Kenya: The Struggle to Create a Democracy

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I. INTRODUCTION

Kenya provides a useful illustration of the challenges a newly independent nation faces in structuring a government that will best represent its people. The Kenyan leaders chose to adopt a Western form similar to that found in Britain for their Independence Constitution. Many of those who participated in its creation, however, expected that the Independence Constitution would blend with the unique culture of Kenya, creating an independent government that would truly represent the will of the Kenyan populace. The constitution imported from the West would merely be "a valuable ingredient in the construction of a home-grown constitution,"1 rather than the definitive basis of Kenyan government.

This comment focuses on the growing pains that have come with converting a western constitution into a democratic, "home grown constitution" that responds to and reflects the needs of the Kenyan people. First, it is necessary to explain my use of the term "democracy." In pre-colonial Kenya, various tribal democracies survived because of the communities' small size and homogeneity; each community's leaders accurately represented the interests and ideals of the group.2 Tribal leaders were chosen and evaluated "entirely upon [their] behavior . . . to [the] group and to the community at large."3 Democracies were sustained through the leaders' intimate connection with and reflection of the local culture and people.

2. JOMO KENYATTA, FACING MOUNT KENYA 186, 195-96 (1953).
3. Id. at 195. The native Africans resented foreign rule, in part, because they did not regard their British leaders "as the true representatives of the interests of the community." Id. at 196. Kenyatta is speaking specifically about the Gikuyu tribe but all of Kenya's ethnic communities formed communities around similar principles. See IRVING KAPLAN ET. AL, AREA HANDBOOK FOR KENYA 106 (1976) (stating that all of Kenya's ethnic groups share "fundamental principles of social organization and group formation based on kinship, age and neighborhood").
One of the challenges of the new, independent Kenyan government was to design a government whose representatives would be viewed by each of the 64 or more tribes as their legitimate leader. Legitimization was essential because Kenyan leaders had to deal with the possibility of fragmentation and political competition between tribes. Obviously, the post-colonial Kenya was more difficult to manage democratically than the individual tribal units were. Initially, the demands of unity may have required more stringent control by a centralized leader. The Kenyan leaders, however, have not encouraged an evolution toward a more democratic governance. I will discuss two related reasons why the post-colonial Kenyan government has, conversely, moved away from a truly representative government toward a government of centralized power.

First, because Kenya never went through a revolution, but instead won liberation through a series of compromises, government power was passed into the hands of the African ruling party and has never effectively been turned over to the people. Although the first African leaders were elected by popular vote, the present government officials have strengthened their position through denying Kenyans some individual freedoms, such as the freedom to associate and the freedom to participate in the political process, and through perpetuating a one-party system. This continued concentration of power is a form of neocolonialism, impeding Kenya's advance toward true independence.

Second, the native people remain unempowered in part because the culture of traditional Kenya still affects the operation of government. The emphasis on community identity shapes the native people's expectation of their government and their relationship with others in the society. Traditional African thought defines an individual's rights by the needs of the community, as opposed to the Western culture which defines a community as a group of individuals with inalienable rights. In Kenya, for example, a law that limits an individual's ability to speak out against the government may be viewed by a native Kenyan as a redefinition, rather than a denial, of his rights because the community goal of unity is furthered by the law. The communal nature of the native Africans also leads to the problem of tribalism, which is used as a justification by the Kenyan government to concentrate power. I will discuss both the power held by the Kenyan government and the culture
upheld across Kenyan society, focusing on their effects on the operation of law and the interpretation of the Kenyan Constitution.

II. THE CONCENTRATED POWER OF THE KENyan GOVERNMENT

A. History of Colonization

In order to understand Kenya’s rebuilding process, it is necessary to understand how European Kenya’s government became under colonization. Although Western influence in Africa began much earlier through contact with Christian missionaries, British control of present-day Kenya began on September 3, 1888, when a charter was given to the Imperial British East Africa Company (“IBEAC”). The replacement of British law for the laws of the indigenous tribes was gradual. During this early period the British government’s interests were solely commercial and because Kenya’s indigenous governmental structure did not interfere, it was not replaced wholesale. The charter given the IBEAC “laid down certain directives of policy in the matter of human rights which the Company was bound to carry out. . . . It was not to interfere in matters of religion. It was to preserve the customs and laws of the tribes of Kenya.”

Near the end of the nineteenth century, the British built a railway across Kenya to access Uganda. To make the railway profitable, the British declared the territory of Kenya a “White Man’s Country” where European settlers would take all the best agricultural land and try to produce goods to be transported by the railway. At this point the British began to control the laws of Kenya in order to protect the rights of the European property owners.

Kenya became a British Protectorate in 1895 when the IBEAC experienced financial difficulties, causing the British to assert greater control in order to protect their vested interests in Africa. From 1895 to 1915 a “colonial bureaucratic hierarchy

5. Portuguese explorer Vasco da Gama arrived at present-day Kenya with Roman Catholic missionaries in 1498.
was structured, the lowest rung of which consisted of government chiefs and headmen grafted onto and supervising existing systems of age-grade and kinship authority. European missionaries organized the schools, clinics, and African Christian congregations, while British settlers "flooded" the highlands. During this time, the European settlers created an almost exclusively European legislative council with the purpose of transferring power away from the indigenous people. The East African Land Ordinance, which allowed Africans to occupy land but not to hold title, set in place the "final stone of colonial occupation." In 1920, the Kenya Protectorate was formally annexed and became the Colony and Protectorate of Kenya. Clause 10 of the 1920 Letters Patent "invalidates any Kenya law which was repugnant to 'the law of England.'" This rejection of Kenyan law and leadership saw no sign of reversal until 1944 when the first African was appointed to the council.

B. Independence

From 1922-1952 the Kenyans used passive methods of resistance, such as establishing independent schools, newspapers, and religious groups. After World War II the resistance movements became more militant. In 1952 the Kikuyu secret society, Mau Mau, began violent attacks on British leaders. The return of Jomo Kenyatta to Kenya in 1946 as the

8. MILLER & YEAGER, supra note 7, at 15.
9. Id.
10. Singh, supra note 6, at 889. The only non-European on the council was A.M. Jeevanjee, an Indian Merchant. Id.
11. MILLER & YEAGER, supra note 7, at 15. Technically, because of Kenya's protectorate status, it still had to be treated as a foreign country by the British. Singh, supra note 6, at 888.
12. Singh, supra note 6, at 889.
13. Some separation between the African Christian converts and the Christian missionaries was over disagreements on the importance of traditional customs. This separation led to the propagation of independent facilities. See infra, note 66.
14. World War II was an important watershed for the African nationalist movement. Returning African troops brought home "a new political sophistication resulting from their rejection of white-supremacy myths and their desire for a better future." MILLER & YEAGER, supra note 7, at 24; see JOHN LAMPHEAR, THE SCATTERING TIME (1992); INDEPENDENT KENYA, supra note 7, at 9-10.
15. See also KENYA'S FREEDOM STRUGGLE (Maina wa Kinyatti ed., 1987). For detailed accounts of the Mau Mau movement and its continued effects on Kenyan society see ROBERT BUIJTENHULIS, MAU MAU: TWENTY YEARS AFTER (1973); FRED MAJDALANY, STATE OF EMERGENCY (1962).
leader of the Kenya African Union ("KAU") added to the momentum of the nationalist movement in Kenya. KAU's membership grew to 150,000 by 1950. This steady increase in support and the ensuing rise in nationalist fervor "made possible considerable cross-ethnic agreement on land issues and on perceptions of socioeconomic inequity."\textsuperscript{16} Finally, in 1960, in order to facilitate a peaceful resolution that would protect British interests, the British agreed to hold Independence Conferences where the new Kenyan Independence Constitution was created.

A brief analysis of the series of Independence Conferences shows the power that the British government exercised in shaping the post-colonial Kenyan government and also the character of the Kenyans who assumed power in the wake of colonialism.\textsuperscript{17}

1. Independence Conference of 1960

Although the Kenyan people had united in opposition to outside rule, they did not present a unified front at the first Independence Conference in 1960 at the Lancaster House. Chanan Singh believes that at this point the British government was ready to give the Kenyan delegation whatever the Kenyans requested in general agreement among themselves.\textsuperscript{18} However the unofficial delegation from Kenya, made up of 19 Africans, 17 Europeans, 8 Asians and 3 Arabs, did not present a cohesive voice, and so the British government "influence[d] decisions considerably."\textsuperscript{19} The Conference delegates decided to build the Kenyan government around the Westminster model.

This combination of Western government and native realities was awkward.\textsuperscript{20} A government styled after the Westminster model determines leadership according to political representation in the Parliament. The Kenyan African National

\textsuperscript{16} Miller & Yeager, supra note 7, at 24. The Kenyan nationalists were also encouraged by India's achievement of independence from the British in 1947. Id.

\textsuperscript{17} See Bruce Berman, Control & Crisis in Colonial Kenya 408-17 (1990)(stating that the Conference negotiations illustrate the combined effect of Kenya's nationalist pressure and the British government's manipulation to maintain some control).

\textsuperscript{18} Singh, supra note 6, at 893.

\textsuperscript{19} Id.

\textsuperscript{20} J.B. Ojwang indicates that "this [Westminster] prototype could not work, because of a local factor." Ojwang, supra note 1, at 35. Kenyan experience proves that a Westminster-type government cannot work without "congenial local circumstances." Id.
Union ("KANU")\textsuperscript{21}, the largest political party in Kenya at that
time, was therefore given the opportunity to form a govern-
ment. The KANU refused because of the British government's
restrictions against a number of leading African politicians,
including Jomo Kenyatta who was in jail at the time. The Ken-
yan African Democratic Union ("KADU"),\textsuperscript{22} Kenya's second
largest party, was then invited to form a government. This
created a confusion of power: the KADU had the authority to
create a government without a mandate from the people be-
cause the KANU still held Parliamentary control.\textsuperscript{23}

As a consequence, there developed a lack of mutual trust
which led to widening differences of opinion and divisive politi-
cal maneuverings in this phase of constitutional develop-
ment.\textsuperscript{24} The Kenyan people were concerned over the nations
ability to unite; "[T]ribal fears and suspicions over land and
power [heightened] to such an extent that it raised grave
doubts over the stability of an independent Kenya."	extsuperscript{25}

2. Independence Conference of 1962

These two political parties represented Kenya at the 1962
Conference. Again, Kenyans were disadvantaged because these
two groups fought against each other and did not represent the
collective native Kenyans' interests. "If there had been an
'African' point of view as such, it would obviously have won.
But the fact is that the parties to negotiations were the KANU
and KADU, not Africans and others, and they had their sup-

\textsuperscript{21} The "core membership" of the KANU was drawn from the KAU, which
had been formed by Tom Mboya and Oginga Odinga during Kenyatta's prison det-
tention. MILLER & YEAGER, supra note 7, at 30. The KANU receives support from
two of Kenya's largest ethnic groups—the Kikuyu and the Luo. The KANU sup-
ported a large national and unitary government, which would ensure their contin-
dued dominance in the National Assembly. See Singh, supra note 6, at 894.

\textsuperscript{22} The KADU, organized by Daniel arap Moi and Ronald Ngala, had less
power than the KANU in the National Assembly, but had many supporters in the
outlying areas of the Colony. The KADU favored a regional form of government
under which Kenya would be divided into five regions and one Extra-Region Area.
This structure would allow the KADU to capitalize on their strength in
less populated areas of Kenya. See Singh, supra note 6, at 894.

\textsuperscript{23} MILLER & YEAGER, supra note 7, at 31-32. The KADU had won only 19
percent of the popular vote and 30 percent of African support in the 1961 election.
Id.

\textsuperscript{24} See MILLER & YEAGER, supra note 7, at 30.

\textsuperscript{25} MILLER & YEAGER, supra note 7, at 32 (quoting CARL G. RASBERG, JR., &
porters among Europeans and Asians and Arabs.”26 The conflict between the two groups resulted in the formation of alliances between factions from inside and outside Kenya, dividing and overpowering Kenya’s indigenous interests at the Conference.27

3. Independence Conference of 1963

Such counterproductive politics subsided in 1963 when, as a result of the elections, the KANU obtained majority rule and Kenyatta (now released) became the undisputed leader. On June 1, 1963, internal self-government was introduced into Kenya and December 12, 1963 was declared the Date of Independence. The Independence Conference was held at Lancaster House from September 25 to October 19, 1963. Negotiations took place between the British and a united, democratically elected Kenyan delegation. Finally Kenya’s voice sounded in unison at the conferences. There was, however, a European delegation which had received approval for special representation at the Conference.28

Provisions in the Independence Constitution adopted at this Conference mirrored the Western constitutions’ recognition of individual rights (assuring the European settlers that the land and wealth they had amassed during the colonization would be protected) yet made these rights subject to significant exceptions. For example, Section 80 of the Kenyan Constitution gives every person the “freedom of assembly and association,” subject to government actions “reasonably required in the interests of defense, public safety, public order, public morality or public health.”29 This broad exception allows the government

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26. Singh, supra note 6, at 897.
27. See MILLER & YEAGER, supra note 7, at 32.
29. Kenyan Constitution § 80. Section 70 gives every person in Kenya: the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this chapter shall have effect for the purpose of affording protection to those rights.
to pass legislation limiting the freedom of association and religion, like the Public Order Act and the Societies Act, and to take actions limiting the people's access to the political process.

C. Evidence of Neocolonialism

The preceding history illustrates the extent that a European governmental structure replaced Kenya's traditional governmental structure and how negotiations resulted in a blending of the Western governmental structure and Kenya's unique political past. In *Independent Kenya*[^30], a group of anonymous Kenyan citizens write that in order for an independent Kenya to have arisen out of colonialism, there needed to be a clean break or revolution. "In Amilcar Cabral's words, 'it is necessary to totally destroy, to break, to reduce to ash all aspects of the colonial state' before independence can be achieved."[^31] Because Kenya's colonization ended through negotiation and compromise, and "[n]o colonial ruling power has ever voluntarily relinquished hegemony at a negotiating table," the authors claim the British handed over only "nominal power" at the Independence Conferences.[^32] As a result the anonymous Kenyans believe the Kenyan people never had the opportunity to create a democratic government and to escape control by a centralized power base.

[^31]: *Id.* at 13.
[^32]: *Id.* at 13.
Neocolonialism has many definitions, but the definition that best fits the Kenyan authors' arguments is from Colin Leys: "[N]eo-colonialism results 'where the transition from colonialism to independence permitted the relatively efficient transfer of political power to a regime based on the support of social classes linked very closely to foreign interests.'" The Kenyan authors argue that the Kenyans in control of the government now were closely tied to British interests during the colonization and have continued to keep power centralized. "Those who emerged to rule us in 1963 were, in many cases, those who had betrayed our freedom fighters. They were the loyalists, whose cooperation with the murderers of our people bought them privileges and wealth." The Kenyan authors claim that during this transition time toward independence the new government emphasized continuity of power rather than the creation of a new government designed to meet the needs of the Kenyan people.

This character assessment of the Kenyan governmental leaders obviously presents numerous debatable interpretations, but as support for their case that the Kenyan govern-

33. DAVID F. GORDON, DECOLONIZATION AND THE STATE IN KENYA 250-51 (1986) (quoting COLIN LEYS, UNDERDEVELOPMENT IN KENYA (1975)). Professor Gordon discusses the different definitions and chooses this definition because the definition focuses on the "relations between the new leadership and foreign interests and the degree to which the new regime promotes change." Id. at 250. Professor Gordon also discusses several valuative factors that may be used to determine whether a nation is a neo-colonial society. Id. at 251-52. He determines that Kenya does not meet this definition because the link with foreign interests is weak.

My focus is not on the foreign connections the current Kenyan leaders have maintained. Instead, I wish to emphasize the continued centralization of power. The British government passed power into the hands of a few Kenyans and these leaders have continued to hold the power and to strengthen their position rather than gradually releasing the power to the Kenyan citizens. There are, however, evidences of pro-Western leanings in the Kenyan government's economic policy and foreign affairs. See MILLER & YEAGER, supra note 7, at 3, 56.

34. INDEPENDENT KENYA, supra note 7, at 11-12.

35. Id.

36. Jomo Kenyatta, the first man elected President of independent Kenya and "the most important actor in Kenya's colonial and immediately postcolonial history" had ties to the British, but was a strong advocate of native rights. He brought grievances before Parliament and worked as a lobbyist for Kenyan nationalists during colonization. He was jailed by the British from 1952-1959 and detained after that for his suspected involvement with Mau Mau violence. During the latter part of his rule, however, "Kenyatta became at once more autocratic and less willing or able to curb the political and economic excesses of those around him." MILLER & YEAGER, supra note 7, at 21, 29, 58-60; see also GEORGE DELF, JOMO KENYATTA (1961).
ment has horded power, the authors point to several areas in which individual rights have been suppressed in order to concentrate power in the Presidency. They claim the President maintains loyalty by "operat[ing] a rigid licensing system through which the government controls all gatherings of the people—no license, no meeting, no matter how innocent." The elections are showpieces for foreign, particularly Western nations, that are "devoid of debate on issues" and feature "safe personalities who have the KANU seal of approval."

These restrictions of personal freedoms have been documented by other sources. The U.S. Department of State, in its 1994 report on human rights in Kenya, relates an incident occurring January 17, 1993 that illustrates some of the limits the government has placed on religious exercise, even though the Kenyan Constitution recognizes the freedoms of religion, worship and association. President Moi was holding a KANU rally and all students were instructed to attend. The headmistress of a girl's school interrupted a Seventh-day Adventist religious service and ordered the participating students to attend the political rally. When the students refused, they were expelled. The students were later readmitted and punished with forced manual labor.

The Kenyan government has also passed legislation limiting the freedom of association, including the freedom to associate for religious purposes. The Public Order Act requires that a district commissioner approve meetings of ten or more people. By its language the Public Order Act does not apply to meetings for "social, cultural, charitable, recreational, religious, professional, commercial, or industrial purposes," but, according to the same U.S. Department of State Report, "[i]n practice, meetings under all those categories fall under the jurisdiction of the Public Order Act." The report claims that the governmental authorities "routinely" restrict opposition parliamentarians' access to their constituents, breaking up meetings and preventing candidates from addressing the people.

37. INDEPENDENT KENYA, supra note 7, at 15.
38. Id.
39. See supra note 29
41. Id. at § 2(b).
42. Id.
The Societies Act also restricts the Kenyan's freedom of association with even broader suppressive powers. Every "society," defined as "any club, company, partnership or other association of ten or more persons, whatever its nature of object," must be recognized or exempted from registration by the Registrar of Societies. Without registration, a society is not allowed to hold meetings. The Kenyan Attorney General interprets the Act broadly, allowing the government to restrict even the actions of registered religious organizations.

Additional restrictions have come through the government's manipulations of the democratic elections in Kenya. President Jomo Kenyatta, leader of the KANU party, was elected President by the National Assembly on December 12, 1964. In 1968, the method of choosing the president changed to an election by popular vote. This power was not fully exercisable, however, because of the limited choice of candidates the people were given.

In 1977, Oginga Odinga, a disenchanted former vice-president of Kenya, announced his intention to run for president. The KANU refused to permit him to run for office and later announced that the elections for president were postponed indefinitely. When President Kenyatta died in 1978, Vice-President Moi assumed the position of Acting President, pending an election to be held within 90 days. Because the KANU constitution required the president to be a member of a political party, and because the KANU was the only political party at that time, Moi (who was selected by the KANU) was the only nominee for the presidential election. He was unanimously elected by the election delegates. Before the 1979 general election for president, 23 applicants for presidential candidacy were rejected, leaving President Moi again the sole candidate for the presidency. He was returned to office without an election.

In 1982 the KANU government passed an amendment to the Constitution which made Kenya a de jure one-party state. Section 2(a) made it a requirement that an elected official be a member of the KANU party.

43. Societies Act of Kenya (emphasis added).
44. The Attorney General has used the Societies Act to prohibit a religious group from forming a political party. See infra notes 64-66 and accompanying text.
45. For an account of Odinga's disaffection with the KANU, see infra note 78 and accompanying text.
Meanwhile, President Moi’s presidency was becoming increasingly unpopular with the Kenyans because of his strong-arm tactics and the corruption in his cabinet. The choice of candidates in the 1988 elections was limited not only by Section 2(a) of the constitution, but also by voter intimidation, ballot rigging and the blocking of candidates in the primary election. The suppression of free elections led to criticism from the Western world. In 1991, under pressure of reduced foreign aid, the KANU government vacated Section 2(a) and, at least facially, opened up the elections to other political parties.

D. The One-Party State

A discussion of the advantages and disadvantages of a one-party state is helpful in this area because of the central role the political party plays in a democratic state. Since the dissolution of the KADU party in 1964, Kenya has been first a de facto and then a de jure one-party system. Only recently has the political system been opened (at least superficially) to parties other than the KANU.

It is interesting, however, that the authors of Independent Kenya, who complain about the oppressive tactics of the present government, believe true independence will arise under the leadership of one political party. “[Full independence] is the culmination of popular, protracted revolutionary change, during which the people seize control of the instruments of power under the leadership of a party dedicated to the eradication of the institutions and forms of the colonial state.” The authors’ criticisms of the KANU failure to provide a democratic state do not focus on the close association shared by KANU and the entrenched government, but on the lack of connection between the party and the people. They argue that instead of eradicating the forms of colonialism, the KANU leaders took the reigns handed to them by the British and continue to hold power within their small, elite group, ignoring native interests as had their predecessors to power.

47. See Miller & Yeager, supra note 7, at 106.
48. Independent Kenya, supra note 7, at 13 (emphasis added).
49. The authors claim that “[s]ince only those Kenyans wealthy enough to afford to buy life membership [in the KANU] can be elected party officials, it serves as a rich man’s club, whose members are dedicated to making themselves even richer.” Id. at 15.
And so the question naturally arises: Are the suppressions of personal freedoms that occur in Kenya due in part to the existence of a one-party system or to the fact that this party does not adequately represent the voice of the people? There are several arguments on both sides of the debate.

1. A one-party state is necessary in situations demanding unity

Tom Mboya, a Kenyan scholar, argues that in the wake of colonialism, a one-party system was the only practical course in the organization of new African States.

In the days of struggle against [foreign rule], . . . the minds of the people are preoccupied with their political troubles. They experience these troubles not as individuals but as a group . . . The essential point is that all opposition to foreign rule or a mono-racial rule comes from what is to all intents and purposes a single political party.

The fact that this same party's leader, Jomo Kenyatta, who "by reason of his sacrifices in [the national] cause, is regarded by the masses as the leader, the hero, the father of the nation,"51 becomes the leader of the new government "in itself works against the emergence of a multi-party system."52 In addition, because the party is busy in the work of nation building, any opposing parties distract the ruling party; the government will either act "as a steamroller ignoring the existence of the opposition or [take] steps to put an end to opposition, for its own sake—completely and permanently."53

A one-party system provides a practical vehicle for revolution and, as mentioned above, facilitates the unity that has proven essential in post-colonial African countries. Because the pre-colonial government system dispersed power among in individual communities or tribes, there was the danger that when centralized power was taken away with the removal of a colonial head, Kenya would dissolve into various tribal groups

50. OJWANG, supra note 1, at 46 (quoting T.J. Mboya, The Party System and Democracy in Africa, COMMONWEALTH CHALLENGE, 48-50 (1964)).
51. Id.
52. Id. at 47.
53. Id. This helps explain the voluntary dissolution of the KADU in 1964. Upon the dissolution, R. Ngala, leader of the KADU party, urged all supporters of KADU and the KANU to "work together to build our nation socially, economically and politically." Id.
all claiming power and vying to take over the abandoned centralized structure. The community identity of a tribe is based on kinship relation, and more expansively on ethnic identity, as distinguished from a national identity. The danger of "tribalism" is used as a justification by the Kenyan government for many of its restrictive actions. Whether or not a strong national one-party government is still needed to create unity among the tribes, it is clear that the government uses the fear of the consequences of tribalism to limit its citizens' freedom of association, their right to participate effectively in the political process, and their right to exercise religious beliefs.

A one-party system presents obvious dangers because of the concentration of power and lack of alternative voices. KANU founder, Oginga Odinga, advocated a one-party system as a vehicle for democracy only if "the mass of the people were associated with policy-making at all levels." Without leaders who were willing to further the nation's goals as freely expressed by the people, the one-party system failed to create a democracy. And without a "united and powerful national movement neo-colonialism moved in and thrived." As discussed below, Odinga left the KANU party because of what he perceived to be a stifling of free political discourse.

2. A one-party system may be necessary when a nation lacks diversity

J.B. Ojwang argues that, outside practical concerns as to unity, a one-party system is the only viable government structure for Kenya because of the "absence of a social structuring to sustain interest groups that would be the pillars of a party system." He claims this one factor is "the key to a proper understanding of the differing notions of democracy found in Africa and in the West."  

54. Id. at 136.
55. Hemed Said Bat-Haf, the ambassador of Kenya to Saudi Arabia, in an interview with a Saudi newspaper, attributes the political skirmishes that have occurred since the introduction of multiparty democracy to the problem of tribalism. "President Moi warned Africa is not cohesive enough to implement a multiparty democratic system." (Not) the Whole Truth: Kenya—the Fight Goes; Interview with Hemed Said Bat-Haf, 8 INTERNATIONAL INTELLIGENCE REPORT (August 31, 1994).
56. OGINGA ODINGA, NOT YET UHURU 269 (1967).
57. Id.
58. OJWANG, supra note 1, at 48.
59. Id.
He speaks of an ideal sort of diversity which creates an atmosphere of free thinking and private support for political views. This kind of diversity, evident in America and in certain European nations, "rests upon diverse class and status situations which are built upon the diverse economies and societies obtaining in these countries." In the West we enjoy a tradition of support for private societies such as churches, unions, academia, and political groups; this diversity results in constant clashing and competition, balancing and stabilizing the political power struggle along the ideological spectrum. And, as Ojwang points out, "is the occurrence of diversity an act of will, which can readily be brought about in Kenya as in Britain or France?"

Because Kenya lacks the structure and tradition to support differentiation on class or status situations, "the main basis of differentiation and of broad-based group solidarity, at least for the time being [in Kenya], is communal, based on 64 or so ethnic groups." Thus, the introduction of a multiparty system—in the absence of a mature, inter-ethnic diversity of economic and social interests—would flow naturally into the default interest demarcations: tribal allegiances.

Recent developments in Kenya seem to support this fear of ethnic schism, though KANU's incessant will to control has muddied any such worthy justifications for its one-party rule. After the amendment constitutionalizing the one-party state was repealed in 1991, the Islamic Party of Kenya ("IPK") attempted to register as a political party with the Registrar of Societies. The Registrar denied their petition. The Kenyan Attorney General supported the decision with a broad reading of the Societies Act. He maintained that "registering sectarian parties would contradict the spirit of the law, which proscribes organizations 'incompatible with peace, welfare, or good order in Kenya.'" As mentioned above, this reading of the Societies Act restricts the free exercise of religion as well as eliminates a political challenger.

60. OJWANG, supra note 1, at 64.
61. Id. at 64. See MILLER & YEAGER, supra note 7, at 55, 125-60, for a discussion of the theories of a developing Kenyan class structure and economy and current economic realities in Kenya.
62. OJWANG, supra note 1, at 65.
63. See MILLER & YEAGER, supra note 7, at 55.
64. 1994 U.S. Dept. of State, supra note 40, at § 2(b).
The Muslims claim they have been “marginalized” by the Kenyan government since independence and that the denial of registration for the IPK is just the latest stone thrown in a shower of oppression.\(^{65}\) To help ease tension, President Moi formed a Muslim movement in Mombasa, the United Muslims of Africa (“UMA”), but because the group was viewed as an extension of the existing government, its formation has just added to the conflict.\(^{66}\) The IPK’s Sheikh Salim Balala was eventually arrested for threatening KANU leaders. Political violence in the region is increasing.

The IPK conflict may illustrate Kenya’s inability as yet to sustain a multiparty system structured around social and economic interests, in that it shows the primacy of ethnic and religious divisions.\(^{67}\) But the conflict may, instead, show that a multiparty democracy is not working now because the government has institutionally stifled all but its own political and social freedom, thus prohibiting the growth that would support a democracy.

Democratic governance entails far more than the legalization of opposition political parties. For a system of governance to be democratic, it must permit broad participation, not just in the form of opportunities to select candidates and to vote in elections, but also in eligibility for public office. It must be

\(^{65}\) The Muslims crushed a mutiny against President Moi in 1982 and expected some political repayment for their loyalty to the President. The fact that this payoff did not materialize added fuel to the fire. The Muslims also claim that Kenya’s laws are incompatible with Islam and that they are under-represented in the legislature.

\(^{66}\) The argument that the Kenyan government is just trying to separate religious organizations from politics fails in the face of President Moi’s formation of the UMA. In fact, there is no tradition of church/state separation in Kenya. The traditional african culture taught that the peace within the community depended upon the observance of certain customs, and therefore the legal system was inseparable from the religious code. See Vincent Mulago, Traditional Religion and Christianity in AFRICAN TRADITIONAL RELIGIONS IN CONTEMPORARY SOCIETY, 127 (Jacob K. Olupona ed., 1991).

The British system didn’t introduce strict separation between church and state either. During colonialism, the British government maintained a special relationship with the Christian missionaries, allowing them to be involved in governmental decisions because of their responsibility for the establishment of schools and medical clinics. See J.N.K. MUGAMBI, AFRICAN HERITAGE AND CONTEMPORARY CHRISTIANITY, 10 (1989).

\(^{67}\) Kenya’s political conflicts, although primarily ethnic, are not however, limited to ethnic clashes. For example, in January 1992 more than 100,000 people participated in an anti-government demonstration, led by Odinga. MILLER & YEAGER, supra note 7, at 111.
inclusive. It must also ensure the ability to contest public policy . . . through a variety of other guarantees, including freedom to associate, to speak out on policy matters, to gather and dispense information subject to libel laws, and so on. *Democratic governance is a package of guarantees and institutions to support them.*

Although the Kenyan government repealed the constitutional amendment making it a de jure one-party state, the KANU is making frantic efforts to retain power through intimidation and political manipulations. Simply eliminating a constitutional amendment is not enough to create a multiparty system when there have been no supporting actions, especially in light of Kenya's history of de facto single party rule. The Public Order Act and the Societies Act, along with the tremendous power wielded by the KANU, still restrict the operation of a multiparty system in Kenya.

3. *A multiparty system provides the opportunity for democratic governance*

The arguments in favor of a one-party democratic system focus on the necessity of the arrangement to unify the nation and to allow a developing nation to become diversified along other than ethnic lines. It is clear, however, that on theoretical grounds "there is a clear link between multi-partyism and the broader achievement of democratic governance." A multiparty system "improves the ability of the governed to hold the governors to account for their actions, for their fulfillment of the obligations they acquired in assuming leadership." It provides a forum where "the constant struggle to secure and preserve the other elements of democratic governance can be waged without resort to violence."

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69. It seems from statistics that strong-arming is what is required to keep the KANU in power. A poll conducted by a Kenyan magazine after the repeal of Section 2(a) in 1991 found that almost 80 percent of its readers preferred the Forum for the Restoration of Democracy ("FORD"), a newly registered political party headed by Odinga, while only 1.29 percent supported the KANU. See MILLER & YEAGER, supra note 7, at 108. Subsequent factional disagreements in FORD have limited its effectiveness as a force to counter the KANU.

70. WIDNER, supra note 68, at 227.
71. Id. at 226.
72. Id. at 227.
And so, if practically possible, a multiparty system offers the best assurance of free and active democracy, and the leaders in a one-party system who seek to insure a democratic governance of the people should implement the institutions and policies which will support a multiparty system. Extending one-party rule beyond what was arguably an initial period of necessity will swallow Kenya's democratic progress in a new form of totalitarianism. "[T]he protracted existence of a single-party system and attacks against ability to associate outside the confines of a party can shape interest-group structure and modify the effects of private enterprise."73 Those members of society who are in a "position to reduce state control may, for different reasons, remain outside politics. Some fail to enter politics because they cannot conceive of such a thing."74

The Kenyan government, rather than encouraging the development of a multi-party system, has acted to restrict personal freedoms in order to increase its centralized power.75 This is the complaint the anonymous Kenyan authors voiced against the operation of their government—that the government's abuse of their centralized power has impeded Kenya's growth towards democracy.

The history of collusion between the Executive branch and the KANU party exposes the latter's desertion of its proper legislative function of popular representation. In 1965 and 1966, the government of Kenya showed "considerable governmental impatience with disintegrative party activities."76 The forum where party grievances could be heard was terminated and critics of the party's direction were removed from party positions. "Open debate on party matters fizzled out, and the basis of what remained of party activity became, in the first place, the initiative of the Executive, and in the second place, alignments centered on individuals."77 Former KANU leader, Oginga Odinga, explained that

73. Id. at 230.
74. Id. at 230. Professor Widner attributes the "heightened salience of ethnicity in politics" to "single-party monopoly and increasing political repression." Id. at 231.
75. "Dependency in Kenya is mental as well as material. We have been deprived of the opportunity to act and to realize our creative potential as individuals and as a nation." INDEPENDENT KENYA, supra note 7, at 67.
76. OJWANG, supra note 1, at 51.
77. Id. A party code of discipline has now been adopted by the KANU and is used to settle party conflicts. Id. at 59.
He was a believer in a one-party State ... under which individuals were allowed to express their opinions. However, when a group of individuals tried to suppress the views of those with whom they differed and to appoint themselves the sole spokesmen of the party and the government, a one-party State became a mockery. 78

Because the KANU had become a tool for the expansion of the powers of the Executive and of the individual party leaders, it ceased to be an effective voice for the people. The power of the KANU party increased in the years following the adoption of the Constitutional Amendment, to the point that the KANU party became "the undisputed centre of political power, where independent policies are formulated and implemented without necessarily having to seek legislative approval." 79

Near the end of his leadership, Kenyatta began to concentrate power and wealth in his family and the Kikuyu tribe, to which he belonged. He used his presidential influence "to obtain business contracts, trading privileges, and private property." 80 Although the latter part of Kenyatta's rule was characterized by inequity and corruption, he was forgiven by the Kenyan people because of his status as the Father of the Nation. Moi, his successor, did not enjoy such reverence, and has had to fight more strenuously to maintain the reigns of power.

4. The Kenyan Judiciary does not provide a check on the KANU

A one-party system is particularly ineffective in protecting individual rights in Kenya because the Kenyan Judiciary "still shares many traits with the British Judiciary. The main trait is a commitment to restraint and an acceptance of the Executive's policy guidance, where the policy is embodied in definite legal instruments or in recognized principles of law." 81 Because the Judiciary defers to the Executive in issues of individual rights, there is no effective check on the power concentrated in the Executive. The following two cases illustrate the point.

In Ooko v. Republic 82 the plaintiff was suing for unlawful

78. OJWANG, supra note 1, at 51-52 (quoting East African Standard (Nairobi), May 19, 1966).
79. OJWANG, supra note 1, at 59.
80. MILLER & YEAGER, supra note 7, at 57.
81. OJWANG, supra note 1, at 213.
82. See G. Kamau Kuria and J.B. Ojwang, Judges and the Rule of Law in
detention and for failure of the authorities to comply with constitutional provisions requiring the submission of an official statement immediately upon detention of a citizen which sets out the justification therefore. The court refused to investigate the merits of the claim, and instead assumed that the claims of the government were true. And procedurally, since “the grounds stated are capable of justifying the detention [the judge claimed he had] no power to order Mr. Ooko’s release.”

J.B. Ojwang and G. Kamau Kuria claim that in this decision the court denied “it had authority to question executive decision in some cases even if such decisions were in derogation of rights guaranteed under the Constitution.”

In *Kaggia v. Republic*, the defendant was found guilty of holding an unlawful meeting under the Public Order Act. The defendant had attended a Kenya’s People Union meeting where he made a speech which led to the cancellation of the meeting. Although the meeting would probably have qualified as “commercial” and would be exempt from the Public Order Act, the court affirmed the conviction without addressing the constitutionally guaranteed freedom of assembly. Again, the government’s actions in the area of personal liberties were afforded extraordinary deference.

Therefore, because the judiciary cannot act as an effective check on the power of the Executive, the dangers of a one-party system are pronounced. The power passed by the British to a group of Kenyan leaders may have been concentrated necessarily at the outset to create unity, but there have been no subsequent steps taken by the Kenyan government to advance towards a more democratic governance. Instead, individual rights have been suppressed in order to ensure the continued dominance of the KANU party.

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83. *Id.*
84. *Id.* at 269.
85. See *id.* at 273, for a discussion of the case.
86. The Kenyan high court did grant relief to FORD when they protested over the inadequate warning given by Moi of the 1992 elections. Moi, in an effort to limit political participation, announced in October that the national elections would be held on December 7th. The Kenyan High Court set December 29th as the new election date.
III. CULTURAL ASPECTS OF KENYA

The Kenyan government often accumulates power and ensures its stability by using the clauses in the Constitution that allow a violation of rights in situations where the interests of the nation are jeopardized. Beyond this, however, there exists an important cultural source of disrespect for the individual rights recognized in the Independence Constitution. The traditional definition in Kenyan culture of "rights" is less individualistic and more contingent upon group interests than the Western concept of rights, such that the enforcement of the Constitution's individual protections has proven lackluster by western standards. The melding of the language of the Constitution and the culture is not surprising. It was assumed at the outset, or should have been so assumed, "that the model of the constitution which came with independence would adjust to the real life of the Kenyan people."87

A. The Preservation of Kenyan Culture

It may be surprising that the cultural foundations of Kenyan society remain so resistant to change—so firmly and purely traditional. The Kenyans encountered foreign Western influences as early as 1498, over 75 percent of Kenya's population has been baptized into Christianity,88 and the Kenyans were ruled for more than 65 years by a Western culture who, in their determination to create a "White Man's Country," replaced many of Kenya's traditional government structure. Despite outward control, however, neither proselytization nor foreign governance succeeded in supplanting the deep currents of African culture.

The missionaries who came to Kenya had as their goal disorienting their objects of mission from 'pagan, savage, primitive and barbaric' traditions. The practical objective was to turn the prospective converts into replicas of the missionary... On such a scale the missionary could measure his progress in terms of the degree to which his converts imitated him.89

87. OJWANG, supra note 1, at 211-12.
89. MUGambi, supra note 66, at 8. Contrary instructions were given, if not heeded, by Pope Gregory XV in 1622 in the Sacred Congregation for the Propagation of the Faith (the "Propaganda"). Vicars apostolic were admonished to introduce to foreign people
The Kenyan converts were not replicas of the missionaries, however. J.N.K. Mugumbi states that "beneath the veneer of imported ecclesiastical institutions African Christians remain African." Indeed because Christian missionaries also introduced literacy and medicine, "religious affiliation tended to be linked with the religious denomination that managed the school or hospital one went to." Therefore, the christianization was compartmentalized and did little to change the Kenyans' core cultural beliefs.

Similarly, the imposition of foreign rule did not remove the cultural foundations. A major element in the African culture—the community/tribal identity—was even emphasized by early European conquerors under the maxim "divide and rule" to avoid a united uprising. The community groups that had developed around ethnic groups were actually strengthened during the colonial period, and, ironically, "some of them turned into important instruments of resistance."

B. The Importance of the Community

The idea of community identification is "central in African thought." An individual in traditional Africa gains only the faith, which does not despise or destroy the manners and customs of any people. . . . It is the nature of men to love and treasure above everything else their own country and that which belongs to it; in consequence there is no stronger cause for alienation and hate than an attack on local customs, especially when these go back to a venerable antiquity.

STEPHEN NEILL, A HISTORY OF CHRISTIAN MISSIONS 152-53 (2d ed. 1986).

90. MUGAMBI, supra note 61, at 9; see also MUNRO, supra note 7, at 98-122.
91. THEMES IN KENYAN HISTORY, supra note 88, at 86.
92. The controversy surrounding female circumcision is an example of the dedication of African Christians to their cultural ties. For traditional Kikuyus, "the circumcision of both boys and girls had been an integral part of the initiation of young Kikuyu into adulthood." MARSHALL S. CLOUGH, FIGHTING TWO SIDES 138 (1990). Jomo Kenyatta stated that circumcision was part of the moral code of the tribe and that "it symbolizes the unification of the whole tribal organization." Id.

The missions took a position against female circumcision and encouraged their converts to do likewise. But the tradition was well rooted in the African culture. Id. at 138-39. The conflict between the missions and those who were determined to practice female circumcision led the natives to form independent schools and to create their own christian churches. See id. pp. 138-50, for a detailed history of the conflict. See also KENYATTA, supra note 2, at 130-35.
93. MUGAMBI, supra note 66, at 136.
94. INDEPENDENT KENYA, supra note 7, at 73.
95. MUGAMBI, supra note 66, at 136; see also DAVID PARKIN, THE CULTURAL DEFINITION OF POLITICAL RESPONSE (1978).
personhood through his role in the group, and "social identity therefore takes priority over individual self-esteem."96 Communities may form around family ties, shared language, locality or ethnicity, and even occupational niches.97 But regardless of the group a Kenyan identifies with, and even though the community unit is no longer the rule-making body, the idea of the community affects the operation of Kenyan law now because the community drives the definition of rights.

Raymond Verdier calls the African concept of right "a community phenomenon, which conceives of the individual and the group as complementary. This complementary concept leads to fundamental consequences within the legal sphere."98 He identifies the characteristics of the rights given in a community in the following ways. First, an individual's rights are construed as part of an interpersonal relationship. Property rights are not individual as they are in Western thought; an item of property is an "asset" of the community "which serves the function of a link between the members of the community."99 Second, a right connotes a duty. There is a reciprocity established between the one exercising the right and the one the right is exercised upon. The duty is part of a right that is given to the individual by the community.100 Third, the rights of the individual are determined by the function he or she fulfills in the community and they will change as the individual's role changes.101

Because the individual's rights are defined by the community, it is easy to see how they could be eliminated without argument from the native citizens if it were perceived that the good of the community and the role they were to play within

96. MUGAMBI, supra note 66, at 135.
97. See CHARLES H. AMBLER, KENYAN COMMUNITIES IN THE AGE OF IMPERIALISM 31-36 (1988) (The traditional relationships are a "complex world of overlapping, layered and shifting association.").
98. Raymond Verdier, Customary Family Law, at 98.
99. Id.
100. Id.
101. Id. at 98-9. Raymond defines a fourth aspect of the idea of community—that the legal system includes "the deceased persons who have obtained the rank of ancestors"—which does not relate to the definition of individual rights but instead explains the fervor with which the Kenyans cling to customary practices. Ancestors are not only included in the community, they are considered guardians who insure the observance of community customs and traditions. Traditional thought is that if the customary practices are not observed, the community will be destroyed. Mulago, supra note 66, at 127. Thus, the community viewed customary practices as the basis for the community's well-being.
the community called for such elimination. In addition, it makes the definition of a "democratic" government in Kenya more problematic for Western scholars because the voice of the people may not demand democratic rights. Is it then the responsibility of Western powers to "enlighten" the African people as to a new conceptualization of rights or should the traditional idea of rights relative to the community be respected and left unchallenged?

IV. CONCLUSION

At a basic level, Kenya shows only that the creation of a democratic nation may be gradual and must account for the melding of law with native reality. And Kenyans, after all, "[i]n terms of their freedoms, rights, and opportunities for self-advancement," are probably better off than most of their African counterparts.102 There are however, important developments since the initiation of Kenyan self-rule that point to a movement away from rather than toward democracy. Kenyan leaders have never effectively turned governing power over to the native people, but have instead acted to solidify their positions of power by manipulating elections, perpetuating a one-party state, and repressing individual rights. Even though democratic structures must conform to cultural contours, the tribal definition of individual rights should not be used to mask the established Kenyan leaders' will to power. Indeed, the Kenyan notion of rights seeks the good of the community, rather than that of the entrenched leadership.

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102. MILLER & YEAGER, supra note 7, at 59.