Most of NARC's candidates for the December 2002 were nominated by secret ballot, but there were exceptions. As part of the final negotiations forming NARC, a meeting was convened of all NARC members who were interested in vying for the presidency in their respective parties and this group was called "The Summit." As IED reports in its analysis of NARC's intra-party nominations, although most NARC candidates were nominated by secret ballot, the Summit was responsible for the direct nomination of some candidates for parliamentary seats, as well as for the nomination of Mwai Kibaki as the party's presidential candidate. Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, pp. 69 - 71

<sup>216</sup> The "queuing method," as is discussed in Chapter Four, requires party members to publicly queue behind posters of the candidates they support.

<sup>217</sup> Muthui Mwai, "Opposition Set to Launch New Party," *The Daily Nation*, Nairobi: The Nation, July 9, 2002.

On July 24, 2002, the NAC formerly registered as the National Alliance (Party) of Kenya (NAK), with Kenya's Registrar of Societies.<sup>218</sup> Again, movement lawyers largely facilitated this step. By this time, the Alliance brought together eleven of Kenya's opposition parties. Combining party symbols from its three main parties, the NAK leadership decided on a lantern, from the DP, as its official symbol; a two-fingered salute, from FORD-Kenya, as its "official salute," and its colors --yellow green and black-- were from the NPK, the DP and FORD-Kenya.<sup>219</sup> On the same day, a dominant faction of Kenya's fourth largest parliamentary party, the Social Democratic Party (SDP), also formally joined the Alliance. The party had been riddled with conflicts since the emergence of the NAC in early February, since many SDP members believed the party should have joined the Alliance at that time. The primary reason this did not happen was because its leader and designated presidential candidate, James Orengo, believed he could win the presidency without pact members.<sup>220</sup> Upon joining the NAK, SDP chair Justus Nyanga'ya announced that the

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<sup>218</sup> Although Kenya's draft Constitution recommended that political parties merely register with Kenya's national electoral commission, under Kenya's existing law political parties were still required to apply to Kenya's Registrar of Societies. As discussed in chapters Three – Six, this provided a means for both the Moi-KANU regime, and the Kenyatta-KANU regime before it, to control opposition party mobilization. The Registrar of Societies, an executive appointee, could simply refuse to register a party, or delay its registration indefinitely. With the passage of the IPPG reform package in mid-November 1997, the Societies Act was amended to give the Registrar of Societies a maximum of 120 days within which she/he had to make a decision on pending registration applications, and the wide discretion previously allowed to deny or delay registration was also significantly curtailed. Moreover, for the first time, an appeals process was granted to Kenya's High Court in the case of denied or rescinded registrations, and the Court was required to deliver its decision on these cases within ninety days. With the implementation of this amended Act just prior to the 1997 elections, a total of fifteen new parties were registered. See Chapter Six for a more detailed discussion.

<sup>219</sup> "Alliance Sets Out Identity," *The East African Standard*, July 10, 2002.

<sup>220</sup> Phone interview with Willy Mutunga, August 24, 2005.

dominant faction of the party had finally decided to join the Alliance after realizing it was a “formidable organisation capable of defeating KANU.”<sup>221</sup>

The next major political coup for the NAK came just after KANU’s nominating convention in mid-October 2002, where, by acclamation, President Moi ensured that his choice of successors, Uhuru Kenyatta, was KANU’s candidate for the presidency.<sup>222</sup> A large and growing faction within KANU had protested Uhuru’s

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<sup>221</sup> “SDP And Orphan MPs Join Alliance of Three Big,” *The Daily Nation*, Nairobi: The Nation, July 12, 2002.

<sup>222</sup> It should be noted here that another important impetus for opposition pact-making in 2002 was the success of Kenya’s human rights and democracy movement in enacting and enforcing presidential term limits. As discussed in Chapter Four, as a consequence of movement activism, the Moi regime was forced to constitutionally entrench presidential term limits as part of the Constitution of Kenya (Amendment) Act of December 1991. This act stated that, with immediate effect, Kenyan presidents could serve only two five-year terms; thus, President Moi was constitutionally prohibited from seeking re-election in 2002. Although there were rumors that KANU would attempt to repeal this amendment, and there were efforts by KANU hardliners to extend Moi’s tenure, by engaging in legal mobilization and issuing threats of mass action, Kenya’s reform movement succeeded in ensuring that Kenya’s new constitutional law was upheld. Once President Moi announced he would abide by the constitution, and not seek re-election, not only did power struggles begin to emerge within KANU’s hierarchy, but patronage networks connecting the party’s leadership to its rank and file were also disrupted. This resulted in growing uncertainty among KANU’s leadership regarding its ability to carry the 2002 elections. Ironically capitalizing on the repeal of another constitutional amendment that the regime tried very hard to keep, the Constitution of Kenya (Amendment) Act of 1992, which prohibited coalition government, President Moi began courting the leadership of opposition parties to strengthen KANU’s political base. He first approached dominant Kikuyu candidates, and when these efforts failed, he approached Raila Odinga, leader of the NDP, and unofficial leader of Kenya’s Luo community. Despite Raila’s long history of antagonism toward the regime (see chapters Three and Four), he ultimately decided that it was in the Luo community’s strategic interest to collaborate with KANU. Given the politically weakened condition of KANU, Raila assumed that he would wield sufficient bargaining power within the coalition to advance a reform agenda, which he long supported. As Stephen Ndegwa explains in his analysis of NDP’s relationship with KANU, “[t]he NDP started by working with Moi in parliament in exchange for access to government-controlled resources . . . [B]y June 2001, Moi named Raila Odinga and several other NDP members to his cabinet, signaling how important this arrangement had become.” Ndegwa, “Kenya: Third Time Lucky?” pp. 150 – 151. This resulted in the first coalition government in Kenya since multipartyism had been introduced. Finally, by March 2002, Raila made the decision to formally merge the NDP with KANU, with the clear expectation that he would be named Moi’s successor in the upcoming party nominations. With the merger, President Moi immediately named Raila secretary general of KANU, lending credence to this expectation, despite the fact that power struggles continued within the party up until the nominating convention in October 2002, as is discussed below. See Ndegwa’s insightful article for a more complete discussion of this. *Ibid.*

nomination from the time the president first made his choice public in June 2002. By August 2002, this faction had become known as the “Rainbow Coalition,” and one of its most visible leaders was Raila Odinga, former leader of the former NDP, current Minister of Energy in Moi’s cabinet, and Secretary General of KANU.<sup>223</sup> Other prominent leaders of the coalition included: George Saitoti, Joseph Kamotho, Kalonzo Musyoka, Moody Awori and Musalia Mudavadi –all of whom had been senior members of KANU. Citing President’s Moi’s violation of KANU’s nominating procedures, as well as Uhuru’s political inexperience, the Rainbow Coalition’s leadership resolved to break from the party should President Moi “illegally” name Uhuru as KANU’s presidential candidate at its nominating convention.<sup>224</sup> When, on the day before the convention, President Moi asked Raila Odinga, who had also presented papers for KANU’s presidential nomination, to withdraw, Odinga, together with other leaders of the Rainbow Coalition, announced that they would convene a political rally to parallel KANU’s nominating convention the following day.<sup>225</sup>

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<sup>223</sup> When the NDP formally merged with KANU in March 2002, as noted above, Moi named Raila Secretary General of KANU, replacing Joseph Kamotho. In addition, he created three new vice presidential posts in the party, bringing the total number to four, and named the following four individuals to these posts: (1) Uhuru Kenyatta, (2) Katana Ngala, (3) Kalonzo Musyoka and (4) Musalia Mudavadi. “List Drafters And Powermen Carried the Day,” *The Daily Nation*, Nairobi: The Nation, March 19, 2002. Most (correctly) perceived this as a strategic move by Moi to keep multiple *potential* KANU candidates for the presidency in the wings, each representing electorally important ethnic communities, before finally announcing his choice. In appointing the above four individuals, President Moi also replaced Kenya’s current vice president, George Saitoti, who, historically also held the post of party vice president. Thus, the entire leadership of the Rainbow Coalition was comprised of individuals who, in one way or another, felt slighted by Moi’s appointment of Uhuru as his successor.

<sup>224</sup> Rainbow Coalition leaders wanted KANU’s presidential candidate to be nominated by secret ballot, rather than “public acclamation,” as historically had been the case.

<sup>225</sup> When President Moi asked Odinga to withdraw his nomination, Odinga also immediately resigned his post as Minister of Energy, as well as KANU’s Secretary General, and announced the convening of



At the rally, and as promised, the Rainbow Coalition formally declared their break with KANU and founded a new party, the Liberal Democratic Party (LDP). The party was comprised primarily of members of Raila's former National Democratic Party (NDP), as well as members of a reform-oriented faction of KANU known as KANU B.<sup>226</sup> Just over a week later, at a now famous political rally on October 23, the LDP leadership formally announced that they had agreed to join forces with the National Alliance of Kenya (NAK). This new alliance, now comprised of twelve opposition parties, was renamed the "National Rainbow Coalition," or "NARC."

Prior to the October 23<sup>rd</sup> rally, the LDP leadership met with the NAK Council in Nairobi and two final Memoranda of Understanding were drawn up cementing the merger.<sup>227</sup> Once again, movement leaders played an important role in drafting the MoUs. These memoranda not only renamed the enlarged coalition the National Rainbow Coalition, or NARC, but also spelled out the terms of an explicit executive power-sharing agreement by party leaders.<sup>228</sup> According to this agreement, Mwai Kibaki was to be NARC's presidential candidate and Michael Wamalwa its vice president. Once Kenya's new constitution was enacted, Raila Odinga was to be appointed executive prime minister and Charity Ngilu and Kipruto arap Kirwa were to

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a parallel rally. "Moi Nominates Successor Amid Protests," *The Daily Nation*, Nairobi: The Nation, October 14, 2002.

<sup>226</sup> In addition, however, even a handful of KANU's "old guard," KANU hardliners, also joined the LDP in protest of Uhuru's nomination.

<sup>227</sup> Phone interview with movement leader and chair of the former NAK, Willy Mutunga, August 24, 2005.

<sup>228</sup> Ibid.

be deputy prime ministers.<sup>229</sup> In addition, all parties agreed that a second vice presidency would be created, and that this position would go to Kalonzo Musyoka.<sup>230</sup> As movement leader and chair of the former NAK, Willy Mutunga, explained, more important than political party in naming executive posts, given Kenya's ethno-political context, were the individuals' ethnic and regional affiliations, and the perceived likelihood that they could carry their respective political bases in the election.<sup>231</sup>

Specifically, Kibaki, as a Kikuyu was chosen to capture the Kikuyu vote, Kenya's largest ethnic community (22 percent), based in Central Province.<sup>232</sup> Michael Wamalwa, a Luhya, Kenya's second most populous ethnic community (14 percent), based in Western and Nyanza provinces, was chosen as vice president. Raila Odinga, a Luo, Kenya's third most populous ethnic community (13 percent) was chosen as the future executive prime minister. Kipruto Kirwa, a Kalenjin, Kenya's fourth most populous group (12 percent), was from powerful Rift Valley Province,

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid. Given Kenya's "twenty-five percent rule," as Mutunga explains, NARC leaders were chosen with an eye not only toward ensuring that the party received a minimum of twenty-five percent of the vote in five of Kenya's eight provinces, but also toward *preventing* KANU from receiving the requisite twenty-five percent in five provinces. Ibid. As discussed in Chapter Five, the "twenty-five percent rule" required that Kenya's presidential candidates win a minimum of twenty-five percent of the vote in at least five of Kenya's eight provinces, in addition to winning a plurality of the national vote, in order to secure the presidency.

<sup>232</sup> Population estimates of ethnic groups are from the CIA, *The World Factbook*. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

and Charity Ngilu, a Kamba (11 percent), Kenya's fifth largest ethnic group was easily expected to carry Eastern Province.<sup>233</sup>

With this agreement on executive power-sharing in place, and parliamentary and local government candidates for the most part democratically chosen,<sup>234</sup> NARC leaders and supporters began actively campaigning for the 2002 elections. As mentioned above, for the first time since Kenya's political opening in 1991, prominent movement leaders not only publicly endorsed and actively campaigned for political candidates,<sup>235</sup> but they also stood for public office on the NARC ticket. For example, Kivutha Kibwana, co-convenor of the NCEC and leader of CLARION stood for the parliamentary seat in his home constituency of Kibwezi in Eastern Province; Wangari Maathai, founder of Kenya's Green Belt Movement and prominent reform movement

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<sup>233</sup> Phone interview with movement leader and chair of the former NAK, Willy Mutunga, August 24, 2005. Population estimates of ethnic groups are from the CIA *World Factbook*. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>234</sup> As noted above, there were some exceptions to this. Specifically, NARC's presidential candidate, Mwai Kibaki, and candidates for some key parliamentary races were directly named by NARC's "Summit." This group was comprised of the leaders of all constituent parties of NARC, as well as all individuals who had ambitions of vying for Kenya's presidency. In *most* cases, however, NARC's parliamentary and civic candidates were democratically chosen. Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, pp. 69 - 71.

<sup>235</sup> As discussed in earlier chapters, prior to this time, most movement leaders were consciously "apolitical" as they felt it important for advancing the movement's agenda that they not be perceived as partisan. Thus, in many respects, a fundamental change in movement philosophy and strategy can be observed in the 1998 - 2002 electoral cycle as movement leaders actively began to endorse and campaign for political candidates. Interviews with movement leaders indicates that this was largely a consequence of their realizing that they would have to take a more active political stance in order to effectively promote their reform agenda. Thus, by not only promoting the conditions that facilitated the emergence of a successful opposition alliance, but also actively promoting the alliance itself, movement leaders were able to create a situation where they could, in good conscience, support an opposition political platform and opposition candidates. Opposition party leaders were also interested in working closely with movement leaders, as discussed above, because of the numbers of Kenyans (votes) they could mobilize at this stage of the movement's development.

activist stood for the parliamentary seat in her home constituency of Tetu in Central Province; and Njoroge Waithera of the Rescue Political Prisoners (RPP) group stood for the Naivasha seat in Rift Valley Province.<sup>236</sup> Although candidates' ethnicity continued to play an important role in Kenya's 2002 elections, as a lead movement organization found in its detailed analysis of the elections, the 2002 campaign process, more than any other in Kenya's history, was dominated by issue-oriented politics.<sup>237</sup> Moreover, as a consequence of movement activism, the issue that dominated the 2002 campaigns was comprehensive reform of Kenya's Constitution.

Immediately following President Moi's early dismissal of parliament for elections, movement leaders drafted another MoU committing all pact members, if elected, to continue the constitutional review from where it left off and to enact a new constitution within their first 100 days in office.<sup>238</sup> Most analysts of Kenyan politics agree that the movement's success in making constitution reform a priority on the national agenda is the major variable explaining NARC's unexpectedly large margin of victory in both presidential and parliamentary races in Kenya.<sup>239</sup> As mentioned above, NARC's presidential candidate, Mwai Kibaki, ultimately received 62.3 percent of the popular vote, and NARC parliamentary candidates won 60 percent of the seats

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<sup>236</sup> The RPP, Clarion and the NCEC are all discussed in Chapters Five and Six.

<sup>237</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, pp. 75 – 78.

<sup>238</sup> *Ibid.*, p. 78. By this time, the pact included members of the Rainbow Coalition, so it committed all members of NARC.

<sup>239</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*.

in parliament –giving it a comfortable majority to advance its reform agenda.<sup>240</sup>

Moreover, because of NARC's close linkages to Kenya's human rights and democracy movement, its general political platform also firmly embraced the movement's reform agenda.<sup>241</sup> As is discussed in the following section, this success was due not only to the movement's use of legal mobilization strategies at national and international levels, but also, importantly, to the organizational support provided by dominant church organizations in Kenyan, and financial and technical support provided by Kenya's international donors.

### **The Politics of Institution-Building:**

In addition to promoting the constitution-making and pact-making processes discussed above, a third way that Kenya's human rights and democracy movement importantly advanced Kenyans' rights protections through the 1998 - 2002 electoral cycle, and promoted free and fair elections in 2002, was through continued institution-building efforts at both state and societal levels in Kenya. At the societal level, continued development of two movement-supported programs were especially important in this respect. First were educational outreach programs designed to improve both the likelihood that citizens would recognize and act on rights violations, as well as participate in the constitutional reform process in an informed way. Second, were programs focused on the training and deployment of domestic election monitors

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<sup>240</sup> See tables 6.1 and 6.2.

<sup>241</sup> Ibid.

to observe voter registration, candidate nomination, campaign, polling and counting processes.

At the state level, movement organizations promoted greater independence and institutional capacity of Kenya's electoral commission, as well as successfully pressured the Moi-KANU regime to establish Kenya's first national commission on human rights. Although this commission initially was highly controlled by Kenya's executive office, during the 1998 – 2002 electoral cycle, and as a consequence of continued movement activism, it became increasingly independent in pursuing its mandate to promote and protect the human rights of Kenyans. This section examines the role of Kenya's human rights and democracy movement in promoting the development of each of these institutions, as well as their impact on human and democratic rights protections for Kenyans.

#### Educational Outreach Programs:

Movement-supported educational outreach programs, as discussed in Chapter Five, were founded just after Kenya's political opening in December 1991 in preparation for Kenya's first multiparty elections in December 1992. These programs were then continued and expanded upon for Kenya's second multiparty elections in December 1997. Although the programs contributed to Kenya's 1997 elections being considerably more free and fair than the 1992 elections, their political impact remained limited in both of these elections for several reasons. First, because Kenya's political opening did not occur until December 1991, there was very little time for

movement organizations to develop and implement programs prior to Kenya's first multiparty elections in December 1992.

Second, as discussed in Chapter Six, although these programs were significantly more developed by Kenya's second multiparty elections in 1997, a repressive set of statutory, administrative and constitutional laws continued to restrict Kenyans' freedoms of speech, association, assembly and movement, and made implementation of programs, especially in Kenya's rural areas, extremely difficult. Although most of these laws were finally either significantly reformed or repealed through the Inter-Party Parliamentary Group (IPPG) reforms, enacted seven weeks prior to Kenya's 1997 elections; again, the timeframe between enactment of these reforms and convening of elections was too short to significantly impact the election's fairness. Finally, third, as documented in Chapters Five and Six, the overall fairness of both the 1992 and 1997 elections was compromised by regime-supported political violence. Not only were nearly 2000 Kenyans killed and approximately 350,000 others displaced leading up to, during and immediately following the 1992 and 1997 elections, but the violence made electorally strategic parts of the country largely inaccessible to Kenya's human rights and democracy movement organizations and opposition political parties.<sup>242</sup>

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<sup>242</sup> Leading up to, during and immediately following Kenya's first multiparty elections in December of 1992, it is estimated that approximately 1500 Kenyans were killed and at least 300,000 displaced, primarily in parts of Rift Valley and Western provinces. Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, New York: Human Rights Watch, November 1993, p.1. Violence leading up to the 1997 elections was on a smaller scale, but still serious, with an estimated 200 Kenyans killed and more than forty thousand displaced. Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, Nairobi: KHRC, 1998. Holmquist and Ford, "Kenya Politics: Toward a Second Transition?" p. 229. Chapters Five and

By Kenya's 1998 – 2002 electoral cycle, with nearly a decade of experience behind them, the educational outreach materials of movement organizations were considerably more developed. These materials included not only general information on Kenyans' human and democratic (including voting) rights, but also more specific information on the process and substance of constitutional reform in Kenya. Moreover, the number of SMOs engaged in educational outreach programs had also grown considerably. Whereas most of the rights awareness outreach programs during the 1993 – 1997 electoral cycle were conducted by less than ten SMOs,<sup>243</sup> by the 1998 – 2002 cycle this number had more than doubled. Prominent SMOs engaged in rights awareness outreach programs during 1998 – 2002 included: ICJ-Kenya, the Kenya Human Rights Commission (KHRC), FIDA-Kenya, Kituo cha Sheria (Kituo), the Legal Education Aid Programme (LEAP), the Center for Governance and Democracy (CGD), the Center for Law and Research International (CLARION), the Citizens Coalition for a Constitutional Conference (4Cs), the Institute for Education in Democracy (IED), the Youth Agenda (YAA), the Public Law Institute (PLI), the Legal Resources Foundation (LRF), the Agency for Development Education and Communication (ADEC), the National Council of Women in Kenya (NCWK), the

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Six provide an analysis as to why these parts of Kenya (primarily Rift, Western and Coast provinces) were strategically important in Kenya's 1992 and 1997 elections.

<sup>243</sup> As discussed in Chapter Six, the main SMOs conducting rights awareness programs during the 1993 – 1997 electoral cycle were: ICJ-Kenya, FIDA-Kenya, Kituo cha Sheria (Kituo), the Legal Education Aid Programme (LEAP), the 4Cs, the Institute for Education in Democracy (IED) and the Legal Resources Foundation (LRF). In addition, the National Council of Churches of Kenya (NCCK) and the Catholic Justice and Peace Commission worked closely with these SMOs to assist them in reaching rural parts of Kenya.



Collaborative Center for Gender Development, the Kenyan League of Women Voters, Kenya Pastoralist Forum and the TAWASAL Foundation.<sup>244</sup>

In addition, a large and growing network of religious organizations in Kenya continued to support SMOs' educational outreach programs by providing access to their constituent communities, especially in Kenya's rural areas, as well as engaging in their own educational outreach programs, typically using SMO materials. These organizations included the National Council of Churches of Kenya (NCCCK) and the Catholic Justice and Peace Commission (CJPC), who also worked closely with movement organizations prior to 1998. In addition, the Muslim Civic Education Trust and the Muslim Consultative Council (MCC),<sup>245</sup> both of which began working with SMOs during the 1998 – 2002 electoral cycle, also importantly facilitated movement reach into Kenya's Muslim communities.

This tremendous expansion in SMOs' education outreach programs is primarily explained by broad-based support for the movement's agenda by Kenya's dominant religious organizations, substantial increases in foreign-based technical and material assistance to SMOs,<sup>246</sup> and the continued vulnerability of the Moi regime to

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<sup>244</sup> This list is compiled primarily from interviews with representatives of movement organizations and review of movement documents, as well as from reports provided by the U.S. Agency for International Development (U.S. AID) for the years 1998, 1999 and 2000. I am most grateful to Rose Otieno at U.S. AID, Kenya, for providing this information to me, as well as to Bob Leavitt and Julia Escalona for their assistance in helping me to better understand U.S. AID's role in promoting free and fair elections in Kenya during the 1998 – 2002 electoral cycle.

<sup>245</sup> Ibid.

<sup>246</sup> Key foreign-based organizations, foundations and donor state agencies providing support for SMO civic education programs during the 1998 – 2002 electoral cycle included: the Australian High Commission, British Council, British Department for International Development (DFID), Canadian International Development Agency (CIDA), Carnegie Foundation, Catholic Organization for Relief and

domestic and international pressure. To assess the social and political impact of these programs, U.S. AID commissioned an independent agency, Management Systems International (MSI), to conduct an in-depth impact assessment study. After interviewing more than 3600 Kenyans, MSI published its findings in December 2003.<sup>247</sup> The study found that rights awareness programs “were consistently effective in altering the individual’s sense of civic competence, skills, overall political knowledge, and psychological and actual engagement with the political process.”<sup>248</sup> It also found that the programs “were highly successful in promoting individual

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Development (CORDAID), Danish International Development Agency (DANIDA), Embassy of Finland, European Union (EU), Ford Foundation, Global Fund for Women, Heinrich Boll Foundation (HBF), Inter-Church Organization for Development Cooperation (ICCO), Netherlands Embassy, Norwegian Embassy, Rockefeller Foundation, Swedish International Development Agency (SIDA), United Nations Development Program (UNDP), and United States Agency for International Development (USAID). This list is compiled from interviews with representatives of movement organizations and review of movement documents.

<sup>247</sup> Management Systems International reports that “interviews were conducted between late February and April 2002 with 3,619 individuals, half of whom were to attend one of 181 [civil education/educational outreach] workshops sponsored by 26 different civil society organizations (CSOs) [most of these were movement organizations], and half from individuals in the surrounding communities who were not slated to attend the workshops. The individuals in the ‘treatment’ and ‘control’ groups were matched in terms of their age, educational attainment, gender and place of residence. 2,301 of these respondents were re-interviewed between November 2002 and April 2003, between seven and fourteen months after the initial workshop had taken place. A second component consisted of interviews with a national sample of 1,761 Kenyan citizens after the [workshops were] completed in order to determine country-wide trends in democratic orientations, and the extent to which individuals overall were exposed to a variety of [civic education/rights awareness] activities, including democracy workshops, theatre presentations, puppet shows, and public lectures and other events. 1,260 interviews with randomly-selected individuals were conducted in December 2002, and a separate national random sample of 501 interviews was conducted in May 2003. The third component consist[ed] of six focus group sessions, four with individuals who attended [civic education] workshops, one with a mixture of workshop participants and facilitators, and one exclusively with workshop facilitators. The goals of the focus groups were to uncover the potential effects of civic education that may be more nuanced or otherwise more difficult to determine from the survey data, and to solicit participants’ opinions about how workshops and other civic education activities may be improved in the future.” Management Systems International, *The Impact of the Kenya National Civic Education Programme on Democratic Attitudes, Knowledge, Values, and Behavior*, prepared for the U.S. Agency for International Development, Nairobi, Kenya, December 2003, p. iv. AEP-I-00-00-00018-00 Task Order No. 806.

<sup>248</sup> Ibid., p. v.

awareness and knowledge about the Kenyan constitution and the constitutional review process” and “[t]hese effects were the largest identified in the entire study.”<sup>249</sup>

Finally, the study found that there were significant secondary effects of the programs. Specifically, it established that “[o]ver 85% of individuals who were trained in . . . workshops spoke . . . with at least three other individuals about their . . . experiences, and over 50% of all individuals had at least three people speak to them about others’ workshop experiences.”<sup>250</sup>

A lead movement organization, the Institute for Education in Democracy (IED), carried out its own impact assessment of these programs and also found that they

greatly enhanced voters’ understanding of not only the constitutional review process but of constitutionalism, governance, human rights and the value of people’s effective participation in government. As a result, the process also enhanced people’s participation in the electoral process and facilitated an issue-based campaign in which voters required more from their candidates than empty promises.<sup>251</sup>

IED’s report further found that, as a consequence of these programs, “voters were able to link a good constitution to democratic structures required for the eradication of corruption, misuse of public resources, [and] mismanagement . . .,” and, for the first time, “people’s desire for a new Constitution became a campaign issue.”<sup>252</sup> Finally, a European Union report also attributed that fact that Kenya’s 2002 elections ended up

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<sup>249</sup> Ibid.

<sup>250</sup> Ibid., p. vii.

<sup>251</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 28.

<sup>252</sup> Ibid, pp. 29 – 30.

being the most issue-oriented in Kenyan political history to the impact of educational outreach programs.<sup>253</sup>

Although failure of the Moi-KANU regime to consistently and fairly implement the 1997 Inter-Party Parliamentary Group (IPPG) reform package continued to hinder movement efforts to promote educational outreach in Kenya's rural areas,<sup>254</sup> as the reports above indicate, the overall positive effect of these programs cannot be underestimated. In addition, despite the fact that Kenya's only national radio service, the Kenya Broadcasting Corporation (KBC), still failed to provide balanced news coverage, as mandated by the IPPG reforms, its reporting was still considerably more fair than leading up to either the 1997 or 1992 elections. Perhaps even more importantly, two commercial media groups, the Nation Media Group and the Kenyan Television Network (KTN) Baraza, Ltd. were given broadcasting licenses, as also was mandated by the IPPG reforms, and both played important roles in providing election information to Kenyans leading up to the 2002 elections.<sup>255</sup> Although the Nation's broadcasting was restricted to the Nairobi area,<sup>256</sup> KTN was able to broadcast to five major urban centers in Kenya: Nairobi, Mombasa,

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<sup>253</sup> European Union Election Observation Mission (EU EOM), *Kenya: General Elections, 27 December 2002, Final Report*.

<sup>254</sup> In response to the regime's failure to fully implement the IPPG reforms, movement leaders and organizations, engaging in legal mobilization, made the content of IPPG reform package integral to their civic education programs. As a consequence, they were able to mobilize Kenyans to demand that the rights protections in the reform package be enforced, or at least ensure that violations were publicized and resisted.

<sup>255</sup> See Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, Chapter 11, "Role of the Media in the 2002 Elections," pp. 117 – 119.

<sup>256</sup> Specifically an 80-kilometer radius of the Nairobi area. *Ibid.*, p. 119.

Nakuru, Kisumu and Eldoret.<sup>257</sup> In addition to providing much more balanced news coverage than the KBC, both Nation TV and KTN aired special election programs sponsored by movement organizations.<sup>258</sup>

By successfully breaking the Moi regime's monopoly on information, especially in Kenya's rural areas, movement organizations were, for the first time, able to effectively counter framing efforts by the regime-supported countermovement.<sup>259</sup> As argued in Chapters Five and Six, two important variables in explaining the widespread political violence leading up to and following Kenya's 1992 and 1997 elections, and the ultimate victory of the KANU regime in these elections, were: (1) successful framing strategies by the regime-supported countermovement and (2) Kenya's majoritarian electoral system.

The success of countermovement framing, as discussed in these chapters, was largely due to KANU's ability to control information reaching Kenya's rural areas, which, due to regime malapportionment and gerrymandering,<sup>260</sup> were also disproportionately represented in Kenya's parliament. This was achieved not only through controlling access to Kenya's only national radio broadcast system, the KBC,

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<sup>257</sup> Ibid.

<sup>258</sup> For example, IED was given the opportunity to sponsor thirteen episodes of an election information program, "The Third Opinion." Ibid.

<sup>259</sup> As discussed above, this movement emerged in response to reform movement demands for multipartyism and greater human and democratic rights protections in the last quarter of 1991. Countermovement activities are analyzed in chapters Five and Six.

<sup>260</sup> As discussed in Chapters Five and Six, single member district (SMD) plurality electoral systems, such as Kenya's, are especially vulnerable to this type of electoral interference, especially when national electoral commissions are not institutionally independent from the executive, as was also the case in Kenya.

but also through declaring certain areas of the country that were either KANU-dominated or swing constituencies for KANU, “KANU zones.” As a Kenyan political analyst explains, “[i]n those areas . . . advocates of multiparty democracy and opposition politicians were banned from campaigning, and nonnative residents were cautioned against voting for opposition politicians.”<sup>261</sup> It was also these areas of the country that were disproportionately affected by political violence. In contrast, leading up to Kenya’s 2002 elections, movement organizations not only had greater access to Kenyan radio services,<sup>262</sup> but, through repeal of the Outlying Districts and the Special District (Administration) Acts, two key laws used by the regime to declare “KANU zones,” movement and opposition organizations also had much greater physical access to former “KANU zones.”<sup>263</sup> Finally, unlike the 1992 and 1997 elections, Kenyans’ freedoms of speech, movement, association and assembly become *more* protected as the 2002 elections approached, rather than less so.<sup>264</sup>

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<sup>261</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 610.

<sup>262</sup> This was primarily a consequence of the IPPG reforms, although, as mentioned above, these reforms continued to be only partially implemented by the Moi-KANU regime.

<sup>263</sup> These two acts were also repealed in their entirety as part of the IPPG reform package. The Outlying Districts Act gave Kenya’s district commissioners (DCs) the power to declare any district, or part of a district, in Kenya, “closed” and, in so doing, entry into this district became illegal without special permission. The Special Districts (Administration) Act allowed the closed district ordinance to be applied not only to any part of the country, but also to “any person or class of persons from its operation.” Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, p. 418. As explained in Chapter Three, this typically worked in two ways. First, any person, or “class of persons,” could be exempted from the rules governing a “closed district,” and second, if any person, or class of persons, was determined to be acting in a “hostile manner toward the Government,” either the Provincial or District Commissioner could order the arrest of that person, or that *entire class of persons*, as well as “prohibit them from leaving areas reserved for their use and order the seizure and detention of all their property.” *Ibid.*

<sup>264</sup> This was largely due to movement legal mobilization strategies, at national and international levels, to publicize the content of IPPG reforms and promote their enforcement.

Thus, during the 1998 – 2002 electoral cycle, Kenyans residing within former “KANU zones” for the first time had greater access to the substance of the movement’s reform message directly from movement representatives, rather than via the framing of regime-supported countermovement leaders. As a consequence, they could hear and see first-hand that Kenya’s reform movement was *not* comprised solely of representatives of Kenya’s larger ethnic groups, as countermovement leaders insisted, nor were the reforms it advocated exclusionary. Much to the contrary, through movement-supported educational outreach programs,<sup>265</sup> many rural Kenyans for the first time came to understand that the movement’s reform proposals, which, as discussed above, included many of the central institutional features of consensus democracy, in fact provided much *stronger* guarantees for minority interests and representation than regime-supported proposals. As a consequence, not only was an important impetus for mobilizing violence removed, but a growing number of rural Kenyans also came to actively support the movement’s reform agenda. Evidence for these claims includes: (1) the virtual elimination of pre and post-electoral violence in the 2002 elections; (2) the fact that Kenya’s state-mandated constitutional reform commission, after collecting more than 1800 pages of recommendations from Kenyan citizens,<sup>266</sup> ultimately drafted a constitutional reform bill, which recommended almost

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<sup>265</sup> Especially through those programs focused specifically on constitutional reform.

<sup>266</sup> “Draft Bill: Ghai Attacks Chunga,” *The East African Standard*, October 1, 2002.

all of the institutional features advocated by movement leaders;<sup>267</sup> and (3) landslide wins in both presidential and parliamentary races for the movement-supported opposition coalition, NARC.<sup>268</sup>

#### Domestic Election Monitoring:

A second group of movement-supported programs that became significantly more developed during the 1998 – 2002 electoral cycle, and that promoted greater protection for Kenyans' human and democratic rights, were programs focused on the training and deployment of domestic election monitors. As discussed in Chapter Five, two dominant SMOs, ICJ-Kenya and FIDA-Kenya, were largely responsible for founding Kenya's first independent (nongovernmental) election monitoring program, the National Election Monitoring Unit (NEMU), five months prior to Kenya's first multiparty elections in December 1992.

The primary objective of NEMU was to establish, and begin to institutionalize, Kenya's first nongovernmental election unit to monitor conditions leading up to, during and after all future multiparty elections in Kenya.<sup>269</sup> In so doing, it sought to train professional domestic monitors to observe and report on electoral conditions from the time voter registration commenced through candidate

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<sup>267</sup> Republic of Kenya, *The Constitution of Kenya Constitutional (Amendment) Act of 2002*, Nairobi, Government Printer.

<sup>268</sup> See tables 7.1 and 7.2 at the end of this chapter for a summary of Kenya's presidential and parliamentary elections results.

<sup>269</sup> *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, pp. 27 – 29.



nominations, campaigning, polling and vote counting.<sup>270</sup> Although NEMU succeeded in training just over 7000 domestic monitors for the 1992 elections, as discussed in Chapter Five, many violations occurred prior to the deployment of monitors and after monitors left the field. Regardless, it marked the first time in Kenya's post-independence history that regime conduct during the election process was documented, critiqued and publicized by domestically based nongovernmental organizations. By compiling and publishing a detailed analysis of their findings, NEMU began laying the foundations for a permanent nongovernmental domestic monitoring unit for future, more democratic, elections in Kenya.

Just after Kenya's 1992 elections, as discussed in Chapter Six, a new movement organization was founded, the Institute for Education in Democracy (IED), to focus specifically on election-related reforms ranging from voter education and professional training of elections observers, to the development of an extensive research database of electoral laws and conditions since independence.<sup>271</sup> Leading up to Kenya's 1997 elections, IED, together with the Catholic Justice and Peace Commission (CJPC) and the National Council of Churches of Kenya (NCCCK) largely took over, and greatly expanded upon, the monitoring efforts initially established by NEMU. Under IED's leadership, and with material and technical support from

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<sup>270</sup> Ibid.

<sup>271</sup> Interview with Cleophas Torori, Program Director, Institute for Education and Democracy (IED), Nairobi, Kenya, 13 and 14 May 1999.

foreign-based donors,<sup>272</sup> more than 28,000 domestic monitors were trained and deployed for Kenya's 1997 elections, nearly quadrupling the number posted for the 1992 elections.<sup>273</sup>

This formidable presence of professionally trained domestic monitors was, in and of itself, a key contributor to Kenya's 1997 elections being considerably more free and fair than the 1992 elections, despite the fact that political violence, Kenya's biased majoritarian electoral system, and illegal interference by Kenya's provincial administrators in the electoral process, continued to comprise the overall fairness of the elections. In addition, as is also discussed in Chapter Six, the research and materials produced by IED on Kenya's 1997 elections were historically unprecedented for an indigenous organization in Kenya, and were invaluable as movement organizations began to prepare for Kenya's third multiparty elections in December 2002.

#### Domestic Election Monitoring and Kenya's 2002 Elections:

Voter registration for Kenya's 2002 elections began in early January 2002 and closed on March 19, 2002. During this period, in a historically unprecedented move,

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<sup>272</sup> In particular, the Royal Netherlands Embassy, the British Department for International Development (DFID), the Swedish International Development Agency (SIDA) and the Danish International Development Agency (DANIDA) gave U.S. \$ 2.6 million to IED, CJPC, and NCCCK. Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997*, p. 238. See also: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, 1998, p. 8.

<sup>273</sup> Joel D. Barkan, "Toward a New Constitutional Framework in Kenya," *Africa Today*, vol. 45, no. 2, 1998, p. 224.

IED began working collaboratively with Kenya's national electoral commission, the Electoral Commission of Kenya (ECK), through a program funded by the United Nations Development Program (UNDP) and entitled "the Governance for Poverty Eradication Program," or GGPE. As the program's national administrator Elizabeth Oduor-Noah commented, this collaboration marked a "dramatic change" in approach to reform by both the Government of Kenya (GoK) and movement organizations.<sup>274</sup> Only five years earlier, she explains, not only did the GoK not even allow the word "governance" in the title of the UNDP program, but the thought of working collaboratively with a movement organization, especially in an area as politically sensitive as electoral reform, was anathema.<sup>275</sup> Movement organizations were similarly suspicious of working with government organizations, institutions and officials.

By January 2002, however, this situation had changed considerably and, with seed money provided by the UNDP, together IED and the ECK implemented a targeted voter education/ voter registration project in nine pilot districts in Kenya.<sup>276</sup> As a consequence of this work, IED reported that approximately 330,00 new voters were registered in the nine districts, "representing over 30% of the total national new

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<sup>274</sup> Interview with Elizabeth Oduor-Noah, Nairobi, Kenya, 12 June 1998. Elizabeth Oduor-Noah, as is discussed below, was the National Program Advisor for the UNDP's Enhanced Public Administration and Participatory Development Program (EPAPD), which eventually became the Governance for Poverty Eradication Program (GGPE).

<sup>275</sup> Ibid.

<sup>276</sup> The nine pilot districts were: Nairobi, Kisumu, Mombasa, Kilifi, Suba, Murang'a, Isiolo, Bungoma and Makueni. Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 10.

registration figures.”<sup>277</sup>

Moreover, also for the first time in Kenyan history, during July and August of 2002, IED conducted an audit of Kenya’s National Electors’ Register. Its report, entitled “Registration of Voters in 2002: An Audit,” for the first time “provided researched and documented evidence of the strengths and shortcomings of voter registration.”<sup>278</sup> The report was then highly publicized by movement organizations in Kenya’s media and, as IED later reported:

The public debate and interest that [the report] generated . . . demonstrated its significance. It focused voters on the register and ignited efforts to inspect registers to ascertain that their names and other details were correct. In this way, the report resulted in voter education and awareness on the importance of properly inspecting the register.<sup>279</sup>

As a consequence, not only was the voter registry reopened for public inspection at the end of August for fourteen days, but the ECK was also forced to take action to further “‘clean’ the register, albeit cautiously.”<sup>280</sup> Specifically, as IED reports, the ECK

dealt with the more obvious cases of multiple or double registration. [As a result, approximately] 125,000 cases of double or multiple registration were expunged from the register. [However,] the ECK was even more cautious in dealing with the issue of dead voters in the register because authentic records were not available from the Registrar of Births and Deaths. [As a consequence,] only 52,000 reported cases [of deaths] were

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<sup>277</sup> Ibid., p. 31. According to the ECK, approximately 1.3 million new voters were registered by the close of voter registration on March 19, 2002. Ibid., p. 56.

<sup>278</sup> Ibid., p. 32.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

removed from the register.’<sup>281</sup>

Despite continued problems with the registry, SMOs’ involvement and leadership in monitoring voter registration processes led to two further changes of central importance for future elections in Kenya. First, in June 2002, movement organizations successfully lobbied parliament to enact a new law, the Statute Law (Miscellaneous Amendments) Act of June 2002, which provided for continuous registration of voters for all future elections in Kenya.<sup>282</sup> A subset of movement organizations had demanded this since just prior to the 1992 elections, when problems with the state’s voter registration process became apparent.<sup>283</sup> Second, as a consequence of the publication of IED’s audit, and the public outcry it generated, the ECK and all political parties agreed to rely on a single computerized voter registry for the 2002 elections. This registry combined four different registries conducted at four different times in Kenya. In so doing, many duplications and other errors were also eliminated from the official registry.<sup>284</sup> Thus, despite continued inaccuracies, also for the first time in Kenya’s history, the 2002 elections were conducted on the basis of a single, more accurate, computerized registry.

To monitor candidate nominations, campaigning, polling and counting

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<sup>281</sup> Ibid. This is compared to estimates that approximately 1 million voters on Kenya’s register were, in fact, dead. These estimates were based on demographic studies of population growth in Kenya, since actual death certificates had not been filed with Kenya’s Registrar of Births and Deaths.

<sup>282</sup> Ibid., pp. 42 – 43.

<sup>283</sup> See chapters Five and Six.

<sup>284</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 58.

processes for the December 2002 elections, in June 2002 IED joined with dominant religious organizations in Kenya and two other domestically based nongovernmental organizations<sup>285</sup> to establish the Kenya Domestic Observer Program (K-DOP).<sup>286</sup> Although movement organizations had worked closely with the leadership of the NCKK and CJPC in both the 1992 and 1997 elections, as documented in chapters Five and Six, Kenya's 2002 elections marked the first time that they also joined forces with Kenya's Muslim and Hindu communities through the Supreme Council of Muslims of Kenya (SUPKEM) and the Hindu Council of Kenya.<sup>287</sup> Unlike the 1992 and 1997 elections, which had an insufficient number of long-term observers (LTOs) in the field, the K-DOP project trained 630 LTOs and deployed them for a period of three months --two months prior to the 2002 elections and one month afterwards.<sup>288</sup> Three LTOs were assigned to each of Kenya's 210 electoral constituencies and, of these, two were posted to observe and file weekly reports on the electoral environment, and a third was responsible for coordinating the observation and reporting of each

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<sup>285</sup> The Media Institute and Transparency International, Kenya Section.

<sup>286</sup> The Kenya Domestic Observer Program (K-DOP) was established on June 14, 2002.

<sup>287</sup> Population estimates for the number of Muslims in Kenya vary widely from approximately 10 percent to 30 percent. The CIA's *World Factbook* estimates the Muslim community to be 10 percent of the total population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People> The number of Hindu in Kenya are less than one percent, but the Hindu community wields considerable economic and political power in Kenya. Most of the shopkeepers in Kenya's major urban areas are of Indian descent and are Hindu.

<sup>288</sup> Personal correspondence with Majorie Walla-Wafula, Program Officer for Research and Dissemination, Institute for Education in Democracy (IED), October 27, 2005. See also: European Union Election Observation Mission (EU EOM), *Kenya: General Elections, 27 December 2002, Final Report*.

constituency.<sup>289</sup> In addition, another sixty-four regional observers were trained and deployed to coordinate LTOs at regional and national levels, and LTO meetings were convened once per week.<sup>290</sup>

Thus, by the time candidate nominations began in mid-November 2002 for Kenya's December 29<sup>th</sup> elections, a considerable presence of LTOs had been in place throughout the country for approximately six weeks. Historically, as discussed in Chapters Five and Six, the fairness of candidate nominations for Kenya's elections was compromised not only by political violence, but also illegal inference by Kenya's provincial administrators. Although there were some isolated incidences of violence during the 2002 nomination period, it was much less than was predicted, and much less than the 1992 and 1997 nominating periods. Moreover, as a consequence of the IPPG reforms, and legal mobilization by SMOs to promote their enforcement, for the first time since multipartyism was introduced in Kenya, interference by provincial administrators was not a serious problem.<sup>291</sup>

Once the candidate nomination period closed at the end of November, and candidates were cleared by the ECK, the "official" 2002 campaign period began. Although, as discussed in Chapters Five and Six, "nonofficial" campaigning begins long before this, both official and nonofficial campaigning for Kenya's 2002 elections were remarkable in the extent to which, overall, the human and democratic rights of

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<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*.

Kenyans were protected, especially as compared to both the 1992 and 1997 campaign periods. For example, in both the 1992 and 1997 elections, Kenya's provincial administration was notorious for its illegal involvement in campaigning for KANU.

As IED reports:

Traditionally, the provincial administration and civil servants have played a crucial role in campaigning for KANU... [They] contributed at least 50 per cent to KANU's victory in the 1992 elections through direct campaigns for KANU, harassment and intimidation of opposition candidates and supporters, distribution of food and money on behalf of the ruling party, use of the police and other security forces to disrupt opposition meetings and keenly monitor their activities . . . These activities seem to have come to an end, although a few incidents were witnessed in 2002.<sup>292</sup>

Moreover, as Amnesty International, an important international supporter of Kenya's human rights and democracy movement notes, during the 2002 campaign period, and for the first time since Kenya's political opening in 1991, "the police and provincial administration provided adequate policing and security for political rallies and voters, demonstrating that they took the concerns raised by Amnesty International and other local human rights organizations seriously."<sup>293</sup> The extent to which Kenya's provincial administrators and police respected and enforced rights protections is largely credited to the formidable presence of domestic election monitors throughout the country, as well as legal mobilization strategies employed by Kenya's

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<sup>292</sup> Ibid., p. 82.

<sup>293</sup> Amnesty International, *Urgent Action Report*, AI Index: AFR 32/001/2003, 10 January 2003 Library Online: <http://web.amnesty.org/library/Index/ENGAFR320012003?open&of=ENG-KEN>



transnational human rights and democracy movement.<sup>294</sup>

To monitor counting and polling processes, the K-DOP trained an additional 19,000 election observers and deployed them such that at least one observer was present at each of Kenya's 18,366 polling stations.<sup>295</sup> In addition, the ECK accredited another 20,000 observers, primarily representing political parties, movement organizations and the press, bringing the total number of domestic observers of monitoring and counting processes for Kenya's 2002 elections up to 40,000<sup>296</sup>—an increase of approximately 12,000 monitors over Kenya's 1997 elections. Moreover, two relatively small changes in Kenya's electoral laws improved the fairness of both of these processes. First, as a consequence of movement lobbying, the ECK was forced to create an additional 1465 polling stations in the country, to ensure that polling stations were not overburdened, as happened in both the 1992 and 1997 elections.<sup>297</sup> Second, also as a consequence of movement lobbying, vote-counting and ballot verification were required to be conducted at individual polling stations, rather than at designated constituency centers.

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<sup>294</sup> Ibid.

<sup>295</sup> Personal correspondence with Majorie Walla-Wafula, Program Officer for Research and Dissemination, Institute for Education in Democracy (IED), October 27, 2005. See also IED's website: <http://www.iedafrica.org/>

<sup>296</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 99. In addition, the ECK accredited 5000 foreign observers. Ibid.

<sup>297</sup> Republic of Kenya, *Election 2002*, Nairobi: Government of Kenya, December 2002, p. 2. <http://www.kenyaelections.com/>

This seemingly small change not only improved the transparency and openness of the 2002 elections, making “electoral skullduggery” much harder to carry off, as Stephen Ndegwa points out,<sup>298</sup> but it also greatly “reduced the likelihood of . . . constituency centers being a focus for tension and violence.”<sup>299</sup> As a consequence, not only was “the level of political violence and intimidation [in Kenya’s 2002 elections] . . . significantly below that predicted and below the level of the 1997 elections,” but also “in the handful of areas where violence was reported, no one was seriously injured, polling stations remained open, and voting was only briefly interrupted.”<sup>300</sup>

Finally, two technological advances on the part of movement organizations, made possible by the support of foreign-based donors, also significantly improved the effectiveness of their monitoring work. First, cell phones were made available to many election monitors, which enabled them not only to immediately report irregularities to movement and party headquarters, but also to call in precinct tallies as soon as counting was complete. As a result, and as Ndegwa reports, “the opposition knew that it had won hours before the national radio broadcast the results and days before the ECK could officially call the elections. There was simply no opportunity for anyone to ‘retool’ the count.”<sup>301</sup> Second, international donors also provided

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<sup>298</sup> Ndegwa, “Kenya: Third Time Lucky?” p. 154.

<sup>299</sup> *Kenya General Elections, 27 December 2002, Final Report*, European Union Election Observation Mission (EU EOM).

<sup>300</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 89.

<sup>301</sup> Ndegwa, “Kenya: Third Time Lucky?” p. 154.

resources and technical support for IED to construct a website to post electoral results as soon as they were made available.<sup>302</sup> Both of these improvements over Kenya's 1992 and 1997 elections, supported by foreign-based NGOs, foundations and donor state agencies, helped to greatly reduced the incidence of fraud in Kenya's 2002 elections.

Electoral Commission of Kenya (ECK):

At the state level, movement organizations also importantly contributed to the increased capacity and independence of the Electoral Commission of Kenya (ECK). First, as part of the IPPG reform package, movement organizations successfully pressured the Moi regime to enlarge Kenya's electoral commission from twelve to twenty-two members, with the additional ten members being nominating directly by opposition political parties in parliament.<sup>303</sup> Although this change had some impact on the fairness of Kenya's 1997 elections, because it was not introduced until seven weeks prior to elections, the impact was not as significant as it could have been had it been introduced earlier. Thus, the 1998 – 2002 electoral cycle was importantly distinguished from earlier cycles in that opposition party appointees were present on

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<sup>302</sup> Specifically, the Embassy of Switzerland and the Westminster Foundation for Democracy, the European Union, the Carter Center, U.S. AID, the U.S. Embassy, the British High Commission and the Donor Development Group (DDG). Personal correspondence with Majorie Walla-Wafula, Program Officer for Research and Dissemination, Institute for Education in Democracy (IED), October 27, 2005. See also IED's website: <http://www.iedafrica.org/>

<sup>303</sup> The Constitution of Kenya (Amendment) Bill of 1997, which was one of the three major bills comprising the IPPG reform package. Previous to this, all members of Kenya's electoral commission were directly appointed by Kenya's president. See Chapter Six.

the ECK throughout the entire cycle. As a consequence, there was much greater transparency on the commission and the commission more effectively communicated with opposition political parties.<sup>304</sup> Moreover, because the same twenty-two members worked together on the commission from the time the IPPG reforms were implemented in November 1997 through Kenya's December 2002 elections, as IED reports, "[l]ogistically, the ECK was . . . more organized and well prepared to conduct the elections than in any of the previous elections."<sup>305</sup>

Second, as noted above, in a historically unprecedented move, IED began working closely with the ECK on electoral reform during the 1998 – 2002 election cycle, and their first joint project was the production, publication and distribution of the ECK's first elections report in Kenyan history.<sup>306</sup> Although work on the report had begun shortly after Kenya's 1997 elections, it was not completed and published until April 1999. Regardless, it was significant in several respects. First, it marked the first time in Kenyan history that the ECK critically reflected on its institutional role (and failings) in promoting free and fair elections in Kenya, and actually published this critique.<sup>307</sup> Second, through the process of jointly preparing the report with IED,

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<sup>304</sup> For example, unlike the 1992 and 1997 elections, the ECK held regular meeting with representatives of political parties from January 2002 through Kenya's December 27<sup>th</sup> elections.

<sup>305</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 54.

<sup>306</sup> Electoral Commission of Kenya, *Report on the 1997 General Elections*, Nairobi: Government of Kenya, April 1999. As noted above, this collaborative relationship was largely facilitated by funding provided by the UNDP's Good Governance and Poverty Eradication Program (GGEP) with the Kenyan government. The institutional predecessor of this program was the Enhanced Public Administration and Participatory Development (EPAPD) program.

<sup>307</sup> Ibid.

mutual suspicions between representatives of Kenya's reform movement and representatives of government finally began to break down and foundations were laid for future cooperative work.<sup>308</sup> Finally, the ECK's report was based largely on research conducted by movement organizations, and IED in particular,<sup>309</sup> and this became the basis for progressive electoral reforms promoted by *both* government and movement organizations during the remainder of the 1998 – 2002 election cycle.

Third, as discussed above, IED also worked closely with the ECK in implementing an extensive voter education project that included a strong anti-violence message.<sup>310</sup> Although initially focused on just nine pilot districts in Kenya, by early December 2002, the project was expanded to the entire country.<sup>311</sup> As part of this effort, IED helped the ECK to produce eight different voter education programs, which were aired in Kiswahili on Kenya's national radio station, the KBC, as well as five anti-violence campaign messages, which were aired on KCB television.<sup>312</sup> In

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<sup>308</sup> Interviews with representatives of movement organizations and with Elizabeth Odour-Noah, Nairobi Kenya, June 12, 1998 and May 25, 1999. As noted above, Odour-Noah was National Program Advisor for the UNDP's Enhanced Public Administration and Participatory Development Programme (1995 – 1999) in Kenya, as well as its successor, the Good Governance and Poverty Eradication Program (GGEP) (2000 – 2004).

<sup>309</sup> As ECK members complained, the Kenyan government had not allocated them sufficient resources or provided them with the training necessary to conduct the kind of in-depth research on electoral processes that IED conducted.

<sup>310</sup> As noted above, this was largely funded by the GOK/UNDP Good Governance and Poverty Eradication Program. The Australian Agency for International Development (AUSAID) also provided some funding for this program, however. Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 10.

<sup>311</sup> *Ibid*, pp. 11, 125.

<sup>312</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 11. Kiswahili is Kenya's national language. Most Kenyans have at least some knowledge of Kiswahili.

addition, Kenya's Electoral Code of Conduct was for the first time translated from English into Kiswahili and 23,000 copies distributed throughout the country.<sup>313</sup> Kenya's Donor Democracy and Governance Group (DDGG) also sponsored widespread "billboard, print, audio and electronic media advertisements" focused on preventing electoral violence and electing high quality MPs.<sup>314</sup> Finally, for the first time since multiparty elections were convened in Kenya, the ECK began aggressively enforcing its Electoral Code.<sup>315</sup>

Greatly facilitating enforcement of Kenya's Electoral Code was the establishment of "peace committees" in each of Kenya's 210 constituencies approximately one month prior to the December 27<sup>th</sup> elections. These committees were comprised of one Returning Officer, one representative each from the constituency's three dominant religious organizations, one youth leader and two police officers.<sup>316</sup> All peace committee members were jointly trained by IED and the ECK, and most religious and youth leaders had close ties to Kenya's human rights and democracy movement. As IED explains, the committees were designed to "further enhance the capacity of ECK to enforce the Electoral Code of Conduct and promote

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<sup>313</sup> Ibid., p. 12.

<sup>314</sup> Ibid., p. 64.

<sup>315</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*. European Union Election Observation Mission (EU EOM), *Kenya: General Elections, 27 December 2002, Final Report*.

<sup>316</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, pp. 63 – 64.

non-violent campaigns.”<sup>317</sup> Committee members met an average of once per week from one month prior to elections until several weeks after the elections were complete.<sup>318</sup> According to IED’s assessment, the peace committees were highly effective:

They gathered intelligence in their respective constituencies and took preventive measures if and when violence or some other act that would disturb the public peace was about to be committed. Where candidates contravened provisions of the Electoral Code of Conduct, they were reported to the ECK. Where complaints were filed with the ECK regarding breaches of the Code, the ECK dispatched its investigative team to the area concerned, and took very seriously the observations of the peace committee.<sup>319</sup>

As a consequence of these efforts, both international and domestic observers of Kenya’s 2002 elections agreed that they were “the most competently and effectively administered elections to date in the pre-election, election-day, and post-election phase.”<sup>320</sup> Moreover, it was reported that “Kenyans, including representatives across party lines, for the first time reported high levels of confidence in the ECK’s competence and independence.”<sup>321</sup> In its final analysis of the 2002 elections, IED found that the work jointly undertaken by IED and the ECK “sent a strong message against violence, voter bribery, corruption and other political malpractices,” and that

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<sup>317</sup> Ibid., p. 54.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid., p. 63.

<sup>320</sup> U.S. Agency for International Development, Congressional Budget Justification, Democracy and Governance Program: Kenya, 2005. p.2. <http://www.usaid.gov/policy/budget/cbj2005/afr/pdf/615-006.pdf>

<sup>321</sup> Ibid.

this “created confidence in the ECK and brought the realization that indeed the ECK was serious and committed to ensuring that Kenyans exercised their political will freely and elected leaders of their choice.”<sup>322</sup> Finally, they concluded that the ECK “conducted its affairs more openly at all stages [of the electoral process] . . . Election rules tended to be followed, and for the first time, the ECK was diligent in its enforcement of Kenya’s election code.<sup>323</sup> As a consequence, “Kenyans showed for the first time their confidence and trust in the ECK to safeguard the credibility of the electoral process.”<sup>324</sup>

#### The Kenya National Commission on Human Rights:

Also as a consequence of movement activism, Kenya’s first national commission on human rights, the Kenya National Commission on Human Rights (KNCHR), was established during the 1998 – 2002 electoral cycle. Although its institutional predecessor, the Standing Committee on Human Rights, was founded in June 1996,<sup>325</sup> it took five full years, and sustained lobbying by Kenya’s human rights

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<sup>322</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report of the Transitional General Elections 2002*, Synopsis -2002 Election, [http://www.iedafrica.org/elections2002\\_synopsis.asp](http://www.iedafrica.org/elections2002_synopsis.asp)

<sup>323</sup> Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 93.

<sup>324</sup> *Ibid.*, p. 124.

<sup>325</sup> The Moi regime announced the formation of the Committee immediately prior to a July 1995 meeting of Kenya’s major donors, and just after Amnesty International and Human Rights Watch published detailed reports documenting the regime’s continued abuse of Kenyans’ human rights. See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, New York: Human Rights Watch, 2001, p. 173. A draft UDDP report on EPAPD also states that “[t]he Standing Committee on Human Rights was established by the government . . . follow[ing] numerous complaints both globally and internally about gross human rights violations by the government.” It was



and democracy movement, before parliament finally passed a bill that entrenched the institution in Kenyan law and granted it sufficient institutional and fiscal autonomy to pursue its mandate.<sup>326</sup> Whereas all members of Kenya’s initial Standing Committee on Human Rights were directly appointed by the president, reported directly to the president,<sup>327</sup> and were easily removed by the president; members of the newly founded KNCHR were appointed by parliament, reported to parliament, had security of tenure, and, for the first time, had to have proven experience in the field of human rights.<sup>328</sup> Moreover, unlike the initial Standing Committee, the KNCHR was granted broad investigative and subpoena powers, financial autonomy through parliament, the authority “to force the release of any detained or restricted persons,” as well as to demand the “payment of compensation to victims.”<sup>329</sup>

When Kenya’s Standing Committee on Human Rights was first established in June 1996, there were three central parts to its mandate: (1) “to investigate complaints of alleged violations of the fundamental rights and freedoms as set out in [Kenya’s] Constitution”; (2) “to investigate complaints of alleged injustice, abuse of power and

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“an attempt to respond to these complaints and to allay fears. . .” Peter Wanyande, Ludeki Chweya, Paul Collins and Horacio Boneo, *Draft Report of the Study on Benchmarks for Good Governance and Civil Society Participation*, KEN/95/100: GOK/UNP Enhanced Public Administration and Participatory Development Programme, Nairobi: GOK/UNDP, p. 56.

<sup>326</sup> Njerei Rugene, “Bill Setting Up Human Rights Body Is Passed,” *The Daily Nation*, Nairobi: The Nation, June 12, 2002.

<sup>327</sup> As is discussed below, investigative reports by the Committee were to be made, in confidence, to President Moi.

<sup>328</sup> In addition, all committee members on the KNCHR were employed full time, as opposed to the part time appointment of Standing Committee members.

<sup>329</sup> “Kenya to Set up Human Rights Commission,” *Xinhua News*, Xinhua General News Service, October 17, 2000.

unfair treatment of any person by a public officer in exercise of his official duties”;

and (3) “to education the public as to human rights and freedoms by such means as the Committee deems fit . . .”<sup>330</sup> Soon after its founding, it began conducting workshops and public lectures on human rights in each of Kenya’s eight provinces. But, as institutional assessments by the UNDP and Human Rights Watch point out, not only were its investigative powers limited, but also reports on its findings could be made only in confidence to Kenya’s president.<sup>331</sup>

In part due to movement activism, and in part as a consequence of initiative taken by some Committee members, by 1998, the Standing Committee began to assert greater institutional independence. For example, in December 1998, a bold decision was made to publish a 170-page report on the status of human rights in Kenya.<sup>332</sup> The report appeared to be drawn from a series of confidential reports made to President Moi in the previous two years, and specifically included information drawn from two special investigations the Committee had conducted on politically-instigated violence in Coast and Rift Valley provinces leading up to and immediately following Kenya’s 1997 elections.<sup>333</sup> As Human Right Watch commented, despite the continued institutional dependence of the Committee on Kenya’s executive, the report marked “a

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<sup>330</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, p. 172.

<sup>331</sup> Wanyande, Chweya, Collins and Boneo, *Draft Report of the Study on Benchmarks for Good Governance and Civil Society Participation*, p. 56, Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, p. 173 – 182.

<sup>332</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, p. 178.

<sup>333</sup> *Ibid.*

major step in breaking [its previous] silence and in at least raising the visibility of the Standing Committee.”<sup>334</sup>

As a consequence of collaborative work that the Standing Committee had begun with movement organizations, largely supported by the same UNDP program that had targeted Kenya’s national electoral commission for assistance,<sup>335</sup> Committee members increasingly realized that, in order to effectively pursue their institutional mandate, they would need parliament to enact legislation granting them greater institutional and fiscal autonomy. As the national director of the EAPD program, Elizabeth Odour-Noah, explains, perhaps the greatest contribution of this UNDP program was that it “began to importantly change the perspectives and institutional incentives of Kenyan technocrats,”<sup>336</sup> in this case members of the Standing Committee. By providing funding for workshops and encouraging Committee members to consult with representatives of movement organizations, as well as U.N. officials, she explains that “more technocrats began asking ‘What is our [institutional] role?’ and ‘How can we most effectively pursue our mandate?’”<sup>337</sup>

In the case of Kenya’s Standing Committee on Human Rights, this led to a series of collaborative workshops with representatives of movement organizations and

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<sup>334</sup> Ibid., p. 180.

<sup>335</sup> That is, the Enhanced Public Administration and Participatory Development Program (EPAPD), which eventually became the Governance for Poverty Eradication Program (GGPE).

<sup>336</sup> Interview with Elizabeth Odour-Noah, National Program Advisor, EPAPD/GGPE Nairobi, May 25, 1999.

<sup>337</sup> Ibid.

U.N. officials<sup>338</sup> focused on drafting legislation to establish the Committee's institutional autonomy and increase its investigative powers. Although it was another four and a half years before parliament finally enacted this legislation, by the time it did, the Bill not only granted the Committee, renamed the Kenya National Commission for Human Rights, significant institutional and fiscal autonomy, but also broadened its mandate to include the power "to monitor the government's compliance with its obligations under international treaties and conventions on human rights."<sup>339</sup> As a consequence, by the time Kenya's 2002 elections were convened, for the first time in the country's history, it was in compliance with its reporting requirements under international human rights law.<sup>340</sup>

### **The December 2002 Elections:**

As a result of the movement's institution-building efforts at state and societal levels, domestic and international observers agreed that Kenya's 2002 elections were its "most competently and effectively administered elections to date in the pre-

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<sup>338</sup> Specifically, the Office of the U.N. High Commissioner for Human Rights provided technical advice on the draft bill. As Human Rights Watch notes in its analysis, the fact that the Committee took the initiative to contact the U.N. High Commission for Human Rights "indicates some seriousness on the part of the Standing Committee and its advocates to genuinely strengthen its formal base and powers." Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, p. 176.

<sup>339</sup> "Kenya to Set up Human Rights Commission," *Xinhua News*, Xinhua General News Service, October 17, 2000.

<sup>340</sup> "Bill On Rights Body Goes for Scrutiny," *The Daily Nation*, Nairobi: The Nation, April 19, 2002. [UN confirm.]

election, election-day, and post-election phases.”<sup>341</sup> Moreover, because of the dramatic decline in pre- and post-election violence, and increased domestic protections for freedoms of speech, movement, association and assembly, Kenyans’ human and democratic rights were more protected during this election period than at any other time in Kenya’s post-independence history. This section analyzes the results of these elections and examines how Kenya’s majoritarian electoral system impacted outcomes.

In addition to the NARC coalition, four political parties ran presidential candidates in Kenya’s 2002 presidential elections: (1) KANU, (2) FORD-People, (3) the Social Democratic Party (SDP) and (4) Chama Cha Umma (CCU).<sup>342</sup> As discussed above, surprising even close observers of Kenyan politics, NARC’s presidential candidate, Mwai Kibaki, won a landslide victory in this race, sweeping 62.3 percent of the popular vote. The next closest candidate was KANU’s Uhuru Kenyatta, who received only half as many votes --31 percent. FORD-People’s candidate, Simon Nyachae, won only six percent of the vote, and the two remaining presidential candidates, James Orengo of the SDP and Waweru Ng’ethe of CCU both received less than 0.5 percent of the vote.

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<sup>341</sup> U.S. Agency for International Development, Congressional Budget Justification, Democracy and Governance Program: Kenya, 2005. p.2. <http://www.usaid.gov/policy/budget/cbj2005/afr/pdf/615-006.pdf>

<sup>342</sup> See Table 7.1 for a summary of the 2002 presidential elections. Although a majority of SDP members joined NARC in July 2002, as noted above, a minority faction of the party, led by presidential candidate James Orengo, was allowed to field candidates. A fifth presidential candidate, Waweru Ng’ethe of Chama Cha Umma (CCU), is not listed on table 7.1, as he received less than 10,000 votes nationally. David M. Anderson, “Briefing: Kenya’s Elections 2002 – The Dawning of a New Era?” *African Affairs*, vol. 102, 2003, p. 336.

Indicative of the degree of broad-based national support that the NARC coalition generated is the fact that it surpassed the 25 percent threshold in all eight of Kenya's provinces.<sup>343</sup> Moreover, in six of these provinces it received more than 60 percent of the vote, and in four of these six, its level of support was nearly seventy percent or greater.<sup>344</sup> The only other candidate to surpass the 25 percent threshold in five provinces was KANU's candidate, Uhuru Kenyatta. Significantly, however, Uhuru received only 26 percent of the vote in Eastern Province, only 30 percent in Central Province, and only 33 percent of the vote in Coast Province.<sup>345</sup> As was anticipated, he won sizable majorities in Kenya's sparsely populated and remote North Eastern Province (67 percent) and in former President Moi's home province, Rift Valley (53 percent). As documented in Chapters Five and Six, both of these provinces have been KANU strongholds as a consequence of regime malapportionment and gerrymandering during Moi's reign. KANU's vote share in Rift Valley Province, in

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<sup>343</sup> As discussed in chapters Five and Six, the "25 percent rule" was introduced by the Moi-KANU regime just prior to its first multiparty elections in 1992, and required that winning presidential candidates receive a minimum of 25 percent of the vote in five of Kenya's eight provinces, in addition to a plurality of the national vote. As discussed in Chapter Five, its historical precedent was the Nigerian case and the regime insisted that its introduction was to ensure that presidential candidates had broad-based national support. As Kenyan analyst Stephen Ndegwa remarks, however, "[t]his provision [was] written into the constitution by Moi in order to cripple his regionally or ethnically based rivals going into the 1992 elections . . ." Stephen N. Ndegwa, "Kenya: Third Time Lucky?" *Journal of Democracy*, vol. 14, no. 3, 2003, p. 147. By 2002, however, as Table 7.1 indicates, the rule was no longer an obstacle.

<sup>344</sup> As documented in Table 7.1, in descending order, NARC won: 76.5 percent of the vote in Nairobi Province, 76.3 percent of the vote in Western Province, 72.6 percent of the vote in Eastern Province, 69 percent of the vote in Central Province, 62.8 percent of the vote in Coast Province, 61.4 percent of the vote in Nyanza Province, 43.4 percent of the vote in Rift Valley Province, and 28.1 percent of the vote in North East Province. The Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, Nairobi: The Institute for Education in Democracy, 2003, p. 143

<sup>345</sup> See Table 7.1 at the end of this chapter for a summary of presidential election results.

particular, was significantly lower --almost twenty percentage points-- in 2002 than it was in 1997, however.<sup>346</sup> Its vote share was also lower in North Eastern Province, but less dramatically so --approximately 6 percent lower.<sup>347</sup> It was in Coast Province, where the majority of pre-election violence was witnessed in the 1997 elections that KANU's vote share was most dramatically reduced --nearly thirty percentage points-- from 61 percent of the vote in 1997, to only 33 percent in 2002.<sup>348</sup> The only other presidential candidate to exceed the 25 percent threshold in any province in Kenya was FORD-People's Simon Nyachae, who won 29.8 percent of the vote in his home province of Nyanza.

In Kenya's 2002 parliamentary elections, as electoral systems theory would predict, Kenya's single-member district plurality system produced predominantly a two "party" race.<sup>349</sup> Although in addition to NARC, six political parties won seats (KANU, FORD-People, Safina, FORD-Asili, Sisi kwa Sisi, and Shirikisho), NARC and KANU won 90 percent of the 210 elected seats.<sup>350</sup> Unexpectedly, the NARC coalition also won 50 percent of the vote share in these elections, which, again

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<sup>346</sup> As mentioned above, KANU's vote share in Rift Valley was 53 percent in 2002, but was 70 percent in 1997. See tables 7.1 and 6.1 at the end of chapters Seven and Six.

<sup>347</sup> KANU's vote share in North Eastern was 67 percent in 2002, and 73 percent in 1997. Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> "Party" is placed in quotations here because, as is explained below, although NARC was a broad coalition of opposition political parties, primarily due to the institutional incentives in Kenya's majoritarian electoral system, it officially registered with the state and ran candidates as a *single* party.

<sup>350</sup> As discussed in Chapter Three, Duverger's Law is a political principle that states that plurality electoral systems tend "to create and maintain two-party systems." Maurice Duverger, "Duverger's Law: Forty Years Later," in *Electoral Laws and Their Political Consequences*, Grofman and Lijphart, eds., p. 69.

because of Kenya's majoritarian electoral system, translated into 60 percent (or 125 of 210 seats) of the elected seats in parliament. KANU won 31 percent of the seats (64 seats) with 27.6 percent of the vote; FORD-People won 6.7 percent of the seats (14 seats) with 8.3 percent of the vote; and Safina, FORD-Asili, and Sisi kwa Sisi won 1 percent of the seats (2 seats each) with 3.6, 1.4 and 0.7 percent of the vote, respectively. Finally, Shirikisho won 0.5 percent of the seats (1 seat) with 0.3 percent of the national vote.<sup>351</sup>

Indicative of the extent to which regime malapportionment and gerrymandering continued to favor KANU is the fact that in the two provinces where KANU won the most seats, Rift Valley Province, where it won 30 seats, and North Eastern Province, where it won 10 seats, the average number of votes per seat was 16,347 and 6,546, respectively.<sup>352</sup> NARC, on the other hand, won all eight seats in Nairobi Province, where the average number of votes per seat was 32,920 –or *more than twice* the number of votes per seat in Rift Valley, and more than *five times* the number of votes per seat in North Eastern Province, won by KANU.<sup>353</sup> Even within Rift Valley Province, however, the difference in population between KANU and NARC constituencies was significant. Here it also took more than twice as many

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<sup>351</sup> See Table 7.2 at the end of this chapter for a summary of the 2002 parliamentary elections results.

<sup>352</sup> These numbers are calculated from "Table 9.2: Election Results by Party and Province" and "Table 9.6: Parliamentary Seats by Province," Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, Nairobi: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, 1998, pp. 103 and 107.

<sup>353</sup> Ibid.



votes to win a NARC seat as opposed to a KANU seat.<sup>354</sup> Still, in these elections, it was the NARC coalition, as Kenya's largest party, that benefited most from Kenya's majoritarian electoral system. Not only did its 50 percent vote share translate into 60 percent of the seats in parliament, as mentioned above, but NARC parliamentary candidates also very likely benefited from NARC's landslide victory in the concurrent presidential race as well.<sup>355</sup>

Despite the fact that the reformist NARC coalition clearly benefited from Kenya's majoritarian electoral system in the 2002 presidential and parliamentary races, the problems of this system remained. Although malapportioned districts in this case worked to provide rough proportional representation for KANU in parliament (vote share was fairly accurately translated into seat share), smaller parties in Kenya were disadvantaged by the system. Moreover, representation of the political interests of smaller parties comprising the NARC coalition was also ultimately contingent on the new government actually delivering its pre-election promise of enacting constitutional reforms that promoted executive power-sharing, coalition government, a

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<sup>354</sup> NARC's 18 seats in Rift Valley Province were won with an average of 32,612 votes per seat, whereas KANU's 30 seats were won with an average of 16,347 votes per seat. Calculated from "Table 9.2: Election Results by Party and Province" and "Table 9.6: Parliamentary Seats by Province," Institute for Education in Democracy, the Catholic Justice and Peace Commission and the National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya: 29 – 30 December, 1997*, Nairobi: Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, 1998, pp. 103 and 107.

<sup>355</sup> As electoral systems theorists point out, and as discussed in chapters Five and Six, "[b]ecause the presidency is the biggest political prize to be won and because only the largest parties have a chance to win it, these large parties have a considerable advantage over smaller parties that tends to carry over into legislative elections." Lijphart, *Patterns of Democracy*, p. 155. Moreover, this effect "is especially strong when the presidential election is decided by plurality instead of majority-runoff (where small parties may want to try their luck in the first round) and when the legislative elections are held at the same time or shortly after the presidential elections. Ibid. As discussed above, both of these conditions held in the Kenyan case.

form of PR, bi-cameralism, executive-legislative balance, and a reformed judiciary with clear powers of judicial review –that is, central institutions of consensus democracy. As discussed above, it was NARC’s endorsement of this constitutional reform agenda that largely explains not only the coalition itself, but also its margin of victory in the 2002 presidential and parliamentary races.

**Conclusion:**

This chapter has argued that NARC’s electoral victory, as well as the advance of Kenyans’ human and democratic rights protections through the 1998 – 2002 electoral cycle, is largely explained by the success of Kenya’s human rights and democracy movement in three main areas: (1) proposing a constitutional reform agenda at state and societal levels that recommended central institutional features of consensus democracy; (2) facilitating the emergence of an opposition unity pact that committed itself to enacting this reform agenda; and (3) institution-building to provide for more free and fair electoral processes in Kenya. Like the previous two chapters, this chapter also demonstrated the analytical value of three central social movement concepts --*political opportunity structures*, *mobilizing structures* and *framing processes*-- as well as legal mobilization strategies, to explain the continued development and political impact of Kenya’s human rights and democracy movement during this period.

Specifically, although there continued to be regime violations of the 1997 Inter-Party Parliamentary Group (IPPG) reforms, the expanded democratic space

made available by forcing at least partial regime compliance, through employing legal mobilization strategies, made a significant difference in allowing the movement to advance its reform agenda through the 1998 – 2002 electoral cycle. In addition, the continued organizational support by Kenya's dominant religious organizations, and the financial, technical and moral support provided foreign-based human rights organizations, private foundations and the aid agencies of donor states, were also of critical importance to the survival and effectiveness of movement organizations (SMOs). Finally, by continuing to frame movement demands in terms of constitutionally and internationally recognized human and democratic rights, and by engaging in legal mobilization reform strategies to support these demands, movement organizations succeeded not only in facilitating the KANU regime's defeat in 2002, but also in creating a much higher level of human and democratic rights awareness in Kenya, and, ultimately, the deepening of democratic development. As the study's concluding chapter, Chapter Eight, argues, however, the continued development of human and democratic rights in Kenya is contingent on the new NARC government delivering on its campaign promise of comprehensive constitutional reform.

**Table 7.1: Kenya's 2002 Presidential Elections  
Provincial Distribution of Votes by Candidate and Party<sup>356</sup>**

Province	Uhuru/KANU	Kibaki/NARC	Nyachae/FORD-P	Orengo/SDP	Vote Totals
Nairobi	76,001 (20.8%)	279,705 ( <b>76.5%</b> )	8,775 (2.4%)	891 (0.2%)	365,673
Central	308,072 ( <b>30.3%</b> )	701,916 ( <b>69.0%</b> )	4,441 (0.4%)	1,443 (0.1%)	1,017,925
Eastern	270,060 ( <b>26.2%</b> )	748,273 ( <b>72.5%</b> )	7,854 (0.8%)	3,465 (0.3%)	1,031,899
North East	83,358 ( <b>67.1%</b> )	34,916 ( <b>28.1%</b> )	5,660 (4.6%)	297 (0.2%)	124,304
Coast	121,645 ( <b>33.4%</b> )	228,915 ( <b>62.8%</b> )	11,716 (3.2%)	1,539 (0.4%)	364,638
Rift Valley	762,354 ( <b>53.0%</b> )	624,633 ( <b>43.4%</b> )	45,375 (3.2%)	3,830 (0.3%)	1,437,795
Western	143,013 (21.5%)	506,999 ( <b>76.3%</b> )	9,069 (1.4%)	3,442 (0.5%)	664,348
Nyanza	64,411 (7.6%)	521,052 ( <b>61.4%</b> )	252,488 ( <b>29.8%</b> )	9,630 (1.1%)	848,694
<b>Total</b>	1,828,914 (31.2%)	3,646,409 (62.3%)	345,378 (5.9%)	24,537 (0.4%)	5,855,276

<sup>356</sup> Vote tallies are given for the top four candidates only. The Institute for Education in Democracy (IED), "Table 9.4, Summary of Presidential Votes," *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, Nairobi: The Institute for Education in Democracy, 2003, p. 143. Provincial vote totals that reach or exceed the 25 percent minimum threshold are in bold print. Thus, in these elections, NARC exceeded the minimum 25 percent threshold in all eight of Kenya's provinces, and in a majority of these provinces, its majority was 63 percent or greater.

**Table 7.2: Kenya's 2002 Parliamentary Elections**

Party	Seats <sup>357</sup>	% of Seats <sup>358</sup>	% of Vote <sup>359</sup>
NARC	125 / 132	59.5 / 59.5	50.0
KANU	64 / 68	30.5 / 30.6	27.6
FORD-People	14 / 15	6.7 / 6.8	8.3
Safina	2 / 2	1.0 / 0.9	3.6
FORD-Asili	2 / 2	1.0 / 0.9	1.4
Sisi kwa Sisi	2 / 2	1.0 / 0.9	0.7
Shirikisho	1 / 1	0.5 / 0.5	0.3
TOTAL	210 / 222		

<sup>357</sup> The first number is the number of seats elected. The Institute for Education in Democracy (IED), "Table 9.6: Parliamentary Seats by Province," *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, Nairobi: The Institute for Education in Democracy, 2003, p. 107. The second number is the total number of seats held by parties once nominated seats were allocated.

<sup>358</sup> The first number is calculated based on 210 elected parliamentary seats and the second number is based on the total of 222 parliamentary seats, once the twelve nominated seats were allocated. As discussed in Chapter Six, as part of the movement-promoted IPPG reform package, enacted just prior to the 1997 elections, these seats had to be allocated according to parties' proportional representation in parliament; prior to this time, all nominated seats went to KANU.

<sup>359</sup> Calculated from IED's report on election results by party and province. The Institute for Education in Democracy (IED), "Table 9.2: Election Results by Party and Province," *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 103.

## Chapter Eight

### **Transnational Movements, Human Rights and Democracy: Conclusions and Contributions of the Kenyan Case**

The test of human rights legitimacy, therefore, is taken from the bottom, from the powerless . . . activists need to attend to [the problem of] how to create conditions in which individuals on the bottom are free to avail themselves of such rights as they want. . .

--Michael Ignatieff, 2001

The democratic problem in a plural society is to create political institutions which give all the various groups the opportunity to participate in decision-making, since only thus can they feel that they are full members of a nation, respected by their more numerous brethren, and owing equal respect to the national bond which holds them together . . .

--W. Arthur Lewis, 1965

In the near term, democrats around the world confront a historic opportunity and imperative: to prevent a third reverse wave of democratic breakdowns by moving the values, practices, laws, and institutions of new and unstable democracies toward consolidation.

--Larry Diamond, 1999

#### **Summary of Central Findings:**

We are now in a position to review the study's central findings and assess the general contributions the Kenyan case may make to theories in political science. The study began with a series of questions, puzzles and hypotheses. The overarching research question motivating the study was: What explains the emergence of human and democratic rights in historically authoritarian and dependent regimes? This question was examined in the context of the Kenyan case because of the empirical and theoretical puzzles it poses to dominant theories in political science. The study's central finding is that between December 1991 and December 2002<sup>1</sup> certain

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<sup>1</sup> It was in December 1991 that Kenya's incumbent authoritarian regime first conceded multiparty elections, and in December 2002 that it was finally defeated in presidential and parliamentary races. In terms of the regime categories outlined in the study's introductory chapter, Chapter One, this period covers Kenya's transition from an authoritarian regime to a "pseudodemocracy," to an "electoral democracy." As Chapter One explains, building on the work of Larry Diamond, "pseudodemocracies"

fundamental human and democratic rights became more widely recognized, practiced and protected in Kenya due to the emergence, development and political impact of a transnational social movement dedicated to these goals. This movement worked at state, societal and international levels to promote and protect Kenyans' human and democratic rights, as defined by the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> and Kenya's constitutional Bill of Rights.<sup>3</sup>

At the state level, specific reforms that the study traced to Kenya's transnational human rights and democracy movement included: the introduction of multiparty politics; reinstatement of secret ballot voting; establishment (and enforcement) of presidential term limits; repeal or significant amendment of Kenyan laws suppressing freedoms of speech, information, association and assembly; greater protections from arbitrary arrest, searches, seizures and torture;<sup>4</sup> release of all political prisoners; reinstatement of judicial tenure; increased institutional capacity and independence of Kenya's national electoral commission;<sup>5</sup> enactment of progressive electoral law reforms resulting in more free and fair electoral processes; repeal of constitutional prohibitions on coalition government; establishment of Kenya's first

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are conceptually distinct from both authoritarian regimes and electoral democracies in that they are characterized by the presence of opposition political parties, but electoral processes are not yet free or fair enough to allow for the ruling party to be defeated. Diamond, *Developing Democracy: Toward Consolidation*, p. 15.

<sup>2</sup> Kenya ratified the ICCPR in May 1972 and it came into force in March 1976.

<sup>3</sup> Kenya's Constitution came into force at independence in 1963.

<sup>4</sup> Although there continue to be violations of these rights, the frequency of violations has been dramatically reduced.

<sup>5</sup> The Electoral Commission of Kenya (ECK).

independent national commission on human rights;<sup>6</sup> fulfillment of state reporting requirements under the ICCPR; ratification of two new international human rights treaties;<sup>7</sup> establishment of an independent constitutional review commission to comprehensively reform Kenya's Constitution with broad-based participation by Kenyan citizens; and finally, regime change to an electoral democracy, after nearly forty years of post-colonial authoritarian rule.

At the international level, movement actors and organizations effectively mobilized the international human rights regime in support of its goals; placed human and democratic rights violations in Kenya on the international political agenda; delegitimized Kenya's incumbent authoritarian regime; successfully pressured donor states to make aid delivery contingent on human and democratic rights reform; successfully lobbied donor states to provide financial and technical support to movement organizations; and, ultimately, strengthened the international rights regime by forcing a noncompliant party state to begin observing its human rights obligations as defined by international law.

Perhaps most impressive, however, was the movement's impact at the level of Kenyan civil society. As a consequence of the movement's reform activities, in the period between December 1991 and December 2002, to an historically unprecedented extent, Kenyans began freely practicing political speech; forming and joining

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<sup>6</sup> The Kenya National Commission on Human Rights.

<sup>7</sup> The Convention on the Rights of the Child (CRC) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) were ratified by the Kenyan state in July 1990 and February 1997, respectively.



independent organizations, including opposition political parties; campaigning and voting in multiparty elections; engaging in civil disobedience, and demanding state accountability through the courts, the parliament and the streets.

With the support of foreign-based international human rights organizations, independent foundations, and later donor states, dominant organizations comprising Kenya's human rights and democracy movement monitored and publicized state abuses of human and democratic rights; implemented nation-wide human and democratic rights awareness programs; established paralegal training programs; provided legal aid to victims of abuse; established Kenya's first independent, nongovernmental, domestic election monitoring organization; professionally trained and deployed a formidable presence of election monitors for Kenya's 1992, 1997 and 2002 multiparty elections; made human and democratic rights protections, including comprehensive constitutional reform, a priority on the national political agenda; organized three citizen-based constitutional assemblies; and, ultimately, produced a draft Constitution that was later largely adopted by Kenya's state-mandated constitutional reform commission, after collecting more than 1800 pages of recommendations from Kenyan citizens.<sup>8</sup> Although there continue to be violations of human and democratic rights in Kenya, and the future of democracy remains uncertain, the political impact of Kenya's contemporary human rights and democracy movement has been both unprecedented and unexpected.

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<sup>8</sup> Although it was widely anticipated that this draft, or a slightly revised version of it, would be enacted either just before Kenya's December 2002 elections, or shortly afterwards, as is discussed in the study's postscript, at the time of this writing (April 2006), Kenya's majoritarian constitution remains intact.

**Theoretical Contributions of the Kenyan Case:**

These findings challenge dominant explanations of human and democratic rights expansion in the political science literature. First, by documenting the role of nonstate actors in enforcing international treaty obligations in the area of human rights, the study challenges dominant realist and neo-realist assumptions in international relations theory regarding the role of states as prime movers in the international system. Second, by documenting the movement's leading role in promoting Kenya's transition from an authoritarian regime to an electoral democracy, the study challenges dominant approaches in comparative politics that focus predominantly on regime elites and political parties, and tend to discount the role of societal and transnational influences in explaining democratic transitions. Third, by documenting movement emergence and impact under conditions of economic decline and state control of news media, the study challenges central assumptions of modernization theories regarding the expansion of human and democratic rights. Finally, by examining the role of legal mobilization strategies in movement development and impact, the study challenges dominant civil society theories that tend not to examine the strategic dimensions of organizational formation and impact, or the role of international level variables in these processes.

By integrating state, societal and international levels of analysis, and building on insights from social movements and legal mobilization theories, the study puts forth a new theoretical framework to explain the empirical and theoretical puzzles

posed by the Kenyan case. Specifically, the study argues for the analytical value of three core concepts found in social movements theory --*political opportunity structures, mobilizing structures, and framing processes*-- as well as legal mobilization strategies, to explain the emergence, development and political impact of Kenya's contemporary human rights and democracy movement. By framing movement demands in terms of human and democratic rights recognized under international and constitutional law, and "mobilizing" these laws to legitimate their demands, the study examines how emergent movement leaders were able to strategically exploit three changes in national and international political opportunity structures to catalyze movement emergence: (1) the increased repressiveness of Kenya's incumbent authoritarian regime, (2) increased regime "vulnerability,"<sup>9</sup> and (3) the emergence of new movement allies in the form of foreign-based international human rights organizations, independent foundations and later donor states.

As the case study documents, the critical organizational question in the earliest stages of movement emergence is whether or not sufficient mobilizing structures are available to activists for a movement to "take off." As was seen in Chapter Four, three mobilizing structures were particularly important to Kenya's transnational human rights and democracy movement's emergence: (1) Kenya's professional legal association, the Law Society of Kenya (LSK), (2) dominant church organizations,

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<sup>9</sup> As the study explains, this concept builds on Keck and Sikkink's concept of "state vulnerability." Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. In the case of movement emergence in Kenya, increased regime "vulnerability" resulted from the collapse and delegitimization of single party states in Eastern and Central Europe, the breakup of the former Soviet Union, and new post-Cold War international political re-alignments

specifically the National Council of Churches of Kenya (NCCCK)<sup>10</sup> and Kenya's Roman Catholic Church,<sup>11</sup> and (3) foreign-based international human rights organizations. Whereas members of the LSK and their international colleagues provided necessary technical skills to effectively deploy legal mobilization strategies at state, societal and international levels, it was the moral authority and extensive domestic organizational networks of Kenya's dominant church organizations that provided the movement with its domestic legitimacy and mass base. Foreign-based human rights organizations also played critical roles in exposing and publicizing regime abuses internationally, and in successfully lobbying legislatures in donor states to withhold aid to Kenya and materially and politically support movement organizations.

Once Kenya's transnational human rights and democracy movement successfully "emerged" and forced a democratic opening in Kenya's resistant authoritarian regime, it continued as the central political actor in advancing human and democratic rights reforms not only leading up to Kenya's founding elections in December 1992, but also through Kenya's next two electoral cycles, 1993 – 1997 and 1998 – 2002, when the case study ends. This finding challenges a central assumption of democratic transitions theory. Although democratic transitions theory recognizes a role for civil society actors in regime transitions, it predicts that once founding

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<sup>10</sup> The National Council of Churches of Kenya (NCCCK) is an umbrella organization that conjoins most of Kenya's Protestant Churches. Protestants constitute approximately 45 percent of Kenya's population. <http://www.cia.gov/cia/publications/factbook/geos/ke.html#People>

<sup>11</sup> Roman Catholics constitute approximately 33 percent of Kenya's population. Ibid.

elections are announced by regime “hard-liners,” political parties will assume “center stage in the political drama,” and civil society actors and organizations will recede into the background.<sup>12</sup>

To explain this political puzzle, the study argues for the continued value of concepts from social movements theory –mobilizing structures, political opportunity structures and framing processes-- as well as legal mobilization strategies. Specifically, the study finds that the continued dominance of Kenya’s human rights and democracy movement in promoting rights protections is explained by the development of new movement mobilizing structures in the form of formal social movement organizations (SMOs).<sup>13</sup> These SMOs created an enduring organizational structure for movement development, which allowed it to sustain successful collective action efforts much longer than democratic transitions theorists could anticipate or

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<sup>12</sup> Specifically, as discussed in Chapter Five, this theory predicts that civil mobilization occurs “once [regime] soft-liners have prevailed over the hard-liners,” but insists that this mobilization is “is always ephemeral.” O’Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, pp. 48, 55, 56.

<sup>13</sup> Social movement theorists Jackie Smith, Ron Pagnucco and Charles Chatfield define social movement organizations (SMOs) as “those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation.” They further explain that SMOs “vary in their degree of *formalization*, or formally defined roles, rules and criterion of membership, and *centralization*, or the degree of concentration of decision-making power.” Smith, Pagnucco, and Chatfield, “Social Movements in World Politics: A Theoretical Framework,” in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Smith, Chatfield and Pagnucco, pp. 60 – 61. In an early work, Mayer Zald and Roberta Garner argue that social movement organizations differ from other types of organizations in two ways: (1) “they have goals aimed at changing the society and its members; they wish to restructure society or individuals . . .” and (2) “they are characterized by an incentive structure in which purposive incentives predominate. While some short-run material incentive may be used, the dominant incentives offered are purposive . . .” Zald and Garner, “Social Movement Organizations: Growth, Decay, and Change,” p. 123.

predict. The emergence and success of these organizations, in turn, is explained by two further changes in domestic and international political opportunity structures: (1) lowered state barriers to independent organization, as a result of the regime's political opening in December of 1991, and (2) the provision of material, technical and moral support to these organizations by foreign-based human rights organizations, foundations and aid agencies of donor states, as a consequence of movement lobbying and legal mobilization. That these further changes in political opportunity structures were caused by the movement itself also confirms a central hypothesis of social movements theory –that an important difference between nascent and more mature movements is that successful emergent movements often become an important influence on political opportunity structures themselves.<sup>14</sup>

By then continuing to frame movement demands in terms of constitutionally and internationally recognized human and democratic rights, and engaging in legal mobilization strategies to promote these rights, new movement organizations were able to: (1) sustain a common reform agenda and sense of collective identity among diverse domestic and foreign-based actors; (2) expose contradictions between regime rhetoric and practice to promote reforms and ensure their implementation, or, at the very least, ensure that violations were highly publicized; (3) increase general awareness among Kenyans of their constitutionally and internationally recognized human and democratic rights, and the role of state institutions in protecting them; (4)

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<sup>14</sup> McAdam, McCarthy, Zald, "Introduction," in McAdam, McCarthy, Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, 1996.

facilitate democratic institution-building at state, societal and international levels to promote greater rights protections; and (5) ultimately force Kenya's incumbent regime to concede deeper human and democratic rights reforms than it otherwise would have.

In addition, whereas dominant theories of democratization in the political science literature tend not to examine or explain the political violence that often is associated with democratic openings and regime transitions, the study argues that social movements theory provides valuable theoretical resources for better understanding potential sources of this violence. Specifically, social movements theory anticipates the emergence of "countermovements"<sup>15</sup> in response to the development of any social movement that becomes a significant socio-political force, as well as increasingly intense "framing contests" between movements, countermovements and regime elites, depending on the movement's goals and the extent to which it threatens other socio-political actors.

In the Kenyan case, a regime-supported countermovement emerged in the last quarter of 1991, in response to the growing strength of Kenya's human rights and democracy movement, and framing contests between this countermovement and the reform movement did, indeed, become increasingly conflictual and, ultimately, violent over time. This violence peaked leading up to and immediately following Kenya's 1992 elections.<sup>16</sup> It emerged again just prior to and after the 1997 elections,<sup>17</sup> but it

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<sup>15</sup> "Countermovements" are defined by social movement theorists simply as those movements that "make contrary claims simultaneously to those of the original movement." Meyer and Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity," p. 1631.

<sup>16</sup> Leading up to, during and immediately following Kenya's first multiparty elections in December of 1992, it is estimated approximately 1500 Kenyans were killed and at least 300,000 displaced, primarily

was virtually absent in Kenya's third multiparty elections when Kenya's incumbent regime was finally, and decisively, defeated by an opposition coalition, the National Rainbow Coalition, NARC. As domestic and international observers alike reported, these elections were Kenya's most peaceful to date and "contributed to [a] quantum leap in democracy" in Kenya.<sup>18</sup>

Building on theoretical insights from social movements and electoral systems theory, as well as empirical insights from the Kenyan case, the study finds that two variables are important to explaining this political violence in Kenya: (1) countermovement framing strategies and (2) Kenya's majoritarian electoral system. Specifically, the study finds that the form Kenya's countermovement took, and the demands its leaders made, were largely shaped by institutional incentives embedded in Kenya's majoritarian electoral system. As electoral systems theorists predict, in ethnically plural societies, like Kenya's, single-member district plurality electoral systems create institutional incentives for groups of similar segments to cluster

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in parts of Rift Valley and Western provinces. Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, p.1.

<sup>17</sup> Violence leading up to the 1997 elections was on a smaller scale, but still serious, with an estimated 200 Kenyans killed and more than forty-thousand displaced, --this time predominantly in Coast Province, but also in parts of Rift Province. The numbers killed and displaced in the political violence leading up to Kenya's 1997 elections vary considerably. The numbers cited here come from two sources: (1) Kenya Human Rights Commission, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya*, Nairobi: KHRC, 1998 and (2) Holmquist and Ford, "Kenya Politics: Toward a Second Transition?" p. 229.

<sup>18</sup> The Institute for Education in Democracy (IED), *Enhancing the Electoral Process in Kenya: A Report on the Transition General Elections 2002*, p. 33.



together in order to gain political influence.<sup>19</sup> This, in turn, tends to encourage parochial voting, group polarization and, in some cases, political violence. This appears to be the case in Kenya leading up to and following its 1992 and 1997 elections, where countermovement leaders, responding to these institutional incentives, engaged in framing strategies that mobilized ethno-political violence as part of a regime-supported electoral strategy to ensure KANU parliamentary majorities. Predictably, violence was concentrated in KANU swing constituencies and constituencies that were otherwise of strategic electoral importance to KANU.

The success of countermovement framing strategies, as the study documents, was also importantly facilitated by the KANU regime's ability to control information reaching Kenya's rural areas, where the majority of Kenyans live.<sup>20</sup> This was achieved not only through controlling access to Kenya's only national radio broadcast system, the Kenya Broadcasting Corporation (KBC), but also through declaring certain areas of the country that were either KANU-dominated or swing constituencies for KANU, "KANU zones." As a Kenyan political analyst explains, "[i]n those areas . . . advocates of multiparty democracy and opposition politicians were banned from

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<sup>19</sup> Lewis, *Politics in West Africa*, pp. 64 – 74, Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, pp. 156 – 168, Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 143 – 170.

<sup>20</sup> In addition, as is discussed below, due to regime malapportionment, also made possible by Kenya's majoritarian electoral system, rural constituencies in Kenya were disproportionately represented in Kenya's parliament.

campaigning, and nonnative residents were cautioned against voting for opposition politicians.”<sup>21</sup>

Thus, although the movement ultimately did not succeed in reforming Kenya’s majoritarian electoral system prior to the December 2002 elections, because it did succeed in breaking the regime’s monopoly on information reaching Kenya’s rural areas during the 1998 – 2002 electoral cycle, it effectively undermined countermovement framing efforts and, in so doing, removed an important catalyst of political violence. As was seen in Chapter Six, seven weeks prior to Kenya’s 1997 elections, a sweeping set of constitutional, statutory and administrative reforms were enacted by Kenya’s parliament, the Inter-Party Parliamentary Group (IPPG) reforms. These reforms repealed entirely or significantly amended almost all of Kenya’s most repressive laws, which had become a target of movement legal mobilization strategies just after the 1992 elections. Despite the fact that movement leaders remained critical of the IPPG reform package for not being comprehensive enough, and for failing to reform Kenya’s majoritarian electoral system, in particular, it was still significant in expanding protections for Kenyans’ freedoms of speech, association, assembly and movement during the 1998 – 2002 electoral cycle, and in importantly undermining the ability of countermovement leaders to mobilize ethno-political violence. Moreover, unlike the 1992 and 1997 elections, Kenyans’ freedoms of speech, movement, association and assembly become *more* protected as the 2002 elections approached, rather than less so.

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<sup>21</sup> Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transitional Moments in Kenyan Politics,” p. 610.

Finally, the study also found that Kenya's majoritarian electoral system was an important variable in explaining KANU "victories" in the 1992 and 1997 elections, and, as a result, Kenya's protracted democratic transition. As electoral system theorists predict, and as the Kenyan case clearly supports, not only do single-member district plurality systems tend to overrepresent large parties and create high institutional thresholds for the emergence of new parties, but they also provide political opportunities for the re-drawing of constituency boundaries in ways that can even more seriously exaggerate regime support. Specifically in the Kenyan case, as a consequence of blatant regime malapportionment and gerrymandering, the incumbent KANU regime won parliamentary majorities in the 1992 and 1997 elections, with only 26.6 and 38.6 percent of the vote respectively.<sup>22</sup>

In addition to these general distorting effects of majoritarian electoral systems in parliamentary representation, as electoral systems theorists also predict, presidential systems, like Kenya's, can also importantly contribute to disproportional legislative outcomes. This is predicted especially under conditions, like Kenya's, where "the presidential election is decided by plurality instead of majority-runoff (where small parties may want to try their luck in the first round) and when the legislative elections are held at the same time or shortly after the presidential elections."<sup>23</sup> As Arend Lijphart argues, "[b]ecause the presidency is the biggest political prize to be won and

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<sup>22</sup> See tables 5.2 and 6.2 at the end of chapters Five and Six for summaries of the 1992 and 1997 elections.

<sup>23</sup> As Lijphart argues, "[p]residential systems can have an indirect but strong effect on the effective number of parliamentary parties." Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 155.

because only the largest parties have a chance to win it, these large parties have a considerable advantage over smaller parties that tends to carry over into legislative elections.”<sup>24</sup> In the Kenyan case, this effect was perhaps especially exaggerated not only because its plurality presidential and parliamentary elections were held concurrently, but also because of the degree of political (and economic) power concentrated in the executive office.

Moreover, the case study documents how two new regime-supported electoral laws, introduced four months prior to Kenya’s 1992 elections, virtually sealed the Moi-KANU regime’s “victory” in these elections. The first of these required that presidential candidates win a minimum of 25 percent of the vote in five of Kenya’s eight provinces, in addition to receiving a plurality of the national vote. The historical precedent for this law, known as the “25 percent rule,” was Nigeria,<sup>25</sup> and similar to the Nigerian case, the regime justified it as a means of ensuring that winning presidential candidates had broad-based national support. Although the law had this general effect in Kenya over the long term, as the case study documents, in the short term, it was a carefully calculated regime strategy to ensure its re-election. Since KANU was the only political party with a national presence, and elections were only four months away, it was virtually impossible for any political party except KANU to

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<sup>24</sup> Ibid.

<sup>25</sup> This law was first introduced in Nigeria’s 1979 Constitution as an institutional incentive to encourage the development of “a small number of parties . . . each with broad multiethnic support.” Horowitz, “Chapter Fifteen: Structural Techniques to Reduce Ethnic Conflict,” *Ethnic Groups in Conflict*, p. 636.

fulfill the law's requirements, unless opposition parties could quickly agree to run a single presidential candidate.

This possibility was basically precluded by the regime's second new law, which was also highly majoritarian in character and required Kenya's elected president to form a cabinet solely from his or her own party.<sup>26</sup> By thus eliminating the possibility of coalition government, the Moi-KANU regime made it virtually impossible for emergent opposition parties to field a single presidential candidate to defeat the regime. As the results of Kenya's 1992 elections indicate,<sup>27</sup> had there been institutional incentives for coalition government prior to these elections, the incumbent Moi-KANU regime would very likely have been defeated much sooner than it ultimately was. In these elections, President Moi was re-elected with only 36 percent of the popular vote, and a coalition between any two of the top three opposition presidential candidates would very likely have led to his defeat.<sup>28</sup>

Drawing on evidence from the Kenyan case and insights from electoral systems theories, the study argued that if, instead, Kenya introduced larger multi-member constituencies and proportional representation, as consensus theorists of democracy, as well as leaders of Kenya's human rights and democracy movement, advocate, thresholds to representation in Kenya would be reduced, votes more

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<sup>26</sup> A dominant characteristic of majoritarian systems versus consensus democracy systems is "[c]oncentration of power in sing-party majority cabinets versus executive power-sharing in broad multi-ethnic coalitions." Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 3.

<sup>27</sup> See tables 5.1 and 5.2 the end of Chapters Five for a summary of the 1992 presidential and parliamentary races.

<sup>28</sup> Ibid.

accurately translated into parliamentary seats, and the stakes for winning seats also reduced. Since, under these conditions, minorities are guaranteed proportional representation at the national level regardless of the “majority” influence in their constituency or region, the violence that Kenyans witnessed leading up to and following the 1992 and 1997 elections likely also would have been attenuated. In addition, the problems of regime-biased electoral malapportionment and gerrymandering of constituencies would be eliminated entirely. Finally, if Kenya had this type of electoral system<sup>29</sup> prior to the 1992 elections, in addition to institutional incentives for coalition government, the incumbent Moi-KANU regime very likely would have been defeated in these elections, and Kenya’s transition to an electoral democracy would have come a decade earlier than it ultimately did.<sup>30</sup>

Finally, the study’s last empirical chapter, Chapter Seven, argued that defeat of the KANU regime and the advance of Kenyans’ human and democratic rights protections during the 1998 – 2002 electoral cycle was largely explained by the success of Kenya’s human rights and democracy movement in three main areas: (1) winning regime concessions on the process of constitutional reform, and advancing a substantive constitutional reform agenda that advocated seven of ten institutional characteristics of consensus democracy; (2) facilitating the emergence of a formal opposition unity pact that held through the election period; and (3) continuing

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<sup>29</sup> That is, multi-member constituencies and proportional representation.

<sup>30</sup> As mentioned above, not only did KANU win a majority (53 percent) of parliamentary seats with less than one-third of the popular vote, but President Moi was also re-elected with only 36.6 percent of the vote.

institution-building efforts to provide for more free and fair electoral processes, as well as the general expansion of Kenyans' human and democratic rights during this period.

Regarding the process of reform, the chapter demonstrated how, using legal mobilization strategies, movement leaders were able to win two key concessions from the regime. First, against the regime's wishes of keeping the constitutional reform process confined to the KANU-dominated parliament, the movement succeeded in guaranteeing broad-based participation by Kenyan citizens to ensure that the process was "people-driven," rather than "parliamentary-driven" as the regime desired. Second, movement leaders also successfully lobbied for institutional guarantees to ensure that Kenya's state-mandated constitutional reform commission remained (mostly) independent from regime interference.

Regarding the substance of reform, movement leaders succeeded in advancing, but not enacting, a constitutional reform agenda that advocated seven of ten institutional features characteristic of consensus democracy: (1) executive power-sharing and coalition government;<sup>31</sup> (2) executive-legislative balance of power; (3) multipartyism; (4) a form of proportional representation; (5) bicameralism; (6)

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<sup>31</sup> As Chapter Seven discusses, this central characteristic of consensus democracy was only *partially* met by movement reform proposals and by the constitutional draft produced by Kenya's state-mandated constitutional reform commission. Although both movement leaders and the state commission's constitutional draft recommended the creation of multiple positions of executive power, it was not until just prior to the 2002 elections that an executive power-sharing formula was made explicit. Moreover, this proposal named only specific *individuals* who were broadly representative of dominant ethno-political and party interests in Kenya to its proposed executive posts, and it only informally agreed that power would be shared among these interests in the cabinet. As is discussed in the study's postscript, this pre-election executive power-sharing agreement ended up being only partially honored by President Kibaki, and this in turn, contributed to a major schism between the LDP and DP wings of the coalition.

constitutional rigidity; and (7) judicial review.<sup>32</sup> As the chapter documented, these proposed reforms were ultimately incorporated into the draft constitutional proposal produced by Kenya's state-mandated constitutional reform commission in September 2002.<sup>33</sup>

The chapter also argued that this constitutional reform agenda importantly explains both the emergence and electoral success of Kenya's 2002 opposition unity pact. In particular, the strongly held belief that Kenya's new constitution would provide for executive power-sharing and coalition government was of utmost significance, but other institutional features of consensus democracy were also important in solidifying opposition unity.<sup>34</sup> As Kenyan political analyst Stephen Ndegwa has argued: "Had the constitutional reform process not been going on at the

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<sup>32</sup> See Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, pp. 34 – 41.

<sup>33</sup> As Chapter Seven also discussed, these constitutional reforms were ultimately not enacted prior to Kenya's 2002 elections because President Moi dissolved parliament three days prior to the convening of Kenya's National Constitutional Convention (NCC). Because parliamentarians constituted approximately one-third of the NCC's delegates, by dissolving parliament to call for elections, President Moi ensured that the constitutional reform process was successfully suspended until after these elections. As the chapter explained, the NCC was the institutional body empowered under Kenyan law to make any final amendments (by two thirds majority) to the September 2002 constitutional draft. It was widely expected at the time that no major changes would be made to the draft, given that all major political players in Kenya, with the exception of the incumbent regime, had endorsed it. This draft was then to proceed to parliament for ratification by a two-thirds vote. The Kenya Constitutional Review Act explicitly stated that parliament had to either accept or reject the NCC's constitutional draft in its entirety; that is, under no circumstances could it amend this draft. Although Kenya's human rights and democracy movement had also lobbied for a national referendum to allow Kenya's entire electorate to endorse the NCC draft after parliamentary ratification, this provision was later repealed by parliament (in August 2002). As discussed in the study's postscript, however, this provision was ultimately re-instated by a 2004 court decision.

<sup>34</sup> As mentioned above, these included devolved central political power, legislative-executive balance, the creation of a second legislative chamber to safeguard minority representation, the introduction of some form of proportional representation, comprehensive reform of Kenya's judiciary with explicit provisions for judicial review, and requirements of super-majorities in both houses of parliament for constitutional amendment.



time of the [2002] campaign, it is virtually inconceivable that any opposition leader would have agreed to give up his or her slim chance at imperial presidency and settle for the certainty of exclusion in its shadow.”<sup>35</sup>

This finding is supported by theories of political pact-making in democratic transitions theory. Specifically, although democratic transitions theory does not offer what might be considered necessary and sufficient conditions of political pact-making in regime transitions, it finds that agreement on “distribution of representative positions and . . . collaboration between political parties in policy-making” is a common characteristic of successful transition pacts.<sup>36</sup> In addition, this theory finds that two further conditions, which also held in the Kenyan case, explain pact emergence: (1) “conflicting or competing groups are interdependent, in that they can neither do without each other nor unilaterally impose their preferred solution on each other if they are to satisfy their respective divergent interests;”<sup>37</sup> and (2) competing groups make “a commitment for some period to resolve conflicts arising from the operation of the pact by renegotiating its terms, not by resorting to the mobilization of outsiders or the elimination of insiders.”<sup>38</sup>

In addition to these three conditions, analysis of the Kenyan case reveals that three further characteristics of the pact-making process itself were also important to

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<sup>35</sup> Stephen Ndegwa, “Kenya: Third Time Lucky?” p. 154.

<sup>36</sup> O’Donnell and Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, p. 40.

<sup>37</sup> *Ibid.*, p. 38

<sup>38</sup> *Ibid.*, p. 41.

the emergence and success of Kenya's 2002 opposition unity pact.<sup>39</sup> First, it mattered that the pact was "formal" in the sense that its terms and conditions, including its organizational and decision-making structures, procedures for reconciling emergent conflicts and penalties for defection, were explicitly written into its memoranda of understanding (MoUs), and that the leadership of member parties publicly signed and committed themselves to these agreements. Second, the fact that the 2002 pact emerged gradually over a ten-month period and focused first on areas of common agreement, deferring more contentious issues until later in the pact-making process, when considerable trust had been established between parties, was also important. Finally, third, the fact that the 2002 pact made explicit a *process* for choosing its leadership and candidates, with a clear understanding that multiple positions of executive power would be shared among key opposition leaders, without actually naming these individuals until a great degree of trust had been built through the coalition, was also important to its success in sustaining opposition unity through the election period and in ultimately defeating the incumbent regime.<sup>40</sup>

Finally, as Stephen Ndegwa has also argued, for the KANU regime to be defeated in 2002 "it was not enough to build a coalition: A way had to be found to

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<sup>39</sup> By "success" I mean that it achieved its goal of cementing opposition unity through the 2002 election period.

<sup>40</sup> As discussed in the study's postscript, although these three conditions were important to the opposition coalition's emergence and electoral success, ultimately, once the LDP decided that it would join the then NAK coalition, forming NARC, the process of the LDP's incorporation into the existing pact happened very quickly, and some of these procedures were violated. As Chapter Seven discusses, the LDP did not join NAK, forming NARC, until late October 2002, so elections were only two months away by this time.

make sure that the votes which Kenyans cast for it would count.”<sup>41</sup> In this respect, as Chapter Seven also documented, continued institution-building efforts at societal and state levels by movement organizations were also important for NARC’s electoral success and for the general extension of Kenyans’ human and democratic rights through the 1998 – 2002 electoral cycle. At the societal level, continued development of two movement-supported programs, initially established just prior to Kenya’s 1992 elections, and further developed through the 1993 – 1997 and 1998 – 2002 electoral cycles, were especially important: (1) human and democratic rights educational outreach programs, and (2) professional training and deployment of domestic election monitors to promote fair voter registration, candidate nomination, campaign, polling and counting processes. At the state level, the role of movement organizations in promoting greater institutional capacity and independence of Kenya’s national electoral commission (ECK) was also important in promoting Kenya’s most free and fair elections to date, and generally expanding human and democratic rights protections of Kenyans through the 1998 – 2002 cycle.

As a consequence of these reform activities at state and societal levels, Kenya’s broad-based opposition coalition, the National Rainbow Coalition (NARC), finally, and decisively, defeated the KANU regime in Kenya’s 2002 elections. In this case, as the largest political “party,” it was the NARC coalition that clearly benefited from Kenya’s majoritarian electoral system. NARC’s presidential candidate, Mwai Kibaki, won 62 percent of the national vote in the presidential race and NARC

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<sup>41</sup> Ndegwa, “Kenya: Third Time Lucky?” p. 154.

parliamentary candidates won 50 percent of the national vote share, which translated into 60 percent of the seats in parliament.<sup>42</sup> Moreover, as electoral systems theory predicts, it is highly likely that the anticipated NARC victory in Kenya's plurality presidential elections importantly influenced the extent of support that NARC received in its concurrent parliamentary elections.

Despite the fact that in this case Kenya's majoritarian electoral system benefited a broad-based coalition of opposition political parties with a pro-reform agenda, the problems of this electoral system remained. First, and foremost, is that fact that as a consequence of this system, constituent parties of NARC formally registered as a *single* political party with the Kenyan state in order to ensure KANU's defeat. This is exactly as electoral systems theory predicts: single-member district plurality systems tend "to create and maintain two-party systems."<sup>43</sup> Although six political parties, in addition to NARC, ultimately won parliamentary seats in Kenya's 2002 elections, 90 percent of the elected seats in parliament were held by two parties – NARC and KANU.

Even though constituent parties of NARC, for the most part, maintained separate organizing structures and political identities, their formal registration as a

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<sup>42</sup> See tables 7.1 and 7.2 at the end of Chapter Seven for a summary of Kenya's 2002 presidential and parliamentary races.

<sup>43</sup> Duverger, "Duverger's Law: Forty Years Later," in *Electoral Laws and Their Political Consequences*, Grofman and Lijphart, eds., p. 69. As French sociologist Maurice Duverger has argued, and as is discussed in Chapter Three, that this is the case is due both to "mechanical" and "psychological" effects of single-member district plurality systems. The "mechanical effect" refers to the fact that a party can win up to 49.99 percent of the vote in a constituency, yet still fail to win a seat. The "psychological" effect follows from this mechanical effect in that voters, candidates and political party organizers understand that single-member district plurality systems discriminate against smaller parties, and thus they gravitate towards supporting major parties.

single political party, as the study's postscript discusses, was to have negative political consequences for all parties in the coalition --except for the party that ultimately controlled Kenya's still all-powerful and majoritarian executive, Mwai Kibaki's Democratic Party (DP). Ultimately, as is discussed in the study's postscript, despite NARC's campaign promise that comprehensive constitutional reforms promoting consensus institutions in general, and executive power-sharing, in particular, would be enacted within six months of taking office (June 2003), three and a half years into its term (April 2006), the DP-wing of NARC has ensured that Kenya's majoritarian institutional structures, particularly its executive presidency, remain intact.

Thus, although Kenya's 2002 elections marked an important advance in Kenya's democratic development and, significantly, in terms of the regime categories outlined in the study's introductory chapter, Kenya's transition from a "pseudodemocratic" regime to an "electoral democracy,"<sup>44</sup> until the consensus institutions advocated by leaders of Kenya's human rights and democracy movement, and endorsed by all parties comprising the NARC coalition prior to the 2002 elections, are formally enacted, the human and democratic rights of Kenyans will remain vulnerable. That is, returning to the one of the fundamental hypotheses examined in this study regarding the relationship between institutional form of democracy and the protection of human and democratic rights, the more closely Kenya's emerging democratic system approximates a liberal democratic system with consensus, rather

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<sup>44</sup> As discussed in the study's introduction, "pseudodemocracies" are conceptually distinct from both authoritarian regimes and electoral democracies in that they are characterized by the presence of opposition political parties, but electoral processes are not yet free or fair enough to allow for the ruling party to be defeated. Diamond, *Developing Democracy: Toward Consolidation*, p. 15.

than majoritarian, institutions, the greater the likelihood that Kenyans' human and democratic rights, as individuals and as groups, will be promoted and protected by this system. Although "[h]ow constitutional provisions work also depends on how they are interpreted and shaped in practice," as evidence from the Kenyan case clearly demonstrates, "the independent influence of explicit written rules should not be underestimated."<sup>45</sup>

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<sup>45</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, p. 302.

## Postscript

The genius of NARC prior to the 2002 election was its ability to center the idea of collective decision-making and to dangle the possibility of a new power-sharing arrangement. This strategy mitigated the divisive danger of ethnic thinking and allowed Kibaki to appear, at least as far as electioneering lasted, as a national leader . . . Immediately [after] Kibaki arrived at state house, [however] the MoU was abandoned and the collective decisionmaking was jettisoned along with the possibility of power-sharing.

--Godwin Murunga, March 21, 2006  
*The Kenya Times*

At the time of this writing (April 2006), almost three and a half years into NARC's five-year term in office, Kenya's majoritarian constitutional structure remains intact. This is despite the fact that all constituent parties of NARC promised that constitutional reforms would be enacted within six months of taking office (June 2003), *and* that implementation of pre-election power-sharing agreements was tied to these reforms. As Chapter Seven argued, it was these formal agreements (MoUs) that largely explain both the emergence and electoral success of NARC in Kenya's 2002 elections. Although the NARC government delivered on its campaign promise to convene Kenya's National Constitutional Convention, known as "Bomas,"<sup>1</sup> the Democratic Party (DP) wing of NARC, which controlled Kenya's all-powerful presidency and key cabinet positions, including the newly created Ministry of Justice and Constitutional Affairs,<sup>2</sup> ultimately rejected the constitutional draft produced by this Convention.<sup>3</sup>

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<sup>1</sup> Bomas is the name of the venue where Kenya's constitutional conference was convened. It is a large convention hall just outside of Nairobi.

<sup>2</sup> This new ministry was created by Kibaki as the government's liaison between the state-mandated Constitution of Kenya Review Commission (CKRC) and the Parliamentary Select Committee (PSC) on constitutional reform to facilitate speedy enactment of constitutional reforms.

<sup>3</sup> This draft was known as the "Bomas Draft."

By controlling appointments to Kenya's Parliamentary Select Committee (PSC) on constitutional reform,<sup>4</sup> rotating cabinet positions to punish NARC "rebels" and reward its supporters (including former members of KANU), and promising government/executive largess to MPs who supported their constitutional reform agenda, the DP faction of NARC succeeded in empowering parliament to produce a new constitutional draft, known as the Wako Draft,<sup>5</sup> to replace the Bomas Draft. As is discussed below, this draft largely preserved the majoritarian character of Kenya's existing constitution, especially in its provisions for executive structure. It was this constitutional draft, not the Bomas Draft, that then was voted on in Kenya's national constitutional referendum on November 21, 2005. Movement organizations, members of the LDP faction of NARC,<sup>6</sup> and representatives of smaller political parties both within and outside of NARC mobilized aggressively against this constitutional draft, and it was ultimately rejected by fifty-seven percent of Kenya's electorate --despite the DP faction's liberal dispensing of state resources in its support. Although this defeat can be considered a movement

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<sup>4</sup> When Raila Odinga, one of the prominent leaders of the Liberal Democratic Party (LDP) faction of NARC, protested his party's exclusion from this powerful parliamentary committee, Kenya's Minister for Justice and Constitutional Affairs, Kiraitu Murungi, of the DP faction replied: "As my friend Raila will appreciate, Parliament does not recognize parties such as DP, LDP, or Ford-Kenya --we are all members of the (governing coalition) called NARC." "Parties Gang Up Against Justice Minister," *The East African Standard*, March 27, 2005.

<sup>5</sup> This is because Kenya's Attorney General, Amos Wako, was authorized to produce the final constitutional draft, which then proceeded to a national constitutional referendum.

<sup>6</sup> As Chapter Seven discusses, the Liberal Democratic Party (LDP) was formed from a faction of KANU that broke with the party just prior to KANU's nominating convention in October 2002 over former President Moi's violation of KANU nominating procedures and his appointment of Uhuru Kenyatta as KANU's presidential candidate. The faction was comprised primarily of former members of the National Democratic Party (NDP), led by Luo Raila Odinga, which merged with KANU in March 2002 in anticipation that Odinga would be KANU's presidential candidate in the 2002 elections. In addition, however, a section of reformists and even hardliners within KANU, who also rejected the appointment of Uhuru, also broke with the party and joined the LDP at this time. Shortly after this, the LDP joined with the NAK coalition to form NARC.



“success” of sorts, the question remains: Why has Kenya’s human rights and democracy movement failed, once again, to effect reform of Kenya’s majoritarian constitutional structures? In this postscript, I briefly summarize the continued politics of constitutional reform from the period when the case study ends (December 2002) through the present (April 2006), and address this question.

### **The (Continued) Politics of Constitutional Reform: January 2003 – April 2006:**

Despite initial foot-dragging in convening Kenya’s National Constitutional Conference (NCC), known as “Bomas,” the NARC government finally delivered on this campaign promise four months into its term –in late April 2003. The task before the Bomas’ delegates was to debate all twenty chapters of the September 2002 constitutional draft produced by the Constitution of Kenya Review Commission (CKRC), known as the “Ghai Draft,”<sup>7</sup> and make recommended changes. If proposed changes received two-thirds support from conference delegates, they were referred to one of thirteen technical committees for incorporation into a new constitutional draft. This final draft then needed two-thirds approval by delegates before proceeding to parliament for ratification. According the Constitution of Kenya Review (Amendment) Act of 2002, which governed the exercise, parliament was expressly forbidden from making any amendments to this draft. It was required to either approve or disapprove of the draft in its entirety, and ratification required a two-thirds majority vote. These were conditions advocated by Kenya’s human rights and democracy movement and agreed to by all constituent parties

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<sup>7</sup> Named for the chair of the commission, Yash Pal Ghai, a renowned, and widely respected, Kenyan constitutional scholar.

of NARC prior to the 2002 elections. In addition, as discussed in Chapter Seven, movement leaders also advocated a national referendum by majority vote to allow Kenya's entire electorate to endorse (or reject) the draft to promote its popular legitimacy. This clause was ultimately repealed by the KANU-dominated parliament at the time (August 2002), but then re-instated by a court order in March 2004.

Although many contentious issues emerged during the course of the Bomas Conference, which lasted almost one year --from April 2003 to March 2004,<sup>8</sup> the most contentious, not surprisingly given the degree of power concentrated in Kenya's executive, was how executive power should be structured. As discussed in Chapter Seven, the constitutional draft published by the state-mandated Constitution of Kenya Review Commission (CKRC) in September 2002, the "Ghai Draft," and endorsed by all

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<sup>8</sup> Due primarily to the DP wing's stalling tactics in general, and Minister for Justice and Constitutional Affairs, Kiraitu Murungi, in particular, Kenya's National Constitutional Conference ended up sitting in three separate sessions. "Bomas I" was convened from the end of April to the beginning of June 2003, when it was suspended so that parliament could convene to enact Kenya's budget. "Bomas II" was then convened on August 17, once parliament was again available. It met only for two weeks, however, before it was again suspended, due to the unexpected death of Kenya's Vice President, Michael Wamwala. At this time, President Kibaki declared a two-week period of national mourning, so it was the beginning of September before Bomas II got underway. It then had only three weeks to meet, as the government insisted that pressing legislation needed to be enacted by parliament before the end of the year. Thus, Bomas delegates agreed that they would convene "Bomas III" in November 2003. In yet another stall tactic, however, Kenya's Minister of Justice and Constitutional Affairs, Kiraitu Murungi, met with the leader of Kenya's Parliamentary Select Committee (PSC) on Constitutional Reform and members of Kenya's constitutional review commission (CKRC) and announced that Bomas III would have to be postponed until January 2004 due to parliament's schedule. As Chairman of the CKRC, Yash Ghai, insisted, this was in complete violation of Kenya's Constitutional Review Act, which gave Bomas delegates exclusive authority to schedule its meetings. As he reminded the Kibaki government, this was incorporated into the Review Act to prevent external interference, either by the executive, parliament, or others in the process. Despite the fact that a section of delegates took the Kibaki government to court over the issue, likely due to executive pressure, Kenya's High Court ended up dismissing the case. In an act of civil disobedience, Chairman Ghai, together with a section of Bomas Delegates, attempt to convene at Bomas in November, but in clear disregard for the law, they were turned away by Kenya's police. Moreover, top cabinet ministers in the Kibaki government insisted that Ghai resign as Chair, since he had demonstrated that he could no longer "objectively" facilitate that process. Due to an immediate out-pouring of public support for Ghai, however, the ministers eventually backed away from this demand. Bomas III was finally reconvened on January 2004 and met until mid-March 2004, when it approved constitutional draft referred to as the "Bomas Draft."

constituent parties of NARC prior to the December 2002 elections, recommended the creation of an executive prime minister as head of government, with a popularly elected president as head of state. Specifically, it recommended that “[t]he Prime Minister is the leader of the Cabinet and presides over meetings of the Cabinet.”<sup>9</sup> Thus, according to this draft:

[t]he Prime Minister and the other members of the Cabinet exercise authority . . . by developing and implementing national budgets and policy; preparing and initiating government legislation for introduction in Parliament; implementing and administering Acts of Parliament; co-ordinating the functions of ministries and departments; and performing any other executive function provided for by the Constitution or an Act of Parliament, except those functions assigned to the President.<sup>10</sup>

The president, on the other hand, was to exercise authority as “the Head of State, Commander-in-Chief of the Defence Forces, the Chairperson of the National Security Council and the Chairperson of the Defence Council.”<sup>11</sup> The prime minister was to be appointed by the president from the majority political party, or coalition of parties, in parliament, subject to majority approval by parliament. Alternatively, the “leader of the minority political party, or coalition of parties” could be appointed, “if the leader of the majority party or coalition [was] unable to command or retain the confidence of the National Assembly.”<sup>12</sup> Significantly, the prime minister could be removed only by a majority no confidence vote by parliament.

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<sup>9</sup> *Draft Bill: The Constitution of the Republic of Kenya, September 27th, 2002*, Part III, Sec. 170 (1).

<sup>10</sup> *Ibid.*, Part II, Section 170, (2) (a) – (e).

<sup>11</sup> *Ibid.*, Part I, Section 150, (1) (a).

<sup>12</sup> *Ibid.*, Part II, Section 171, (1) (a) and (b).

The prime minister was given authority to nominate her or his two deputy prime ministers and all ministers and assistant ministers in the cabinet, although this was to be done “in consultation” with the president.<sup>13</sup> Moreover, the size of the cabinet was capped at fifteen ministers and fifteen assistant ministers. Although the draft provided for a multiparty cabinet, it did not include an explicit power-sharing formula to govern selection of cabinet members. After nearly a year of contentious debate, and numerous delays and interruptions, instigated primarily by the DP wing of NARC, this basic structure of the executive was endorsed by two-thirds of the delegates at Bomas at its conclusion on March 15, 2004.<sup>14</sup> As mentioned above, this constitutional draft was known as the “Bomas Draft.”

Despite the fact that this basic executive structure was endorsed by the DP in February 2002 with the emergence of NAC,<sup>15</sup> *and* was formally submitted by the party in

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<sup>13</sup> Ibid., Part II, Section 151, (2) (a), (i) – (iii) As is discussed below, that the Ghai Draft required the prime minister to appoint her or his cabinet “in consultation” with the president was perceived as highly problematic by a majority of Bomas delegates. Most feared that this could lead to governmental paralysis should the prime minister and president fail to agree on appointments. For this reason, a majority at Bomas recommended that the president’s powers should be restricted to formal appointment of cabinet members only, from a list of nominees presented by the Prime Minister.

<sup>14</sup> There were some differences between the drafts, however. First, whereas the Ghai Draft stated that the prime minister would nominate the cabinet in “consultation” with the president, the Bomas Draft was explicit that the president’s role was limited to formal appointment of cabinet nominees from a list decided and presented by the prime minister. Second, whereas the Ghai Draft limited the number of ministers and deputy ministers to fifteen each, the Bomas Draft raised this number to twenty and left fifteen as a minimum threshold. This was considered a very important clause in the chapter on executive powers, as under Kenya’s current constitution, there is no limit established on the size of the cabinet and the executive (president) is allowed to create new cabinet positions at will. This provision was used not only by former Presidents Kenyatta and Moi to shore-up regime support, but also, as is seen below, by Kibaki. Moreover, controversially, Kibaki ended up bringing in former high-ranking members of KANU, without consulting either his coalition partners or the leadership of KANU, in order to bolster support for his proposals in parliament and undermine the support of the LDP wing of NARC. Thus, by the time the “Consensus Bill,” discussed below, was finally voted on in parliament, Kibaki’s cabinet had twenty-seven members, the vast majority of whom had pledged to support the DP’s constitutional reform agenda.

<sup>15</sup> NAC, the National Alliance Coalition, was the first coalition forged among a subset of opposition political parties, including the DP, in February 2002.

its constitutional reform proposal to Kenya's state-mandated Constitutional Review Commission (CKRC) in March 2002, *and* was endorsed by the party again once the Ghai Draft was made public in September 2002, *and* pre-election executive power-sharing agreements were premised on these endorsements, once the DP wing of NARC took control of Kenya's executive presidency and key cabinet positions in the wake of Kenya's 2002 elections, it reneged on these pre-election constitutional reform promises and commitments. Specifically, President Kibaki's newly appointed Minister of Justice and Constitutional Affairs, Kiraitu Murungi, who was also the former shadow Attorney General of the DP and, ironically, the individual who formally presented the DP's constitutional reform proposal to the CKRC in March 2002, suddenly insisted that what the party had advocated all along was a *nonexecutive* prime minister and an executive *president*.

Thus, in response to the NCC's endorsement of the Bomas Draft, the DP wing of NARC, led primarily by Kiraitu Murungi, as NARC's Minister of Justice and Constitutional Affairs, insisted it would amend the Constitution of Kenya Review Act (2002) to allow parliament to amend the Bomas Draft.<sup>16</sup> Through several cabinet reshuffles, including bringing former members of KANU into the cabinet to shore up political support in parliament; aggressive parliamentary lobbying, including promises of development funds and other state favors to MPs who supported its agenda; political

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<sup>16</sup> The DP wing justified its rejection of the Bomas Draft on the basis of biased representation of Bomas delegates. Movement organizations agreed with this assessment of Bomas, but insisted that, rather than scuttle or co-opt the process, Kibaki's government should have simply reinstated a national referendum requirement to ensure that Kenya's electorate gave the final endorsement of whatever constitutional draft the Bomas convention produced. As noted above, this requirement was finally reinstated, but by a court order in response to a lawsuit brought by movement activists.

support by Kenya's judiciary; and ultimately a parliamentary walkout by the LDP wing of NARC and its supporters, the DP faction finally succeeded in amending Kenya's Constitutional Review Act of 2002 in early December 2004.

This amendment Bill, euphemistically referred to as the "Consensus Bill," not only granted parliament the authority to amend the Bomas constitutional draft, but it also lowered the previous two-thirds majority requirement for parliamentary approval of the final constitutional draft to a simple majority. President Kibaki assented to the Bill in late January 2005, although it was another three months, April 22, 2005 before the Bill was finally gazetted.<sup>17</sup> At this time, as the Bill mandated, parliament was given 90 days to debate and amend the Bomas Draft. The resultant draft was then to be forwarded to Kenya's Attorney General, Amos Wako, who was given 30 days to produce a "final" draft based on this draft, and it this draft, the "Wako Draft," that was to be subjected to a national constitutional referendum within 90 days. If accepted by more than 50 percent Kenyans, the President was then authorized to "proclaim" this Kenya's new constitution within fourteen days.<sup>18</sup>

Despite the fact that MPs from the LDP wing of NARC and its supporters were completely shut out of the process,<sup>19</sup> over the next 90 days, between April 22 and July 22, 2005, parliament proceeded to review and debate the Bomas Draft. As was expected, even given the degree of executive control over the process, the debate went down to the

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<sup>17</sup> That is, published by the government.

<sup>18</sup> The Bill also gave parliament the authority to alter this calendar, however.

<sup>19</sup> As mentioned above, the DP faction succeeded in completely excluding representatives of the LDP from the Parliamentary Select Committee (PSC) authorized to produce the new constitutional draft by insisting that the LDP did not exist as a parliamentary party.

wire, and the final vote was not taken until nearly midnight on the night before the July 22 deadline. Ultimately, 102 MPs endorsed the new constitutional draft, known as the Kilifi Draft,<sup>20</sup> which, not surprisingly, incorporated all of the DP wing's proposals regarding executive structure. Sixty-one MPs opposed the draft, two abstained, and 59 boycotted the vote altogether. This draft then proceeded to the Attorney General's chambers for thirty days for any "final" changes before the 90-day campaign period for the national constitutional referendum began. Thus, despite the very undemocratic nature of the process that ultimately produced this draft, known as the "Wako Draft," this was the constitutional draft that Kenyan's ultimately voted on in the November 21, 2005 constitutional referendum.

In contrast to the Bomas Draft, the Wako Draft provided for an executive president as head of state *and* head of government with authority to appoint Kenya's *non-executive* prime minister, two deputy prime ministers and all members of the cabinet -- subject to majority approval by parliament. Unlike the Bomas Draft, it also gave the president authority to appoint *any* member of parliament prime minister, again, subject to majority approval by parliament. Significantly, the prime minister --and all other cabinet ministers--could also be dismissed at will by the president, as was the case under Kenya's existing Constitution. In addition, the Wako Draft allowed the executive president to appoint up to twenty percent of the cabinet from outside of parliament and did not cap the cabinet's size. Like the Bomas Draft, it allowed for a multiparty cabinet, but there were also no formal rules governing cabinet appointments. That is, there was

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<sup>20</sup> Kilifi is a town on Kenya's coast where this final draft was produced --without a majority of LDP wing MPs and their supporters.

no explicit power-sharing formula that required the president to ensure that all significant political interests in Kenya were represented at the cabinet level. As the Draft's critics pointed out, this structure of the executive, like Kenya's existing majoritarian constitution, created an institutional context where the president could use cabinet positions as a means of punishing or rewarding government critics or supporters, and as a means of subverting legislative power vis-à-vis the executive, as historically had been the case in Kenya.

Finally, the Wako Draft also introduced a new electoral formula for presidential elections. Instead of needing to win only a plurality of the national vote, winning presidential candidates were required to win a majority; and, instead of needing a minimum of twenty-five percent of the vote in five of eight provinces, winning candidates were required to win a minimum of twenty-five percent of the vote in fifty percent of Kenya's *districts*. This formula was highly controversial since the Wako Draft, unlike the Bomas Draft, also did not cap the number of districts in Kenya; thus, it was feared that a president could politically create districts as an electoral strategy. This fear turned out to be well founded as, in the process of campaigning for the Wako Draft, President Kibaki did, in fact, promise new districts to communities that supported the Draft. Finally, in the case of serious violations of the Constitution, or serious misconduct, the Wako Draft also made provisions for presidential impeachment, although this required a seventy-five percent vote in parliament.

As soon as the Wako Draft was made public on August 22, 2005, campaigning for and against it began in earnest. President Kibaki immediately endorsed the draft and urged Kenyans to support it. His Minister of Justice and Constitutional Affairs, Kiraitu



Murungi, declared the draft a “government project” and, despite repeated warnings by Kenya’s Electoral Commission, which was charged with administering the referendum, the DP faction of NARC and its supporters made liberal use of state resources in its effort to mobilize support. Campaigning against the draft were the vast majority of movement organizations,<sup>21</sup> the LDP wing of NARC, and representatives of small parties both within and outside of NARC. Largely due to the mobilization efforts by these groups, the Wako Draft was decisively defeated in the constitutional referendum by 57 percent of Kenya’s electorate.

### **Kenya’s Human Rights and Democracy Movement and Constitutional Reform:**

Because a majority of movement organizations campaigned aggressively against the Wako Draft, its resounding defeat in November 2005 was, in a sense, a movement “victory.” Moreover, as former head of Transparency International in Kenya, John Githongo, recently commented, the referendum was also an important victory for democracy in Kenya because it clearly demonstrated that “[v]ote buying no longer seems to work in our country . . . the ruling elite lost despite, by its own admission, being endowed with enough resources to shake the country.”<sup>22</sup> However, the question remains: Why did Kenya’s human rights and democracy movement fail, once again, in its effort to effect comprehensive reform of Kenya’s highly majoritarian Constitution?

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<sup>21</sup> Although, significantly, for reasons discussed below, Kenya’s dominant church organizations refused to take a stand on the Wako Draft, and only urged their constituents to “vote their conscience.”

<sup>22</sup> “Githonga Talks of Democracy in Kenya Despite Graft,” *The Daily Nation*, March 31, 2006.

First and foremost, as indicated in the brief discussion above, it was Kenya's majoritarian Constitution itself that, once again, presented the greatest obstacle to the movement in advancing its constitutional reform agenda. Specifically, the vast political and economic power concentrated in Kenya's presidency allowed the party that controlled this office, the DP, to effectively exclude other coalition members from executive power and subvert the constitutional reform process, despite explicit pre-election MoUs to the contrary. Once it became clear that the DP faction of NARC would ignore its pre-election commitments, the only "forcing mechanisms" that Kenya's human rights and democracy movement had open to it were the same ones it employed during the Moi-KANU years –strategic framing processes and legal mobilization.

In the post-2002 election period, however, the movement's political opportunity structure had changed considerably. This, in turn, significantly impacted the ability of the movement to effectively mobilize against the Kibaki government. First, in terms of the relative openness or closure of the institutionalized political system,<sup>23</sup> despite the fact that the Kibaki government failed to honor its pre-election MoUs on executive power-sharing and enactment of a constitutional reforms, the government was still clearly much more open than the previous Moi-KANU regime. As Human Right Watch reported in its 2004 analysis: "[t]he current human rights situation in Kenya is one of few serious abuses."<sup>24</sup> Moreover, Kenya moved from the status of 'not free' to 'partly free' in

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<sup>23</sup> This is one of three constituent elements of political opportunity structures examined in the case study.

<sup>24</sup> Human Rights Watch is foreign-based human rights organization, which has been an important participant in Kenya's transnational movement, as the case study documents. Human Rights Watch, "Human Rights Overview: Kenya," World Report 2005." <http://hrw.org/english/docs/2005/01/13/kenya9831.htm>

Freedom House's ranking of political and civil liberties for the first time in 2003 --a status it has maintained through the present.<sup>25</sup> That is, on a scale from one to seven, with one representing the highest level of protection of political and civil rights, and seven indicating their virtual nonexistence, Kenya received rankings of "three" in both political and civil liberties each year since the NARC government took office.<sup>26</sup>

Moreover, despite that fact that Kibaki was later to engage in similar political strategies of exclusion and control via cabinet reshuffles used by his predecessors, in his inaugural cabinet, Kibaki strove to promote proportional representation of political parties (within NARC), ethnic groups and Kenya's regional (provincial) interests. Specifically, eleven cabinet positions went to the LDP, ten to the DP, three to Ford-Kenya, and one to the National Party of Kenya (NDP).<sup>27</sup> In terms of ethnic composition, five positions went to Kikuyus, five to Luhyas, four to Luos, two to Kalenjins, two to Merus, two to Mijikendas, two to Maasais, one to Embus and one to Somalis.<sup>28</sup> In terms of regional, or provincial, power sharing, this meant that five cabinet positions went to Central Province, five to Eastern, five to Rift Valley, three to Nyanza, three to Western,

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<sup>25</sup> Freedom House is a nonprofit, nongovernmental organization that promotes human and democratic rights through advocacy, educational outreach, training programs, analysis and publications. It publishes an annual survey that evaluates the level of political and civil rights protections in all countries in the world, as well as assesses global trends in democratization. <http://www.freedomhouse.org>

<sup>26</sup> That is, in 2003, 2004 and 2005. Aili Piano and Arch Puddington, ed., *Freedom in the World 2005: The Annual Survey of Political Rights and Civil Liberties*, New York: Rowman and Littlefield Publishers, Inc., 2005, pp. 340 – 344.

<sup>27</sup> David W. Throup, Table 11, Political Affiliations of Cabinet Members, "Kibaki's Triumph: The Kenyan General Election of December 2002," Elections in Africa Series Briefing Paper No. 3, June 2003. This paper is a shortened and edited version of a paper originally published on the Center for Strategic and International Studies (CSIS) website, and forms part of the RIIA Africa Programme's 'Elections in Africa' series, edited by Associate Fellow Heather Deegan. [http://www.riia.org/pdf/briefing\\_papers/Africa.pdf](http://www.riia.org/pdf/briefing_papers/Africa.pdf).

<sup>28</sup> Ibid. Approximate percentages of ethnic communities are as follows: 22% Kikuyu, 14% Luhya, 13.1% Luo, 13.8% Kalenjin; 11% Kamba, 6% Kisii, 6% Meru, Mijikenda, 1.2% Maasai, 1.2% Embu and Somali.

two to the Coast, one to Nairobi and one to Northeastern.<sup>29</sup> As Kibaki's critics were quick to point out, however, a disproportionate number of the most prestigious cabinet positions went to members of his own party, the DP, and ethnic group, the Kikuyu. This group was increasingly referred to by Kenyans as the "Mount Kenya mafia," in reference to the region in Kenya where most Kikuyus live. Moreover, once tensions began to emerge between the LDP and DP wings of NARC, LDP cabinet positions were the first to be withdrawn.

Nevertheless, Kibaki was able to sustain support by most movement organizations during his first year in office, and even into his second, despite clear foot-dragging on the constitutional reform process, as he began to deliver on other NARC campaign promises. For example, within his first two months in office, Kibaki recalled parliament early to introduce two new Bills believed central to addressing rampant corruption in Kenya: the Anti-Corruption and Economic Crimes Act and the Public Officer Ethics Act.<sup>30</sup> The first of these established a constitutionally-protected independent anti-corruption body, the Kenya Anti-Corruption Authority, headed by renown anti-corruption activist and reform movement participant, John Githongo; and the second, for the first time in Kenyan history, made it a statutory requirement for all public officers to declare their wealth.<sup>31</sup>

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<sup>29</sup> Ibid., "Table 12, Provincial Background of Cabinet Members." In addition, it should be noted that Kibaki's cabinet included three women: Martha Karua as Minister for Water Development, Charity Ngilu as Minister of Health, and Linah Kilimo (LDP) as Minister of State in the Office of the Vice President. As Throup reports, "[i]n the previous 40 years, Kenya has had only one previous woman cabinet member." Throup, Kibaki's Triumph: The Kenyan General Election of December 2002," [http://www.riia.org/pdf/briefing\\_papers/Africa.pdf](http://www.riia.org/pdf/briefing_papers/Africa.pdf).

<sup>30</sup> Unfortunately, these Bills have not had the political impact that its supporters hoped, and rampant corruption continues to be an enormous problem in contemporary Kenya.

<sup>31</sup> John Githongo, as mentioned above, was former head of the Kenyan section of Transparency International.

Kibaki also “nullified all illegal allocations of public property to individuals and businesses who had links with the former KANU government” and suspended Kenya’s controversial Chief Justice, Bernard Chunga, who was accused of “complicity in torture and cruel, inhuman, and degrading treatment” of government critics in Kenya during the 1980s.<sup>32</sup> Major reform efforts were also launched to investigate corruption and rights abuses within Kenya’s judiciary, police forces and prisons. As a consequence of these efforts, Kibaki’s government successfully suspended half of Kenya’s senior judges and established special tribunals to investigate corruption charges brought against them.<sup>33</sup>

Finally, Kibaki was also careful to bring many visible movement leaders into his government. For example, Maina Kai, former co-director of the Kenya Human Rights Commission (KHRC), was appointed chair of Kenya’s newly established Kenya National Commission on Human Rights.<sup>34</sup> Wangari Maathai, prominent human rights activist since the early stages of movement emergence, founder of Kenya’s environment movement, the Green Belt Movement, and recent (2004) Nobel Peace Prize winner, was appointed Assistant Minister for Environment. Gibson Kamau Kuria, also an early movement activist, was appointed to head a special commission of inquiry, the Goldenberg Commission, to investigate one of the largest financial scandals in Kenyan history. This scandal implicated numerous high-ranking members of the former ruling

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<sup>32</sup> Human Rights Watch, “Human Rights Overview: Kenya,” World Report 2005.” <http://hrw.org/english/docs/2005/01/13/kenya9831.htm>

<sup>33</sup> Alan Rake, “Kenya: Recent History,” *Africa South of the Sahara*, 35<sup>th</sup> Edition, New York: Routledge, 2006, p. 597.

<sup>34</sup> As discussed in Chapter Seven, this is Kenya’s first state-mandated, but institutionally independent, human rights commission. It was established primarily in response to movement demands.

party, KANU –including former President Moi. John Githongo, former head of Transparency International (TI) in Kenya and prominent anti-corruption activist within the movement, was also appointed Kibaki’s special advisor on corruption; and Kivutha Kibwana, former co-convenor of the NCEC,<sup>35</sup> was appointed Assistant Minister of Provincial Administration and National Security within the Office of the President, with responsibilities for overseeing and reforming Kenya’s police forces.

For these reasons, movement organizations were reluctant to mobilize against the Kibaki government at least through its first year, and even into its second. As one former movement activist remarked: “[i]n the Moi days, lines were clear cut, the presidency was depraved and rabid and needed to be fixed. Today, Moi is taken seriously as the lines have become fogged. Who are the *bad guys*? Are the guys in power necessarily bad? Are the alternatives necessarily good?”<sup>36</sup> Thus, in social movements terms, the domestic opportunity structure for continued movement mobilization was considerably less favorable in the post-2002 election period than during the Moi-KANU years.

It was not until January 2005, when President Kibaki assented to the Consensus Bill,<sup>37</sup> and the Wako constitutional draft began to take shape, that movement organizations finally began to mobilize *en masse* against the Kibaki government. Their mobilizing efforts were constrained by two additional shifts in political opportunity structure, however. First, at the international level, although foreign-based international

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<sup>35</sup> NCEC stands for the “National Convention Executive Council.” This council was democratically elected at the movement’s First Plenary for a National Convention, convened April 3 – 7, 1997.

<sup>36</sup> E-mail correspondence with Winluck Wahui, former program director, International Commission of Jurists, Kenya Section, January 11, 2006.

<sup>37</sup> As discussed above, the “Consensus Bill” amended the Constitution of Kenya Constitutional Review Bill of 2002 to allow parliament to amend the Bomas Draft.

human rights organizations, independent foundations and donor states continued to support the constitutional reform effort and *verbally* pressure the Kibaki government to quickly enact reforms, most major donors began resumption of aid to Kenya by late 2003. With foreign aid resources again freely flowing, the Kibaki government was much less “vulnerable” to international or domestic pressure than its predecessor.<sup>38</sup> As Human Rights Watch reports:

In 2003, the European Union was the first to announce that it would resume aid, pledging 50 million euros in budget support and 225 million euros for development projects. Days later, the IMF announced that it would also resume dealings with Kenya, approving a U.S.\$252.8 million loan, of which roughly U.S. \$36 million will be available immediately. Then, in the last week of November [2003], a group of donors—including the World Bank, the European Union, the African Development Bank, the United States and the United Kingdom—announced pledges totaling U.S. \$4.1 billion for 2004-2006, the greatest portion of which would be available in 2004.<sup>39</sup>

Although delivery of aid in some cases was delayed due to donor concerns over the DP faction’s stalling on constitutional reform, for the most part, especially during its first two years in office, the Kibaki government was broadly perceived by the international community as serious about economic reforms and furthering Kenya’s human and democratic rights reform agenda.

Second, in terms of movement allies,<sup>40</sup> although foreign-based international human rights organizations, independent foundations and donor states continued to

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<sup>38</sup> Building on Keck and Sikkink’s concept of “state vulnerability,” this is the second of three features comprising political opportunity structures that are examined in the case study. Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

<sup>39</sup> Human Rights Watch, “Human Rights Overview: Kenya,” World Report 2005, <http://hrw.org/english/docs/2005/01/13/kenya9831.htm>

<sup>40</sup> This is the third constituent element of political opportunity structures examined in the case study.

support movement reforms efforts, with the conclusion of the Bomas Conference in March 2004, material support for constitutional reform projects began to decline. Domestically, although Kenya's dominant religious organizations also continued to support constitutional reform efforts, serious political differences began to emerge between these religious organizations and other movement organizations during the Bomas Conference. A particularly contentious issue for the powerful NCKK<sup>41</sup> was the status of Kenya's Kadhi courts under Kenya's new Constitution.

Although these courts had operated under protected constitutional status since independence in 1963 without incident, the leadership of the NCKK insisted that continuance of this protective status not only was a fundamental violation of the constitutional principle requiring separation of church and state, but it could also "dangerously" lead to the establishment of Sharia law in Kenya. As a consequence, when a two-thirds majority at Bomas agreed to allow continued protective status for the Kadhi courts in the Bomas Draft, the leadership of NCKK, in particular, threatened to pull out of the constitutional reform process entirely. This position caused an obvious split with Muslim organizations, which had become important participants in and supporters of Kenya's reform movement. It also was divisive among leading SMOs,<sup>42</sup> most of which

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<sup>41</sup> The NCKK is the National Council of Churches of Kenya, an umbrella organization of Protestant Churches in Kenya. Protestants comprise approximately 45 percent of Kenya's population.

<sup>42</sup> Social movement organizations (SMOs) are defined as "those formal groups explicitly designed to promote specific social changes. They are the principal carriers of social movements insofar as they mobilize new human and material resources, activating and coordinating strategic action throughout the ebbs and flows of movement energy. They may link various elements of social movements, although their effectiveness in coordinating movement activities varies greatly according to patterns of organization and participation." They "vary in their degree of *formalization*, or formally defined roles, rules and criterion of membership, and *centralization*, or the degree of concentration of decision-making power." Smith, Pagnucco, and Chatfield, "Social Movements in World Politics: A Theoretical Framework," in



concurred with Kenya's Muslim community that protective status should be allowed and that reform efforts should focus instead on developing an extensive and progressive Bill of Rights as a formal protective mechanism for rights protections.

Thus, these changes in political opportunity structure at national and international levels, coupled with the continuing institutional barriers presented by Kenya's majoritarian political structures, largely explain the failure of Kenya's human rights and democracy movement to successfully pressure the Kibaki government to honor its pre-election MoUs and deliver a comprehensively reformed constitution. Should the Kibaki government continue to practice exclusionary politics at the national level, and resist sustained popular demands for constitutional reforms, however, as the results of Kenya's November 2005 constitutional referendum indicate, it will be held accountable for its broken electoral promises in Kenya's 2007 elections. As a recent commentary on Kenyan politics has noted, although Kibaki's government has engaged in some of the same political practices of exclusion, control and corruption as did its predecessor –albeit to a much lesser extent, it has “ignored a fatal flaw in the political method of Mr. Moi. His regime was eventually voted out.”<sup>43</sup>

Since defeat of the Wako Draft, President Kibaki has appointed a new constitutional review committee led by Bethwell Kiplagat, a former Minister for Foreign Affairs and highly respected statesman in Kenya, to find a way forward on the constitutional review process. Although movement organizations insist that this is merely

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*Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Smith, Chatfield and Pagnucco, eds., pp. 60 – 61.

<sup>43</sup> “Kenya: Voting Out Corruption,” *The Economist*, January 28<sup>th</sup> – February 3<sup>rd</sup> 2006, p. 14.

another “public relations” exercise on the part of the Kibaki government to impress international donors and deflect domestic criticism, the committee was given a May 30, 2006 deadline to draft a legal framework for restarting the constitutional reform process. As of mid-April 2006, however, the committee decided to call in additional constitutional experts to assist them in this process and implied they would likely need an extension beyond the May 30<sup>th</sup> deadline to complete their work. Movement representatives predict that the regime will continue to keep the issue of constitutional reform in the news, but that nothing of substance will come from Kibaki’s committee unless and until movement organizations mobilize and force it to do so. If history proves a guide to future action, however, should the Kibaki government fail to deliver on its campaign promise, we can expect escalated “cycles of contention”<sup>44</sup> focused on constitutional reform as Kenya’s December 2007 elections approach.

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<sup>44</sup> As discussed in Chapter Two, these are defined as “phase[s] of heightened conflict across the social system: with rapid diffusion of collective action from more mobilized to less mobilized sectors . . . the creation of new or transformed collective action frames; a combination of organized and unorganized participation; and sequences of intensified information flow and exchange between challengers and authorities.” Tarrow, *Power in Movement: Social Movements and Contentious Politics*, p. 142.

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