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Free Expression and Authority in Contest: The Evolution of
Freedom of Expression in Kenya

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Abstract

The status of freedom of expression in Kenya improved considerably in the 1990s. By the early and mid 2000s, Kenyans could express themselves without fear that the state would arrest, detain, or otherwise interfere with their expression. This relatively expansive freedom was the culmination of historical contests between the modern Kenyan state on the one hand, and anti-colonial nationalists, post-independence liberals and contemporary democratizing elements, on the other. Using a historical analysis of political, cultural and social thought and action, this dissertation explores the evolution of freedom of expression in Kenya. It also offers a holistic examination of the history of free expression in Kenya, which has tended to be treated in bits and pieces, often contingent upon donor or government funding. The interdisciplinary nature of this study strengthens prior research on freedom of expression and places the current free expression climate into a larger context. The historical approach that is utilized adds to this knowledge by examining the tension between liberty and authority in a developmental setting across time. This study also fulfills the need for more engagement with the history and politics of contemporary Africa. In the past, most scholars have focused on precontact, anthropological history of the continent, and tomes have been written about Africa's archeology and prehistory. However, this is not solely a historical project. It also makes a contribution on how free expression can be mobilized in the effort to consolidate emergent constitutionalism in Africa, and updates the historiography of free expression in Africa. This study is also an attempt to locate emerging formulations of freedom of expression, and to document their recent and current implementations.

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CHAPTER ONE

Introduction: Free Expression Theory and the Kenyan Context

On March 2, 2006, a contingent of unknown men dressed in police uniform, allegedly under the command of a foreigner, raided the offices of *The Standard* in downtown Nairobi, vandalized the print press, burned newspaper copies, and carted away forty newsroom computers to an unknown destination (*The Standard* March 3, 2006). The attackers also switched off the *Kenya Television Network* (KTN), a subsidiary of the Standard Group. Reporting of this incident cast Kenya as a country in which free expression was endangered. The Commonwealth Human Rights Initiative even declared that freedom in Kenya had gone up “in smoke.”¹

However, this incident belies the relative freedom of expression existing in Kenya. Generally speaking, Kenyans enjoy more freedom of expression today than at any other time during their modern history. The Kenyan media operate with enviable freedom, and critically examine any branch of government. The President is criticized in his official and private capacities.² Assessing this freedom, Gitau Warigi, a leading columnist, observed that Kenyans can “say and shout whatever we want without him [President Mwai Kibaki] getting into our hair the way his predecessors would have”

¹See “Media Press Release from Director,” Commonwealth Human Rights Initiative, Friday March 3, 2006. <http://www.humanrightsinitiative.org/new/2006/kenya%20media%20freedom%20goes%20up%20in%20smoke.pdf> (accessed August 22, 2006).

² Kibaki family matters provide salacious fodder for Kenya’s media. A shy polygamist, Kibaki’s two wives were engaged in a public struggle to monopolize the President. Lucy Kibaki, the first wife, has appropriated the title of “First Lady” for herself, and the president has felt compelled to issue a statement declaring that he has only one “immediate” family. Lucy barged into the offices of the *Daily Nation* in 2006 and slapped a cameraman, who later sued. However, wife number two is more flamboyant, a quality that endears her to the media, who publish pictures of her resplendent in colorful African dresses. But she and her daughter have been associated with dubious businessmen, forcing the media to question her integrity. Meanwhile, cartoonists have been having a field day portraying Kibaki as a diminutive, sleepy, retarded, idiot who is hiding from public view in the State House.

(*Daily Nation* October 1, 2006). This position is fairly common. Writing in *g21.net*, a popular Internet magazine, University of Nairobi Professor X. N. Iraki lamented that the Kenyan media had usurped the role of the “First Estate, even deciding who should be in the Cabinet.” Rosemary Okello, the Executive Director of the African Woman and Child Feature Service, assessed that “Kenya has made significant strides in realizing freedom of expression” (2006:1). And Salim Lone, a celebrated Kenyan editor who had fled the country in 1982 at the height of crackdown on the media, on retiring from the United Nations in 2004, found “wondrous” press freedom in Kenya.³ Kenya’s most renowned writer, wa Thiong’o, published an op-ed article in the *Daily Nation* on December 9, 2007, in which he said that he was “very impressed by the atmosphere of free speech prevailing in the country.”

However, there are many who feel that free expression is still restricted in Kenya. One such person is long-time journalism Joe Kadhi who has expressed the view that the government is still secretive and oppressive (2005). There appears to be agreement among international free expression monitors that freedom of expression in Kenya is non-existent. In 2005, Freedom House, an American organization that monitors freedom of expression, adjudged Kenya as “Not Free.”⁴ An opinion poll done in 2006 showed that 43 percent of Kenyans thought that the raid on *The Standard* was not justified (Kabukuru 2006). Clearly, the freedom of expression in Kenya is a highly contested issue.

What is clear, however, is that the political climate in Kenya has changed so drastically in recent years that the country may never revert back to the old days of

³ Kabukuru, Wanjohi, “Is the Kenya Media Its Own Worst Enemy?” *New African*, June 1, 2006, 8–20.

⁴ *Map of Press Freedom* by Freedom House is available at:

<http://www.freedomhouse.org/template.cfm?page=251andyear=2005> (Accessed April 2, 2006).

colonial and postcolonial authoritarianism. Nothing gives better credence to this view than the draft constitution presented to the government for debate and possible ratification by Kenyans on March 15, 2004. It contained a lengthy and grandiose bill of rights that promised to grant Kenyans extensive human rights, including first generation and fourth generation rights, with freedom of expression occupying a prominent place in this pantheon of constitutional rights.

Although some sections of the constitutional draft, including those on executive powers and devolution were contentious, the bill of rights section of the draft constitution was received with little opposition and is expected to be included with little or no opposition in any future constitution ratified in Kenya. This study demonstrates clearly that the bill of rights in the draft constitution constitutes the most ambitious attempt to enshrine free expression in Kenya. Taken together with the current *de facto* state of freedom of expression, these advances must be seen as the result of the sedimentation of historical contests between the authority of the modern Kenyan state and historical nationalists and contemporary democratizing elements. The current status of free expression in Kenya is an amalgamation of historical, ideological, legal/constitutional, professional, cultural, and external influences, as they are played out in a bruising contest between authority and the search for greater liberty.

I argue here that this generous bill of rights as well as the very liberal draft constitution itself, in addition to the prevailing favorable climate of free expression, are important milestones in the evolution of freedom of expression in Kenya and are the culmination of a spirited struggle that has occurred throughout Kenya's colonial and postcolonial history. This struggle, I argue further, is rooted in popular desire for greater

freedom based both on local understandings of what it means to be free and on new concepts of freedom superimposed on local ideas by modernity and the dynamism of global realities over time. In making this argument, my objective has been to show that that, ultimately, the desire for free expression is not a uniquely Kenyan phenomenon; the narrative of the evolution of free expression presented here must be seen as merely a local articulation of a universal impulse. What gives this narrative its unique, vernacular Kenyan character emanates from the peculiarity of Kenyan history. However, the story of the struggle in Kenya must remain part of the human epic of freedom.

The pursuit of greater understanding of the dynamic of free expression is best served by cross-disciplinary studies. This project is, therefore, inherently interdisciplinary in character. It focuses on the historical development of freedom of expression in Kenya by examining a range of historical documents organized around a series of carefully selected major historical moments. The specific questions that I will address include: How has freedom of expression evolved in the Kenyan context? How has Kenya conceived of the role of free expression in governance, and how has that conception either aided or impeded the evolution of constitutionalism? Finally, what is the current state of media freedom, and where is the country headed in this regard?

I have attempted to answer these questions through a historical analysis of the political, legal, cultural and social thought and action as they relate to freedom of expression in Kenya. As a backdrop to this whole project, and bearing in mind that modernist conceptions of free expression were superimposed on existing African notions of the same, and that the two continue to coexist, often uneasily, I have found it necessary to briefly examine how African traditional thought conceptualized freedom of expression

in the precontact era. To fill in the gaps left out in my deliberate focus on only three historical periods, I have reviewed key literature on the media in Kenya through the colonial period up to the postcolonial and contemporary period. All this is done through the prism of classical theories of liberalism and modern ideas on the rule of law.

Free Expression: Some Theoretical Perspectives

It is important to place this project within a systematic view of rights and government, hence the importance of examining, albeit briefly, classical theories about free expression. This is important because the struggle for free expression in Kenya is rooted in liberal theory, which is itself premised on the freedom of the individual. Although freedom of expression has come to be seen as an American invention because of the fame and popularity of the First Amendment of the US Constitution, it is not, exclusively, an American idea (Pember and Calvert 2008:34). Some scholars trace freedom of expression to Greek culture, citing Plato's *Republic* and Aristotle's *Politics*, but it is probably older than that.

The first case for freedom of expression is considered to have been made in 1644 by John Milton in his *Areopagitica*, in which he protested British Parliamentary attempts to regulate the printing press. In subsequent years, other writers published documents that contributed considerable insights into the issue of freedom of expression. In 1651, for instance, Thomas Hobbes's *Leviathan* appeared. Originally written to celebrate absolute monarchy, its importance lies in how it defined the security of each individual as equal under the law, and in locating the basis of liberty in exercise of political power.

Consequently, where government does not exist, where no common power keeps them in awe, human beings exist in a state of war (Hobbes 1992).

Hobbes's premises were grim and absolutist, but they were emblematic of the thinking at the time. Prior to the Enlightenment, the attitude of the Western governments toward expression was authoritarian. Freedom of expression tended to be seen as both an instrument of and a threat to the state. For instance, when the first book was published in England in 1476, the Crown put a clamp on printing so that only vetted books could be published (Pember and Calvert 2008: 34). Power was located in an all-powerful state that expected all individuals to obey the all-knowing government that was assumed to be benevolent. In this world, obedience and order were higher values than freedom, consent, and involvement (Walden 1992: 66).

The Enlightenment era, with its liberalism, engendered an appreciation of individuality in thought and expression. Classical liberals advanced the idea that intellectual and artistic activity flourished only in an atmosphere of freedom. The natural rights theory developed by Locke "transformed the older tradition of natural law into a philosophy of individualism" (Kelley and Donway 1990: 69), with each individual being seen as an end in himself.

This individual was conceived as rational, able to use the faculty of reason for individual gain. But the individual was also seen as inherently self-interested, necessitating the formation, in Locke's view, of some form of regulatory body required for the impartial administration of individual rights. In other words, organizing socially was necessary in order to aid the pursuit of individual values. The state exemplifies this social organization, and is "a common agent whose function is to preserve the right of

individuals against depredation by each other” without encroaching on those rights (Kelley and Donway 1990: 70). Government, in turn, rests on the constitution of civil society, which is voluntarily arrived at through a social contract. The legitimacy of governmental power should be derived from the consent of those who live under it. The granting of this consent is an act of expression; it is the sovereign speaking.

The advent of liberalism, therefore, changed the locus of power and the authoritarian instrumental notion of law. Since power was now located in individuals, whose consent was required in the constitution of government, free expression was seen as essential for the continued development of rational individuals and for the proper functioning of the democratic process. The legitimacy of state action came to depend upon the “rule of law” or “constitutionalism” (Preuss 1995). Instead of being arbitrary, overbroad and discretionary, the law had to be specific in its terms and universal in its application.

The most indelible embodiment of the concept and perhaps the greatest monument to liberalism is the US Constitution (Pember and Calvert 2008: 35), which became the first legal document to guarantee freedom of expression when the First Amendment was enacted in 1791.⁵ More recently, Rawls (1972), Lyotard (1988), and Rorty (1991), as well as various decisions of the US Supreme Court on First Amendment cases, have explicated and reinforced the key tenets of liberalism. Within this liberal framework, “the right to think, speak, and publish freely are important elements of the more general freedom to pursue one’s ends by exercising one’s reason” (Kelley and Donway 1990: 70).

⁵ Today, constitutionalism is a near-universal concept, leading to talk of “world constitutionalism” (Ackerman 1997).

Despite the changes brought about by liberalism, however, the authoritarian tendencies of the state did not disappear completely, and can still be seen today in government restrictions on expression, particularly in emerging democracies. Mill first expressed this antagonism between the individual and the state in his classic text, *On Liberty*. Mill's avowed aim was to explore the nature and limits of power, which can be legitimately exercised by society over the individual in the context of the social struggle between liberty and authority. He concluded that power can only be rightfully exercised over an individual member of a civilized society, against his will, to prevent harm to others (1992: 65). In other words, the state is permitted to restrict expression in limited circumstances, such as when expression threatens public safety and welfare, or when the intolerant threaten the tolerant and therefore threaten free speech (Cohen-Almagor 2001). Put differently, freedom of expression is not absolute.

This ability of governments to restrain expression results in tension between the orientation to free expression expressed in all liberal constitutions, on the one hand, and the imperative of the state to restrict expression in the name of law and order. In effect, this tension is between individual freedom and the authority constituted to maintain public order and safety in recognition of the fact that there are "seeds of anarchy in the idea of individual freedom" (Obama 2006:86).

This "dialectic between universal values under a liberal/constitutional order on the one hand, and the state with its instrumental conception of public law and speech on the other hand" is vital to an understanding of the law of freedom of expression in democratic societies (Lahav 1985: 350). The status of freedom of expression in a given country can only be fully understood through an examination of this contest over time.

Focusing on freedom of the press, Lahav has theorized that “the press of a particular country is not so much determined by the existence of a particular type of constitutional commitment, or by the presence of a special press statute, as by the particular political philosophy which animates it” (Lahav 1985: 347).

This will be shown to be true in many instances throughout Kenyan history where the prevailing political philosophy was powerful enough to overshadow constitutional provisions or at least lead to their being disregarded. For instance, in so far as laws rooted in the English Common Law governed the Kenya Colony, it could be argued that, in colonial Kenya, there was already a constitutional commitment to free expression. But we shall see that this commitment was largely absent in practice at the time. Likewise, although the constitution of postcolonial Kenya guarantees freedom of expression, to a large extent this freedom has been unavailable in Kenya’s postcolonial history.

In focusing on the media, Lahav is acknowledging the contribution made by journalists in democratic rule. In so doing, he joins other contemporary thinkers in this field (Lichtenberg 1990; Keane 1991; Coleman 1999; Curran 1996; 2000; Leslie et al. 2003), who roundly acknowledge freedom of expression as the handmaiden of democracy. Owing to the crucial role played by free expression in democratic governance, all democracies worthy of the name allow their citizens some right to freedom of expression. Indeed, the history of the modern notion of freedom of expression is interwoven with the historical struggle for democracy and the rule of law. The media, by exposing violations of individual and communal rights, chip at the edges of power, thereby providing a vital oversight on governance. This is the watchdog role of the

media, which has come to be seen as to “comfort the afflicted and afflict the comfortable.”⁶

As gatekeepers of public media, journalists improve democratic debates and deter corrupt practices in public service. Media that appreciate the importance of human rights can provide reliable sources of information that all citizens, civil society, private organizations, and even governing authorities need in order to govern better, promote development, and eliminate arbitrary abuse. It is therefore crucial that the media and individuals in a country be able to freely express themselves in order for democracy to function properly.

The role of freedom of expression in democratic rule is acknowledged in international agreements and conventions. Article 19 of the Universal Declaration of Human Rights (UDHR), states expressly that “everyone has a right to the freedom of opinion and expression” and that 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.”⁷ Its successor, the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of expression in the same Article 19.⁸ In Africa, the African Charter on Human and People’s Rights guarantees the right to freedom of expression in Article 9, including the right to receive and disseminate

⁶ This quote is attributed to Finley Peter Dunne in *Bartlett's Familiar Quotations*. <http://www.bartelby.com> (accessed June 18, 2003). The full quote, part of a satirical piece, is: "The newspaper does everything for us. It runs the police force and the banks, commands the militia; controls the legislature, baptizes the young, marries the foolish, comforts the afflicted and afflicts the comfortable, buries the dead and roasts them afterwards."

⁷ United Nations, “Universal Declaration of Human Rights,” <http://www.un.org/Overview/rights.html>. (accessed July 16, 2008).

⁸ United Nations High Commission for Refugees, “International Covenant on Civil and Political Rights,” http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed July 16, 2008).

information lawfully.⁹ The African Commission on Human and People's Rights, meeting at its 32nd Ordinary Session from October 17 to 23, 2002, adopted the Declaration of Principles on Freedom of Expression in Africa. The preamble re-affirms "the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms."¹⁰

The United Nations Development Program (UNDP) sums up the role of the media in a democracy as being to provide a forum for "informed debate." The media, therefore, serve as "the lifeblood of democracies." Without the media, "citizens and decision-makers are disempowered, lacking the basic tools for informed participation and representation" (UNDP 2002:75). While information is not, in and of itself, sufficient to halt human rights abuses, "it is a precondition for stopping abuses and a prerequisite for effective action in the human rights field" (Wiseberg 1989: 373).

It is important to define what is meant by freedom of expression in this study. This is particularly important because in some areas, my documentation of the evolution of freedom of expression resembles a history of nationalism and democratization. The relationship between nationalism, democratization, and free expression is certainly very close. Perhaps the first two are the last's first cousins, if not siblings. Free expression is certainly one of the ways in which nationalism and democratization manifest themselves. Nationalists must express themselves in order to state their grievances and to demand freedom. And so must democracy activists. Democracy itself entails the free expression

⁹ African Commission on Human and Peoples' Rights, "African Charter of Human and Peoples' Rights," http://www.achpr.org/english/info/charter_en.html (accessed July 16, 2008).

of an individual's political choices. However, free expression is certainly not a synonym of nationalism and democratization. There are certain aspects of free expression that have little to do with nationalism or democratization. For instance, pornography is an aspect of free expression that is unrelated to either nationalism or democratization.

Freedom of expression has its own historical pedigree. As we have seen in the foregoing discussion, it is rooted in the Enlightenment era. There is no clear-cut definition of free expression. It is defined more by its absence than its presence. It has been referred to as "liberty of expression" (Cook 1990). The moniker of "liberty" serves to establish an umbilical connection with the concept of "free will," which itself evokes the ability or discretion to choose unconstrained by external circumstance or an agency such as authority. Freedom of expression has evolved as an important part of human rights. It has been celebrated as a "means to attaining truth or individual self-realization, a necessary element in a democratic society, a precondition of personal autonomy, a watchdog of government" (Lichtenberg 1990: 15).

This study is informed by the breadth of the First Amendment of the US Constitution, which broadly defines free expression to include "the right to demonstrate and to picket, the right to compete in elections, and the right to communicate views via the written and electronic media" (Cohen-Almagor 2001: xiii). This study is also informed by the First Amendment doctrine that has been established by the US Supreme Court in a string of decisions regarding free expression issues. This doctrine clearly shows a hierarchy of First Amendment freedoms that places political speech at the apex

¹⁰ African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression in Africa," http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html (accessed July 17, 2008).

followed by commercial and other kinds of speech (Middleton and Lee 2007: 43).¹¹

Consequently, this study is characterized by what may appear to be a bias towards political speech. Political speech takes place mainly through the media, which in turn means that I have tended to use free expression and media freedom rather synonymously.

According to An-Na'im, freedom of expression possess a "contingent universality" rooted in both the "dynamic of internal domestic affairs" and "the dynamic of external or international affairs" both of which are in constant interaction and modify each other (1997:30). The realm of international affairs, with its complexities of geopolitics, while important, is not the focus of this study. However, I have often found it necessary to make occasional references to geopolitics in order to provide further context. For instance, it is imprudent to discuss the 1970s without reference to the Cold War era. Likewise, although I acknowledge that free expression can be constrained by economic factors, the emphasis here is on political and legal constraints.

This study is concerned with the dynamics of the evolution and application of freedom of expression in a given locale, using Kenya as a case study. It offers one answer to the questions of the origins of social desire for greater liberty and the means by which societies come to win a larger degree of free expression from recalcitrant states that are often characterized by authoritarian rule. It is more than a compelling narrative of socio-political changes, offering insights into the debate about the role of free expression in the emergence of constitutionalism.

¹¹ Middleton and Lee explain the hierarchy of protected speech as follows:

In the constitutional hierarchy of content, the most favored speech is political speech and social content, the regulation of which must be subjected to strict scrutiny. Less protected are advertising and nonobscene sexual expression, the regulation of which is subjected to more relaxed scrutiny or intermediate scrutiny. Excluded from constitutional protection are false advertising, fraud, obscenity and fighting words (2007:43-44).

Many scholars, including leading contemporary thinkers like Dworkin (1977), Rawls (1973), Raz (1986), and Allan (2003), exhibit a functionalist approach to their analysis of constitutionalism. They are concerned with how the rule of law can be made to work. They tend to view it as a given that constitutional rule is a necessary component of any genuine liberal or democratic polity, but they tend not to be overly concerned with the details of whence and how such constitutional rule evolves and comes into being, particularly in a developmental setting. This kind of scholarship does not address the chicken and egg conundrum: Which comes first, rule of law or free expression? This study makes the point that the rule of law does not appear from nowhere serving free expression on a platter, unprovoked and on its own volition. Rather, it is the cumulative struggles for free expression that result in advances in the kind of rule of law that is capable of securing and guaranteeing liberty. I agree with Gathu that the “movement along the freedom of expression continuum is a dynamic process” (1995b: 78).

Constitutionalism also tends to be viewed as a formal state structure by the disciplines of law and political science. The doctrine of separation of powers associated with liberal democratic states is often pointed to as the guarantor of liberty because different branches of government are established to countervail one another. Freedom of expression is presented as being located in the interstices of these separations. The concept of checks and balances evokes this idea of freedom; as different branches of government check one another, balance their interests, check factions and prevent tyranny of both the majority and oligarchy, human beings are left in peace to enjoy their freedom.

This study, while concurring with this general theorization, demonstrates that sources of free expression are much more complex. Free expression in this study emerges as always evolving — the byproduct of simultaneous, cascading and interlocking dynamics in the spheres of politics, law, religion, culture, society and history.

Freedom of Expression in Traditional African Society

Free expression is often depicted as an ideological component of a modern commercial capitalist system, “whose compatibility within the traditional African society is doubtful, so long as Africa is typically oral, aggregative, and communal in character” (Yankah 1998:4). The communal basis of the traditional African society is seen as having been antithetical to, or at the very least, incompatible with free expression. If African traditional society did not enjoy free expression, it is implied, then modern Africa cannot be expected to effectively handle freedom of expression.

One scholar has argued that free expression was absent in African societies because they are characterized by irrationality and sentimentalism, and lack a technological capacity requisite for effective enjoyment or practice of free expression:

Freedom of the press and objective distancing...call for quiet contemplation of the evidence and systematic examination of the many sides of multifaceted issues. Such contemplation is made possible in print cultures where the mind is freed of the responsibility of memorization. Here the individual writer has the luxury to distance himself from the influence of others and formulate reasoned arguments which rest on the scaffolding of logical thought. In print cultures, people develop the habit of trying out new ideas, contrasting them to old ones, and discarding those which are unsuitable. Such experimentation is not possible in oral cultures where each new idea must be stored in the mind (Bourgault 1995: 76).

This position betrays a misunderstanding of human reasoning by not only over-privileging the role of technology in rationalization, but also by devaluing the role of

personal agency and spontaneity. While memory is important, it is by no means the overriding element in decision-making.

This kind of thinking flies in the face of arguments and evidence from other scholars who hold the view that freedom of expression in Kenya and in Africa generally has existed for as long as there have been people inhabiting these areas. Evidence suggests that traditional African societies placed a high value on free speech. Among the Akan's mythology of origin, for instance, the parrot holds a special place. The ethnic lineage owes its special existence to the parrot, which, through cackling, saved their progenitor on a perilous journey. The implication is that if the "freedom to speak had been suppressed in the animal world, an entire human lineage would have been wiped out" (Yankah 1998: 12).

Yankah has concluded that "freedom of speech exists within traditional society" (1998: 12), a conclusion that was also reached by Kenyatta who wrote in 1938 that the African "is conditioned, by the cultural and social institutions of centuries, to a freedom of which Europe has little conception," (Kenyatta 1965: 306). Traditional society gave considerable latitude for people to express themselves. Evidence of this is available in the proverbs in many societies that extol the value of free expression. For instance, a Kikuyu proverb says "*Kiuria gitiohanagiruo*" or that "no one should ever be punished for asking a question." An Akan proverb states that "the mouth is used to protect the head," meaning that lives can be saved by the very act of speech.

However, traditional societies had norms that governed speech. It is such norms that are often misconstrued as evidence of suppression of speech in those societies. African traditional societies have been criticized for the apparent suppression of free

expression among certain segments of society such as women and children, but this critique fails to acknowledge that similar situations existed in non-African societies, including the disenfranchisement of women until the twentieth century in some Western countries.

African ideas and norms of expression were shaped by the nature of social formations in traditional, pre-contact Africa. A key feature of traditional African society was the limited size of political units, with most communities, particularly in East Africa, having been acephalous in organization. It has been argued that the small size of such political units made it possible to operate a participatory system of government not unlike the Greek city-states model, albeit with the dominance of elders (Wirendu 1998:33).

This dominance by the elders was not total. Karp has argued that in some African societies, elders did not and do not “escape accusation,” so that they are often accused of witchcraft even while their wisdom is revered (1995:219). The power of the elders was also limited by their reliance on others, particularly the young, and also by the lack of modern resources requisite for widespread encroachment on human rights. Another check on elder authority came from a variety of brotherhoods, secret societies, younger cohorts, and other loci of power, each controlling a sphere of political existence (Bourgault 1995: 185). Rulers could even be subject to “destooling” or removal by the community for major transgressions (Young 2002:16). This resulted in largely, although not exclusively, nonauthoritarian systems that controlled human action and also distributed resources.

Traditionally, Africans, like other premodern societies, communicated using folk media or “oramedia”¹² as various studies have shown (Pye 1963; Doob 1966; Ainslie

¹²According to Mushengyezi, the term “Orate” was coined by Ugandan scholars Bukonya and Zirimu to designate an “oral” rather than a “written” tradition (2003:108). This term gave rise to such terms as

1966; Hachten 1971; Head 1974; Wilcox 1975; Ugboajah 1972; Nwuneli 1981). Perhaps the best examples of these forms of communication are storytelling, parables, myths, dance, song, rituals, and drama. These were the media through which routine, ritual and religious communication were expressed, and also the channels through which communal memory was passed on to posterity. Mũgo has shown that precolonial orature among the Kikuyu was “greatly preoccupied with human rights concerns” (1991:36).

Before the annexation of Kenya and Africa by the European colonial empires, Africans had their own modes of communication, concepts of freedom of expression and wider human rights, and even rules regulating such expression. As it has been noted, the ideas of the imperialists “were not imposed upon African and Asian *tabula rasa*, but upon peoples and societies which were both appalled by, and attracted to, the strength and vigor of the societies which had the capacity to dominate and remake their institutions” (Taylor 2002:2).

Clear distinctions existed between free and “unfree” status (Young 2002:12). For instance, the Swahili word for freedom, *Uhuru*, existed prior to the coming of the European, so that it cannot be argued that colonialism taught the Waswahili a new concept.¹³ The problem arose in the conception of the fullness and limits of that freedom. Here, Western rationalized notions of freedoms of the individual were pitted against

“Orature,” meaning the study of the oral performance and literature of such societies, and “Oramedia,” meaning the aggregate of media in such societies.

¹³ Besides *Uhuru*, the Waswahili also had other ideas that Europeans could recognize. An example is the idea of relaxation. A story is often told in East Africa about a white missionary out to “civilize” a Mswahili native. He found the native relaxing under the shade of a *Mnazi* (palm tree), and inquired: “Why do you always sleep under this tree? You should go to work!”

The Mswahili replied contemptuously: “*Halafu?*” (So?)

Missionary: “So that you can acquire wealth and be rich.”

Mswahili: “So?”

Missionary: “So that you can have enough to eat and save!”

Mswahili: “So?”

Missionary: “So that you can stop working and relax.”

African communalistic ideas of the same. As one scholar has observed with respect to colonized societies generally, “the language of freedom was often expressed in a language of implied obligation and assumed self-restraint” (Taylor 2002:4). Freedom of expression in traditional African societies existed in relation to a known moral order. Modernity disoriented Africa’s moral compass, but the impulse for free expression was retained and has persisted ever since. This project is a study in the persistence of this impulse. It is also a reaffirmation that contemporary Africans are not inhibited by any perceived lack of free expression in traditional society.

Freedom of Expression in Kenya: A Historical Perspective

The territory that came to be referred to as Kenya came under the British sphere during the Berlin Conference of 1885. Two years later, the territory was placed under the administration of the Imperial British East Africa Company (IBEAC), which had been formed by William Mackinnon to exploit the British sphere (Ogot 1981; Beachey 1996; Sorrenson 1968). The IBEAC administered the territory until July, 1895 when British Protectorate was declared, but the territory did not become a colony until 1920. However, throughout this time, many missionaries and settlers arrived, after active recruitment by the company (Ogot 1981; Beachey 1996; Olumwulla 1990). It is to their arrival that Kenya owes the emergence of the state, modern notions of liberalism, and modern mass media. Indeed the very first newspaper, the *Taveta Chronicle*, a quarterly, was started by Reverend Albert Stegal of the Church Missionary Society near the Kenyan coast in 1895 (Abuoga and Mutere 1988:4–5). The *Uganda Mail* was published in Mombasa between 1899 and 1904 (Abuoga and Mutere 1988).

However, the newspaper that was to have a major impact on journalism in Kenya by sheer longevity was *The Standard*, which was started in 1902 by M. A. Jevanjee, an émigré from India, another British colony. Jevanjee sold his paper to settler interests, who moved it from Mombasa to Nairobi and changed its name to the *East African Standard* in 1905. This newspaper, which still exists today, did not have a serious competitor until 1959 when the Aga Khan established the *Nation* (Soja, 1968: 41). *The Standard* is the oldest continuously published publication in Kenya, and is essentially the newspaper of record as far as Kenyan history is concerned.

Although there exists a fairly large corpus of literature on the media and politics in Kenya, the issue of freedom of expression in Kenya has not been studied holistically in any systematic way. A short book chapter by Kenya's legendary editor George Gethi is perhaps the first article by a Kenyan dealing specifically with an aspect of free expression -- media freedom (1971). Short on details but long on opinion, Gethi's article concluded that Jomo Kenyatta, Kenya's first President, was extremely tolerant of the press. "I can say truthfully that, from the perspective of political press freedom, I was as free as any editor could be, bearing in mind the limits of the law, the limitations of my knowledge, and other matters" (Gethi 1971:64). However, this rosy view of media freedom might have been colored by Gethi's close relationship with Kenyatta, whom he had served as a private secretary in 1963.

Ndeti (1975) contribution came in the mid-1970s. However, he did not address himself specifically to the issue of press freedom, dealing, instead, with the larger questions of culture including language, drama, and government's role in the preservation of traditional African cultures. Mwaura's (1980) work examined communication policies

in existence in Kenya in the late 1970s without addressing their underlying sources. Abuoga and Mutere (1988) dealt with the history of the press in Kenya, but this was largely a history of names, dates, and events which was clearly a history neither of press freedom nor of freedom of expression. Carter (1970), comes out as an apologist for the colonial government in his analysis of the relationship between the colonial government and the press. He concluded that press laws in Kenya over the first fifty years of the twentieth century, “were far from restrictive” (1970:243).

Another notable study (Gadsden 1980) restricted itself to an analysis of the African press during colonial times, overlooking the settler and the Asian press and some key government policy papers of the time, which were equally instrumental in shaping the direction of press freedom in colonial Kenya. Maloba’s study is also situated in the colonial era, but it focuses on how the colonial authorities used propaganda to create a bad image of Mau Mau (1992). Ochieng (1992) wrote a semi-autobiographical indictment of media self-censorship in both the Kenyatta and Moi eras.

Some writers (Rukwaro 1992; Wanyande 1995) have addressed the issue of media-state relations, but these studies fail to give this relationship prolonged treatment. Opiyo (1994) focused on how Kenyan media was exercising the freedom accorded by political liberalization in the early 1990s. His project was clearly influenced by the democratization events of the time. Gathu (1995a) examined the influences of television programming on Kenyan urban youth identity formation. She also briefly compared freedom of expression in Kenya and the United States (1995b). Without limiting his discussion to Kenya, Ngugi (1995) chided African media for not understanding fully the

meaning and implications of democracy and for being oblivious to the wide-ranging impediments that the media faced in the process of supporting democracy.

Kariithi's (1996) study is a comparative analysis of media social responsibility in Kenya and Zambia, while Wanyande (1996) justifies why the media in Kenya are part and parcel of civil society. The term *civil society* was in vogue in the 1990s, hence the attempt to stress the civil society identity of the media should be seen as an attempt to give the media more credence. Odhiambo (2002) discussed the media environment in Kenya since 1990 from a variety of angles, focusing on constitutional, statutory, and technological constraints, with a particularly incisive discussion of economic constraints. The latest addition to this corpus is Makali's (2003) summary of some of the memorable court cases since 1990, but this resource is essentially a legal analysis, written by legal scholars interested in technicalities of law. It therefore omits important non-legal articulations of free expression.

Other notable contributions to the literature on freedom of expression in Kenya have been made by the civil society, which has been pushing for more political liberalization since the early 1990s. These include an advocacy document on press law changes (Kibisu 1994), which was published to influence a task force on press laws established by the government under publisher Hillary Ng'weno. *Broadcasting in Kenya: Submission to the Task Force on Media Law*, by Article 19 (1995), argued for the liberalization of Kenya airwaves. The Kenya Human Rights Commission (KHRC) Report of 1997 concluded that the media in Kenya were "shackled messengers" because whatever freedom of expression was guaranteed by the constitution was effectively taken away by numerous statutes that served to undermine that same freedom (KHRC 1997).

The East African Media Institute (EAMI) received funding from Germany's Friedrich Ebert Stiftung to publish its *Media Culture and Performance in Kenya*, which *inter alia*, discussed media policy and law in Kenya and called for more liberalization (2000). The International Commission of Jurists Kenya Section also chipped in with a report assessing the state of freedom of information in Kenya (ICJ: 2002a). USAID's report on *Existing Legal and Policy Constraints on Media Freedom* (2003) was in effect an update on the KHRC 1997 report, but was honest enough to admit the internal institutional constraints such as media corruption and lack of proper training.

The issue of freedom of expression in Kenya has been treated episodically and randomly. Some reports have been clearly aimed at influencing the direction of change in media law, while others have been written by government apologists. My study will attempt to bridge this gap by analyzing the history of freedom of expression more comprehensively and, hopefully, dispassionately, given the distance of historical time, and also the kind of distance that can result from an absence of more than ten years from active journalism in Kenya.

Significance of the Study

Kenya is an appropriate laboratory for the study of free expression because in comparison with most other African countries that have experienced virulent dictatorships, the country has remained relatively liberal, particularly in the postcolonial era. However, freedom of expression is still very much under threat from executive fiat. Furthermore, unlike other African countries that have experimented with socialism, or have been wracked by violence, Kenya has experienced a semblance of a rule of law, albeit an

imperfect one, since independence. It has not been a failed state in the strictest sense of the word. The absence of major civil disruptions means that the trail of ideas and events has been largely preserved and can therefore be studied.

Kenya was conceived as a liberal society (Ghai and McAuslan 1970); the early colonial settlers who founded Kenya thought of Kenya as England transplanted to the Equator. The new settlers and the nascent colonial state had to contend with the nagging native problem, but they had a novel solution for this problem. They insisted that all the trappings of liberalism, including freedom of expression, could only be enjoyed by those with the requisite civilizational competency to do so, meaning by European settlers and any member of the colonized races who assimilated British culture. Among other benefits, one unintended consequence of the colonial project and its civilizing mission was that by introducing education, religion and Western concepts of government, colonialism introduced modern notions of liberalism to Kenya. Major studies on Kenya such as those of Berman (1990), Leys (1975), Berman and Lonsdale (1992), Widner (1992), Odhiambo and Lonsdale (2003), in one way or another, address the tension caused by this modernization.

At the time of independence, the constitutional arrangement was also liberal in design, with Chapter 5 of the constitution being devoted to the protection of human rights, including that of freedom of expression (Lush 1998). And it must be said that although postcolonial rule was less than liberal, still, relatively speaking, the system of government never became liberalism's opposite. Hence Kenya can be studied as a country that has remained relatively liberal. Studying a country like Kenya and how she has grappled with issues of freedom of expression is also important in understanding the

theory of “incremental success” (An-Na’im 2006) as it applies to African constitutionalism in a relatively peaceful context.

This study makes a contribution to how free expression can be mobilized in the effort to consolidate constitutionalism in Africa, besides updating the historiography of free expression in Africa. It also offers a holistic examination of the history of free expression in Kenya, which has tended to be treated in bits and pieces, often contingent upon donor or government funding. The interdisciplinary nature of this study also strengthens traditional, straightjacket, media research on freedom of expression and places current and proposed laws regulating freedom of expression into a larger context. The historical approach of the study adds to that process by examining the tension between liberty and authority in a developmental setting across time. This study also fulfills the need, identified by Stephen Ellis, for more engagement with the history of contemporary Africa (2002). In the past, scholars have tended to focus on precontact, anthropological history of the continent, and tomes have been written about Africa’s prehistory. However, this is not solely a historical project; it also an attempt to locate emerging formulations of freedom of expression, and to document their recent and current implementations.

One limitation of this study lies in its reliance on documented sources. This approach is imposed by the nature of the project itself. Since I set out to trace the evolution of freedom of expression, the act of assessing this evolution suggested a fidelity to documentary evidence. Future inquiries into the evolution of free expression might want to focus on interviews with key players, particularly in the recent past. Also, there is room for a more intense engagement with one category of material, for instance, an

examination of court decisions on free expression cases or the role of the alternative press over time. I believe, however, that this study is an important trailblazer as it treats the evolution of free expression more comprehensively than any other prior studies.

A Note on Research Methods

Freedom of expression is an inherently interdisciplinary concept, with ideas about it being located in diverse areas and records. This project brings together a wide range of materials from such fields as Kenyan history, politics, law, African literature, and classical political and social theory. There is also material that touches on aspects of American politics and law as well as on international relations and globalization. The primary materials utilized in writing this project came from a variety of sources in Kenya, Britain, and the United States, and include archival collections, newspapers, autobiographies, official publications, and records of colonial and postcolonial governments in Kenya. Most of this material was collected with the aid of a summer research grant from Emory's Graduate Institute of the Liberal Arts and Institute of African Studies. However, I have over the years collected substantial material in my capacity as a former journalist in Kenya and as one who keeps a very close eye on events in Kenya in particular and Africa in general.

Most of the material comes from the Kenya National Archives in Nairobi. The archives have considerable holdings on the colonial interregnum in Kenya and has the most comprehensive collection on this period, although most of the material is said to have been destroyed in a bonfire by the British as they withdrew in the early 1960s (Elkins 2005). For instance, material seized from the personal library of Jomo Kenyatta

when he was arrested in 1952 has never been recovered. This material would be helpful to studies centered on this period. However, the archive still does have considerable resources on this period. Whatever I was unable to obtain from the archives, I was able to access through the inter-library loan system.

Materials were readily available at the National Archives and also at the Jomo Kenyatta Memorial Library at the University of Nairobi, which is the official repository of the registrar of Books and Newspapers. As such, this library receives statutory copies of all publications in Kenya. The archival material that I examined includes the Kenya colonial administration documents; statutes; reports of special commissions; annual reports; the drafts of the independence constitution; the independence constitution; speeches by colonial governors and post-independence presidents, politicians and government officials; autobiographies and biographies of early European settlers, nationalists and editors; as well as newspapers during and after the colonial period.

The Library of the Kenya National Assembly was also helpful, particularly with copies of the *Hansard*, the record of debates in the parliament. Most of the materials dealing with the contemporary period in Kenya are still widely available in bookshops. I was also able to obtain valuable copies of statutes, Sessional papers, bills, and development plans from the Government Printer in Nairobi.

I also collected material relating to the ongoing constitution debate from the Constitutional Review Commission of Kenya (CRCK). This material includes copies of submissions and reports of the commission's work. The Kenyan media also extensively covered this period, and I was able to obtain press reports in the online archives of leading newspapers like the *Daily Nation* and the *East African Standard*. The civil

society has also extensively documented both the debate and their contributions to it. Most of their material is available at their respective web sites, while some has been published as books and reports.

Using a combination of documents and historical and textual analysis, I attempted to uncover ideas regarding freedom of expression in the interstices of carefully selected historical moments and tried to map the struggle for free expression over time. Observing and analyzing changes over time is essential to understanding why a contemporary situation is the way it is. It is impossible to understand the present without understanding the past. And change cannot be imagined fully without a sense of what we want to change from, or how change has occurred in the past in similar situations. I recognize that the past is a period in its own right, “replete with unfulfilled ambitions and disappointed hopes, ideas that once seemed important but that did not actually result in outcomes that are still with us today” (Ellis 2002:3). Consequently, I have tried to situate the events examined here in the reality of their own historical context and viewed the unfulfilled ambitions of the past not as a series of failures, but as the building blocks of today’s successes.

Studying the evolution of freedom of expression in a nation that is now forging its second century of existence is, by all means, a daunting task fraught with numerous challenges. There are long historical periods that are distinguished by lack of relevant data; for other periods, there is an oversupply of material. Some historical events, although prominent by all accounts, may not even have freedom of expression issues at their core. In others, freedom of expression is indistinguishable from the real issue at hand; for instance, the fight over self-determination is essentially a fight for self-

expression. The merging of these two struggles means that a study of either cannot exclude material that at face value relates to the other. This is what turns this study into an interdisciplinary one.

I have approached this study of free expression longitudinally. However, since historical events carry different weight for, and relevance to, freedom of expression issues, not all historical events can be studied. Therefore, for purposes of this project, I have adopted the case-study method, which allows me to focus exclusively on those moments when freedom of expression was most seriously contested, leading to decisive change in the way in which freedom of expression was subsequently conceived and practiced. For instance, some episodes might reveal that freedom of expression was curtailed, while others might show that freedom of expression was expanded, questioned, or reconsidered. The suitability of the case-study approach also lies in the possibility of multi-perspectival analyses (Feagan, Orum and Sjoberg 1991), which means I will be able to consider not just the voice and perspective of the actors, but also of the relevant groups of actors and the interactions between them.

The three case studies were selected using the following criteria. First, in the particular historical moment under study, freedom of expression must evidently be severely tested or debated. Second, the moment must carry the potential to either advance or retard the march of freedom of expression and freedom generally. Third, the period selected must represent an important juncture in the historical development of Kenya, meaning that the event or series of events leading up to and following the event or series of events must be momentous enough to warrant study. Fourth, the case study period selected must promise to yield adequate material for study. Finally, because Kenya's

history since the advent of colonialism in the 1890s is becoming rather long, the case studies were selected to represent colonial, post-independence and contemporary periods in Kenyan history.

In selecting these case studies, care has been taken to see events in a continuum, rather than as isolated phenomena. I recognize only too well that history cannot be divided into neat packages with definitive starting and ending points. Thus, events studied or mentioned here are seen in the context of their antecedents and subsequent events, rather than as events that are quarantined between specific years.

The Case Studies

Case Study 1: The Struggle for Uhuru and Freedom of Expression in Late Colonial Kenya 1945 –1955

After an initial spurt of energetic activism in the 1920s and early 1930s, nationalism in Kenya appears to have receded in the late 1930s and early 1940s. There are a number of good reasons for this. First, the colonial authorities had cracked down heavily on the organizers of dissent, such as Hurry Thuku who was detained in Kismayu (Thuku 1970). Second, the Africans appeared to genuinely believe in the possibility of a self-help route to modernity. Therefore, they focused their energies on building independent schools and churches as means to that end. Third, Jomo Kenyatta, the foremost nationalist of the time and the symbol of freedom in Kenya, was exiled in Britain, unable to exercise his vital leadership in the cause of African nationalism. Finally, the Second World War usurped the energies of Africans and colonial settlers alike, with many young Africans being sent to fight in foreign countries. This war also preoccupied the young with various kinds of

war efforts, depriving the country of a vital constituency in combative politics – the youth.

However, after the war, things began to change. For a start, both Mbiyũ wa Koinange, the first Kenyan to get Bachelor and Masters degrees, and Kenyatta, now armed with a University of London education, returned to Kenya. Both brought with them vital international experience and much-needed intellectual wherewithal, new ideas of freedom, and constitutionalist ideas of how to attain that freedom. Kenyatta in particular brought his personal charisma and rhetorical skills. Returning veterans of the war also came back with new ideas, grievances, and political aspirations. Graduates of independent schools, government and missionaries schools became so numerous as to constitute a critical mass of literate people who could read and contribute to the shaping of popular opinion. The elite of the 1940s and early 1950s also included a significant number of self-taught people. In effect, the elite of these years were the very first Kenyan Africans to straddle both traditionalism and modernity. They could rationalize like the Westerner at some level while still being genuinely steeped in traditional African modes of thought.

At the same time, this period saw a greater association between the African nationalists and the Asian merchant class in Kenya. Although favored by the colonialists, the Asians still resented being kept at an arms' length, and were starting to think of their fate as being intertwined with that of the Africans rather than of the white settlers. This collaboration led to a brief expansion of free expression with the emergence of a number of publications that questioned the treatment of the African at the hands of the colonial officials. These publications, printed by dissident Asian printers in Nairobi, revealed both

African ideas of freedom and a longing for Western ideals of the same. These publications were operating under a particularly restrictive colonial regime of laws and views towards freedom of expression for the African subjects.

This case study reveals the colonial context for free expression through an examination of colonial official documents, statutes, press reports, autobiographies, books, and newspaper accounts. The material reveals both established and changing ideas of how the colonial administration viewed African self-expression, depending on the pressure the Africans were exerting at the time. At the same time, the views relating to freedom of expression of the emergent elite are revealed through the examination of popular publications, as well as biographies and autobiographies of prominent African nationalists and journalists of that era. In 1952, a state of emergency was declared. This effectively denied the African nationalists, particularly members of the Kikuyu who had been exceedingly active prior to the state of emergency, any meaningful participation in the important discourse of the time. Key dissidents of the day were detained, and among the prominent six detainees, at least four were journalists or former journalists. This underscores the seriousness with which the colonial authorities viewed not just freedom of expression in general, but freedom of the press as well.

From this moment henceforth, the path of freedom of expression took a southward turn until 1963, when, with the advent of *Uhuru*, the situation somewhat improved. However, free expression almost immediately faced a different set of obstacles. This particular case study presents the context of free expression in the late colonial period. This period has been described as the period distinguished, on the one hand, by the embarkation on the part of colonial authorities on a developmentalist

program, and on the other, as a period “when colonial rule began to fall apart” and “when Africans mobilized to claim new futures” (Cooper 2002). The fight for free expression was an attempt to claim this new future. In Kenya, this period presented a particularly heated historical eruption of activity and ideas, both rationalizing and attacking colonialism. For freedom of expression scholarship, this is an important period to examine, particularly because it bears heavily on the shape of freedom in the Kenyan postcolonial state.¹⁴

Case Study Two: The Kenyatta Succession and Freedom of Expression, 1974–1978

At independence, Kenya began with one of the most liberal constitutions on the continent, being, as it was, a product of the liberal British tradition and the liberal views of the nationalists, with considerable input from American civil rights lawyer Thurgood Marshall (Dudziak 2006). Some scholars go as far as to claim that the bill of rights in the independence constitution was imposed by the colonial authorities as a condition for independence (Munene 2002:135). The new constitution guaranteed human rights in Chapter Five of the constitution.

Nevertheless, whatever individual rights the constitution guaranteed with one hand, the statutes and policies took with the other. Constitutional guarantees of basic freedoms were circumvented by a slew of statutes that undermined that same freedom. In spite of the existence of these laws, independence itself was received with not just great expectations, but also considerable popular goodwill. The government of Jomo Kenyatta, the first administration by an African in Kenya, drew its legitimacy directly from Kenya’s

¹⁴ Uhuru was but independence in name only; African countries, Kenya in particular, retained the colonial legal and administrative structures (Ogot and Ochieng 1995) making any distinctions for analytical purpose

protracted struggle for freedom. It was, therefore, popularly viewed as infallible, at least in the initial years. As a result, the little opposition that reared its head in the first few years of independence, such as the fallout with the then Vice-President Jaramogi Oginga Odinga, was seen largely as a nuisance that reflected badly on the opposition rather than on the government. In 1969, Kenyatta banned the only political party in existence, the Kenya Peoples Union (KPU), but, in a bold and confident move that distinguished Kenyatta from other African leaders who outlawed political dissent and competition, he did not move to pass a law barring political opposition. This created a situation in which people participated politically, but not in ways of their choosing, as all political activity had to be carried out within the *de facto* single-party Kenya African National Union (KANU).

It took many years for a semblance of a national, non-tribal, opposition to coalesce after Odinga's mainly Luo opposition was quelled, and even when this opposition emerged, Kenyatta was never criticized directly. This opposition eschewed using the mainstream media, which were in any case under the stewardship of timid and torpid editors, made so by threats of deportation and constant questioning by the police (Scotton 1975:20). There were also editors like George Gethi who genuinely trusted the government and believed it was acting in the interest of the people and even collaborated with the regime to cover up the disappearance of Josiah Mwangi Kariuki, the politician popularly known as "JM" (Karimi and Ochieng 1980).

This perceived legitimacy of the postcolonial government, the existence of a subtle regime of media regulation, the co-option of editors and journalists in the pursuit of government agenda, or their willful acquiescence, all combined to ensure the

suppression of regular channels of communication. The few journalists courageous enough to express their views freely soon realized they had no jobs; a number of them started publications, but these soon folded due to a combination of factors including lack of advertising, mismanagement, and dwindling readership.

As a result, the opposition in this era was comprised mainly of academics at the University of Nairobi. With the mainstream media being out of reach, the academics resorted to novel methods of expressing their disfavor. For instance, wa Thiong'o published a number of works that indicted the postcolonial government on critical issues: land grabbing, amassing of wealth through illegal means, immorality, confused cultural policy, and aping of European culture. Together with a number of courageous politicians, these academics also fulminated against the growing disparity between the rich and poor, the wanton disregard of Mau Mau heroes, as well as general corruption afflicting the Kenyatta regime.

This case study provides insight into the evolution of freedom of expression during the dying years of the Kenyatta regime. It also tries to assess how Kenya applied the liberal ideals contained in its independence constitution to the realities of governance in an increasingly complex society laden with ethnocentrism and hemmed in by Cold War politics. What comes out clearly from this case study is that in times of repression, when the regular channels of free expression are constricted, some elements within a society may resort to indigenous modes of communication and ingenious non-mass communication oriented means to express dissent and censure authority.

This era also saw a bitter constitutional crisis, with the so-called "Change-the-Constitution" movement, supported by a highly partisan press, demanding immediate

constitutional changes to bar Daniel arap Moi, the then Vice-President, from automatically ascending to the presidency in the event of Kenyatta's "untimely" death. Because Kenyatta suffered from ill-health and old age when all of this was taking place, this crisis can be seen in some ways as a battle for succession. Widner has described the period between 1972 and 1978 as the "period of the founder's illness" (1992:37).

The examination of this era is important because the period represents the beginnings, the climax, and the curtailment of the questioning of the postcolonial government by a sophisticated and articulate elite cabal of scholars beholden to no one, and certainly not fearful of government reprisals. After this, it was downhill all the way, with dissident views being totally eliminated in Kenyan public discourse during the 1980s. According to wa Thiong'o, "never before, not even under British colonialism, has there ever been such a deliberate, carefully organized campaign of repression of ideas" (1983: 2) as in the decade of the 1980s. This situation persisted until the return of freedom after the so-called "second liberation" in the early 1990s.

With respect to the Kenyatta succession years, no other episode captures the diversity of the creative methods of self expression deployed at the height of post-colonial government high-handedness. The condition of the mainstream media at this time is analyzed in order to show why critics of the regime resorted to non-mass communication channels of communication to express their views.

Case Study Three: The Constitutional Debate and Freedom of Expression 1997–2004

The so-called second liberation in Kenya has its origins in 1990–91. A combined force of Kenyan activists, members of the clergy, college students, and journalists backed by

international diplomats exerted pressure on the government to liberalize the political space. After initial opposition, on December 3, 1991, Parliament repealed Section 2A of the constitution, which had outlawed opposition parties in Kenya. This was the culmination of intense pressure exerted on the Moi regime to expand democratic space, and the start of an episode of determined contest between progressive and conservative forces.

Moi and his regime represented the conservatives, who perceived the legalization of multiparty politics and the liberalization of freedom of expression as ends in themselves rather than as means to a properly consolidated democratic end. Ranged against them were a conglomeration of disparate civil society groups, including religious groups, non-governmental organizations, diplomatic missions, aid agencies, trade unions, students, professional associations, and academics, all of whom regarded the advent of multiparty politics as the very minimum of the kind of change they wanted. For this group, full democratization in Kenya could and can only be achieved after comprehensive constitutional review. After considerable opposition in the early 1990s, the Moi government reluctantly acceded to the start of a constitutional review process, with the Constitutional Review Commission of Kenya (CRCK) Act being passed by parliament in 1997 (Ndegwa 2003).

The passage of this law, coming fast on the heels of dramatic political changes in 1991 that legalized competitive politics, coupled with increased, globalized outspokenness, released a flood of opinions on many issues confronting the nation. People whose freedom of expression had been severely restricted throughout the decade of the 1980s now seized this new-found freedom and started to express themselves

lucidly and passionately using a variety of channels. Following the enactment of the CRCK Act, and the appointment of commissioners, the commission traversed the entire country collating views from Kenyans on the kind of constitution they wanted.

The commission found a lot of views about *Kenya Tuitakayo* (“The Kenya we want”), including an abundance of emergent views on, and ideals of, freedom of expression. In March 2004, the CRCK released its final draft of the constitution, which was presented to the government for ratification by the people through a referendum. An amended version of this draft was later defeated at the referendum after a bitter campaign that split the country in half.

This case study analyzes the exercise of free expression during this important constitutional debate and examines the views and opinions expressed as they relate to freedom of expression. The huge corpus of material generated by the push for a new constitution is analyzed. This case study also attempts to critically analyze legislative reforms undertaken as part of the contest to see how they aim at facilitating freedom of expression. The aim is to assess the social output of ideas on free expression during a time of largely uninhibited expression. This is contrasted with the preceding two case studies which document the advocacy of freedom of expression amidst considerable oppression. This case study also provides pointers to how a future regime of free expression will look. This case study provides data that can be used to measure the extent of democratization and stability in Kenya. If we accept the premise that freedom of expression is one of the cornerstones of democracy, we can argue that an analysis of constitutional and legislative reforms that facilitate freedom of expression can be used to gauge the extent of democratization in a country.

Organizational Structure and Synopsis of Chapters

This dissertation is divided into five chapters that present an examination of the conditions of free expression in late colonial, postcolonial, and contemporary Kenya.

Chapter 1: Introduction

The first chapter defines the problem under study, and freedom of expression as it is understood in this project, briefly addressing its historical and theoretical origins. It provides the theoretical, historical and methodological overview, and attempts to show the linkage between the theory of free expression and the events in Kenya as described in the rest of the study. Moreover, the chapter provides a critical evaluation of the literature and details the primary and secondary sources on which the study is based. The chapter also explains the organizational structure of the project.

Chapter 2: Case Study One

This chapter presents an analysis of the evolution and context of freedom of expression in late colonial Kenya, including the strategies used by the colonial administration to control free expression, and the African nationalist responses and their ideas about freedom of expression. This late colonial environment early nationalist movement is shown to be the backdrop against which *Uhuru*, with all its promise, arrives.

Chapter 3: Case Study Two

Chapter Three presents an analysis of the evolution of free expression in the period leading up to the death and succession of Jomo Kenyatta, Kenya's first President. Here, restrictions on free expression and the response of the academic elite, public intellectuals, and politicians, are examined. This episode is shown as laying the groundwork for greater repression that was to follow.

Chapter 4: Case Study Three

This chapter analyzes freedom of expression issues in the era of transition from the dictatorship of single-party and personal rule to liberal democracy. Ideas about freedom of expression generated during the constitutional review debate are examined, as is the 2004 Bomas "Ghai" constitutional draft, which provides insight into the shape of free expression in Kenya of the future.

Chapter 5: Conclusion

What conclusions can be reached by the study of the three case studies in terms of how freedom of expression in Kenya has evolved? What are the prevailing contemporary ideas about this freedom? What are the emergent ideas about this freedom? What makes it so hard to resolve the tension between authority and free expression in the Kenyan context? This chapter attempts to provide answers to these questions and peers into the future to see the direction free expression will take.

CHAPTER TWO

Freedom of Expression in Late Colonial Kenya, 1944-1955

Colonialism was justified by the imperialists and missionaries as a civilizing mission that would bring the benefits of enlightenment and modernity to Africans and other colonized peoples. Among these benefits were liberty and enlightened democratic government, which the colonized were deemed to be lacking in their traditional society, shackled as they appeared to be by ignorance, superstition, and heathen practices. Colonialism would repair this situation by teaching them how to govern themselves and to live in a modern, civilized society under the Empire.¹⁵ But as the following case study will show, colonialism was in practice inherently contradictory. It dangled the ideal of freedom while working hard to suppress it among the colonized. In other words, colonialism preached water and drank wine.

The source of this contradiction lies in the fact that colonialism sought to impose a new moral, political, and economic order that created and perpetuated subservience of the colonies to the metropolis (Cooper 1987; Berman 1990). Although rule of law was introduced to Africa, law was supposed to serve the metropolitan interests and was interpreted and applied with a view to maintaining political domination of the colonized.

¹⁵ Young quotes Colonial Secretary Malcolm MacDonald as declaring in 1938:

I think it is the gradual spread of freedom amongst all His Majesty's subjects in whatever part of the earth they live...a slow...evolutionary process...There may even, sometimes, be inevitable setbacks. But over generations the evolutionary process goes on...Even amongst the most backward races of Africa our main effort is to teach these people to stand always a little more securely on their own feet...The trend is towards the ultimate establishment of the great commonwealth of free peoples and nations...But it will be generations, perhaps even centuries, before that aim is accomplished (1994:183).

However, the law also gave the colonized new resources for challenging this domination (Mann and Roberts 1991). Among these resources was a new way of conceiving free expression under the new dispensation. The colonized began to imagine a future in which they could express themselves freely as free people within the confines of the modern state and its laws. The modern communication methods introduced by colonialism made the imagination of larger nationhood, *a la* Anderson (1983), possible. In other words, colonialism made it possible to think of freedom in modern terms. This freedom was often imagined in materialistic terms, but it was also seen as the freedom of the colonized to speak and be heard, to air their grievances and make demands without repression. It was seen as the granting of political speech and political rights to the colonized. But colonialism was an inherently contradictory project. As Mamdani (1996) has shown, colonialism classified people into “civilized citizens” and “primitive subjects,” and predicated the enjoyment of rights on the status of being “civilized.”

Citizenship would be a privilege to be enjoyed by the civilized, while the uncivilized would be subject to an all-round tutelage to bring them to the threshold of civilization required to enjoy rights due to citizens. In this colonial dispensation, the uncivilized may have a modicum of civil rights, but not political rights, which were often dependent on property ownership and literacy. The resulting vision was summed up in Cecil Rhodes’s famous phrase, “Equal rights for all civilized men” (quoted in Mamdani 1996:17).

Being civilized was, of course, defined by the colonizers. While free expression was seen as the epitome of civilization and enlightenment in the metropolis, it was frowned upon in the colonial periphery. Here, it was often interpreted as deliberate

sabotage of the civilizing mission, the very exemplification of backwardness. In this case study, I intend to show how colonialism mobilized and deployed administrative, legal, economic, and other resources to suppress dissent at a time when African nationalism in Kenya had awakened to such an extent that it threatened to expose, using legal and constitutional means, the contradictions of colonialism.

Free Expression and Counter-insurgency

On October 20, 1952, the colonial government declared a State of Emergency in the Kenya Colony. Then the arrests began. The following day, October 21, the government issued the following press statement which not only captures the immediacy of the moment and the intensity of suppression, but also the passionate popular resistance:

At 9.45 a.m, reports received at Police Headquarters indicate that the operation went according to plan. Those arrested include Jomo Kenyatta, Richard Achieng, Fred Kubai, Bildad Kaggia, Peter Gatabaki, Joel Kuria, Gakaara Wanjaũ, Willy Jimmy Wambũgũ, Victor Wokabi and two women. The timing of the operation had to be advanced one hour because of a leakage before midnight. This morning all is reported quiet in Nairobi, with people of all races going to work as usual. A company of the K.A.R. was observed patrolling the streets with fixed bayonets. Two groups of women were seen trying to picket people going to work at 6.30 a.m. on the Kaloleni and Racecourse Bridge. No notice was taken of them and they soon disappeared ... In general, the Commissioner of Police is well pleased with the whole operation, as far it has gone, both with the plan and its workings... A number of those arrested have been moved to the Northern Province and the rest are being held in other parts of the country (*East African Standard*, October 22, 1952).

The first to be arrested were leaders of the Kenya African Union (KAU), the trade unions, and African religious leaders, some 130 in all. These were followed by other

waves of mass arrests.¹⁶ The most prominent leaders arrested came to be called the “Kapenguria¹⁷ Six” after the name of the remote town in North West Kenya where the trial of Kenyatta, Paul Ngei, Kubai, Oneko, Bildad Kaggia, and Kung’u Karumba, was held. The arrest of these leaders plunged the country into a state of war that became known as the Mau Mau war, which pitted the nationalists, mainly from the Gikūyū Embu and Meru (GEMA) communities, against the colonial regime. The war lasted from 1952 to 1956, when the foremost Mau Mau general, Dedan Kĩmathi, was arrested and subsequently hanged.¹⁸

In the view of the colonial authorities, the declaration of the State of Emergency was an attempt to bolster authority, which had failed to protect “the fundamental rights of the individual, not only to live, but also to live peacefully and in the lawful possession of

¹⁶ The number of those arrested differs immensely from author to author. Early estimates put the number of those arrested at 50,000 (Slater 1955:13). Official figures placed the number of those arrested at 80,000 (Colonial Office 1960) but this number has been discredited as being based on “daily averages” rather than on gross figures (Elkins 2005:xiii). Anderson (2005:5), a British scholar, has placed the number of those detained at 70,000. The most authoritative number is now considered to be around 320,000 (Elkins 2005: xiii).

¹⁷ Situated 280 miles from Nairobi, Kapenguria was so remote that even government officials in Nairobi did not know where it was. When the governor appointed a retired judge to preside over the trial, the announcement stated that the judge had been appointed as resident magistrate in the Northern Province. Apparently, the governor did not realize that Kapenguria was in the Rift Valley province (Slater 1955:29). Even the above press statement states that the arrested had been moved to the “Northern Province” instead of the northern Rift Valley. The idea was to remove Kenyatta and his fellow accused from their supporters.

¹⁸ Most scholars take it as a given that it was a liberation movement organized and executed by the Kikuyu. However, Muoria, the most prominent Kikuyu journalist of the time, had a different theory which cannot be readily discounted. According to him, Mau Mau was the brainchild of the Director of Intelligence in charge of Kikuyu Affairs in the colony. The idea was to start small-scale skirmishes that would give the government reason to crack down hard on the discontented Kikuyu, thus forestalling widespread violence, but achieving long-term stability under colonial rule or settler control. As it happened, the Director did not anticipate the overwhelming support that the movement would receive amongst the Kikuyu, Embu, and Meru. In other words, the small fire that the Intelligence lit became uncontrollable (Muoria 1994:57–68). If this theory is true, it is reminiscent of the “Third Force” killings by the Inkatha Freedom Movement in late Apartheid South Africa. Although Muoria does not name names, the description given here fits Louis Leakey who spoke Kikuyu fluently and was the Director of Intelligence in charge of Kikuyu Affairs at the time. Kenyatta seems to share this view. During his trial at Kapenguria, Kenyatta told the court that the “Government arrested us simply because, when they saw we could have an organization of 30,000 or 40,000 or more Africans demanding their rights here, they said: we have an excuse to stop this – Mau Mau” (Kenyatta 1968: 57).

his property” (Colonial Office 1960: 242). This struggle is also often seen by most historians as primarily a fight for land, not freedom, amongst the Kikuyu and their Embu and Meru cousins. Freedom itself is seen as an afterthought that was added later on by constructivist historians who want to substitute Kikuyu nationalism for Kenya nationalism and therefore assure the place of the Kikuyu in history as the engine for Kenya’s freedom.¹⁹

Although rarely seen as a freedom of expression case, I shall argue that this case, and all the counter-insurgency measures undertaken by the colonial authorities at the height of the Emergency, represent the greatest crisis affecting freedom of expression in Kenya, leading to decisive change in the way this freedom was subsequently conceived. So profound were these anti-freedom-of-expression measures that their ramifications are still felt in Kenya today.²⁰

In taking this position, I will not be the first to place freedom of expression at the core of this crisis. As a matter of fact, it would appear that the colonial government itself was conscious of the centrality of freedom of expression in this saga. As the Corfield Report argued:

¹⁹ I refer to the perennial debate pitying guild historians, mainly Luo, such as Ogot, Ochieng, Atieno-Odhiambo, on the one side, and Kinyatti, Mūriūki and Mūkaru Ng’ang’a, who are Kikuyu, on the other. Literature professors such as wa Thiong’o, Gīthae-Mūgo, Kimani Gecaū, have joined this debate on the side of the Kikuyu historians. Mau Mau veterans have also chipped in, using the power of their autobiographies and personal witness as powerful evidence of their gallantry and patriotism. Even foreign historians are often seen to take sides. These include British and American scholars like Egerton, Anderson, Lonsdale, Throup, Clough, and Elkins.

²⁰ As often happens in history, moments of crisis provide a model that is learned and appropriated for use in future crises. The concentration camp, so beloved by counter-insurgency experts during Kenya’s state of Emergency, had been developed by the British during the Anglo-Boer war in South Africa. Screening tactics perfected during Mau Mau war were to be used in the future to suppress liberation movements in Rhodesia and South Africa, and one cannot fail to see similarities in contemporary conflicts in the Middle East. But perhaps more interesting is the use of tactics such as carting away books and documents of suspected dissidents by authorities in postcolonial Kenya.

It was the deliberate exploitation of the western ideals of freedom by the more extremely African nationalists which placed the Government of Kenya on the horns of that dilemma [of being democratic at home and autocratic abroad]; and it was the inability of that Government, faced as it was with these outside influences [consideration of human rights], to resolve this dilemma, which was a decisive factor in the spread and near victory of *Mau Mau* (Colonial Office 1960:28).

The difference is that although the above position is contained in the most thorough study undertaken by the colonial government regarding the origins and growth of the Mau Mau crisis, it is subsumed beneath other more prominent reasons, perhaps because the British government did not want to be seen as denying human rights to some of its subjects, and thus acting outside the orbit of civilized conduct. Thus, the colonial government first sought to explain the crisis away as originating from the psychosis of an ethnic group bent on hopeless atavism, and therefore requiring extraordinary measures to contain (Colonial Office 1954). This informed the inhuman screening and the rehabilitation processes that were fashionable and applied to the rebels during the crisis (Elkins 2005; Anderson 2005; BBC 2003).

The Corfield Report enlarged the possible causes of the crisis to include Kikuyu political agitation through their organizations and media, external and internal influences on Mau Mau, and land pressure, amongst others, while retaining a “psychological” and “sociological” dimension to the crisis. While acknowledging that the Africans were fighting for freedom, the report saw this yearning for freedom as yet another benefit brought to the Africans by colonialism, as the “modern concept of freedom, as evolved among the more civilized people, hardly existed in East Africa fifty years ago.” In fact, the report argued, “the first real experience of freedom was the direct result of European emancipation” (Corfield 1960: 28).

What lends credence to my argument that this crisis was an attack on free expression and political speech in particular is that an inordinate number of those arrested were politicians, writers, journalists, and publishers. Of the Kapenguria Six arrested on the night of October 20, 1952, at least five were journalists or former journalists: Kenyatta, Oneko, Ngei, Kubai, and Kaggia. Kenyatta had edited the first African newspaper, *Mũigithania*, a newsletter of the Kikuyu Central Association (KCA), in the 1920s. While in England, he had written numerous articles to the British press, and had authored a series of pamphlets.²¹ Paul Ngei was a journalist who put out a publication called *Uhuru wa Afrika* (Freedom for Africa), considered to have been the most radical publication of its time (Scotton 1975:3).

Achieng Oneko was the editor of *Ramogi* (News) a Nairobi-based Luo weekly circulating widely in Western Kenya, as well as *Nyanza Times*, both of which “minced no words in criticism of government” (Odinga 1967:99). Fred Kubai was more known for his trade union activities, but he also edited *Sauti ya Mwafrika* (Voice of the African), the official journal of the KAU (Slater 1955: 21). Bildad Kaggia was an ex-editor of a Kikuyu journal called *Inooro rĩa Gĩkũyũ*, or “Kikuyu Sharpener” (Slater 1955: 35), and a founder of his own religious sect called *Ndini ya Kaggia* (Kaggia’s Church).²² The sixth,

²¹ Amongst the pamphlets Kenyatta published were: *Kenya: The Land of Conflict, Hands Off the Protectorates*, and *Memoranda to the Colonial Secretary from the Kikuyu Central Association*. We shall not examine them here since they fall outside the period under review.

²² The arrest of Kaggia, a religious leader, was the culmination of a protracted struggle by the colonial authorities to restrict African religious freedom, which is closely related to freedom of expression and is guaranteed in the same clause in the American constitution. The colonial authorities had tried to restrict African religious freedoms on many occasions before. To start with, the work of the missionaries, who, although representing religious authorities were closed linked to the colonial project, had aimed at curtailing African religious freedom through conversion to Christianity, the better to establish a predictable adherence to a familiar non-threatening religion with known rules, rituals, morals, and ideology. The general outlook of the coming European immigrants was that African religion was heathen, primitive, and backward, unworthy of the name religion. Ritual dances were “awful moral depravity” that accompanied “sin and debauchery” besides exciting “the animal passions;” polygamy was an “evil practice” that denied the child “proper home relation;” and circumcision was a “heathen rite” (Mungeam 1978: 167-168).

Kung'u Karumba was “of a slightly different caliber from the others” (Slater 35), being semiliterate and requiring the services of an interpreter in the subsequent trial since he possessed no English skills at all.

Amongst those arrested in this initial swoop, code named “Operation Jock Scott,” but who were not taken to Kapenguria, were Victor Wokabi, editor of *Muthamaki*, and journalist/author/publisher, Gakaara Wanjaũ, who was thrown into detention where he was to languish for nine years. Also arrested were J. D. Kali, a former editor of KAU’s *Sauti ya Mwafrika* (Wanjaũ 1988: 17), and Judith Nyamurwa, wife of Henry Muoria, who had assumed the editorship of *Mũmenyereri* when her husband left for Europe to attend a meeting of the Moral Armament Movement and to try to purchase printing equipment in Britain. Muoria himself had been blacklisted and was among those to be arrested under Operation Jock Scott. He was saved only by his absence from Kenya (Wanjaũ 1988:11).

Upon the declaration of a state of emergency, another vocal Kenyan nationalist, Mbiyũ Koinange, the first Kenyan to graduate with both a Bachelors degree and a Masters degree and the author of a pamphlet called *Ithaka Ciarĩ Ciiitũ* (The Land was Ours), found himself in exile in London where he had been sent by KAU as a delegate, while Mũgo Gatherũ, who had been an assistant editor at KAU’s *Sauti ya Mwafrika*

In a bid to curtail African religions and aid the work of the missionaries, the government had in 1901 introduced “regulations prohibiting *ngomas* or social activities” against which there was no appeal (Ghai and McAuslan 1970: 408). African Christians who tried to practice a brand of Christianity that veered even slightly from official Christianity as taught by missionaries, such as the Kikuyu African Independent Episcopal Churches, were considered subversive heretics but grudgingly allowed to exist, and those trying to reinvent traditional religions, such as Elijah Masinde’s *Ndini ya Msambwa*, were even more reviled. A former colonial administrator, Terrence Gavaghan, describes in his memoirs how *Ndini ya Msambwa* was ruthlessly suppressed by the authorities (Gavaghan 1999:115), thus throwing cold water on the emergent relationship between the people of Western Kenya and the Kikuyu-led KAU, which started being seen by Masinde’s Luhya community as a ploy by a ruthless government to placate the Luhya people (Spencer 1985:158).

(Gatherũ 1965:83) was pursuing further education in America, and was therefore unable to return to Kenya.

In the trial that ensued, which became known as *Queen Against Kenyatta and Others*, the list of charges once again put the issue of freedom of expression to the fore. This case has historically been viewed as a sedition case and its association with violence has tended to subdue its free expression aspects. Kenyatta and his co-accused were on trial for statements they had allegedly expressed, which were perceived as having been in support of Mau Mau. Evidence by the prosecution alleged that Kenyatta, at a meeting at Limuru in Kiambu district, had uttered words to the effect that Mau Mau should be left alone because it “was a religion” (Slater 1955:36) as opposed to a political movement as was being alleged, thus indicating Kenyatta’s support of the proscribed movement. Kenyatta and Achieng were also charged with addressing another meeting in Nyeri where “considerable feeling was whipped up” (Slater 1955: 37). The two were being accused of agitation and clearly their right to speak was at stake.

As well as the speeches, there was literature that was considered subversive. The prosecution produced as exhibits a number of song books, which later came to be called “hymn books” by their Kikuyu word, *Nyimbo* (Slater 1955:37). It was also alleged that one of the accused, Ngei, had composed a “little song in praise of Mau Mau which he suggested should be set to the music of George Formby” (Slater 1955:38). Not only were the accused’s right to carry song books on trial, but so was their right to compose and sing songs. Another charge, this time against Kaggia, was that he was found in possession of 100 copies of the “pale blue edition” of the song book, which he “had

apparently been distributing” (Slater 1955: 37). This amounted to a charge of handling and publishing subversive literature.

Another charge – the main charge – was that from August 1950 onwards, Kenyatta was managing Mau Mau. The only evidence produced to this effect was that he had written a letter in 1948, which was never sent, two years before Mau Mau was banned, addressed to former members of the already proscribed Kikuyu Central Association, asking them to come and meet him. This amounts to being prosecuted for private thoughts which had not even been publicly expressed.²³ As the lead counsel for the defense,²⁴ Dennis Pritt, QC., submitted: “There was not one syllable of anything that Mr. Kenyatta had ever said or written, that could be put to him by the prosecution, that contradicted in any form his statement of his moderate and constitutional policy” (Kenyatta 1968: 60).

A notable aspect of the trial at this stage is that Kenyatta was denied access to his papers, which had been taken by the police upon his detention. As he told the court, this placed him “at a great disadvantage” as he had to “rely on what I can remember” (Kenyatta 1968 26). This denial to the defense of access to evidence that the authorities already possessed, besides its implications for fair trial, should be seen in the context of further restrictions on his freedom of expression.

²³ One of the parallels between the colonial repression and the postcolonial crackdown was this attack on private thought. In 1990, the Rev. Lawford Ndege Imunde, a Presbyterian clergyman, was jailed for six months for possessing a seditious publication. The publication in question was his personal diary, in which he had noted that the murder of Dr. Robert Ouko, the Foreign Minister, had been carried out by government operatives. He had not shared his diary with anyone or otherwise published it (Ayittey 1992: 189).

²⁴ The defense team also included O. Davis from Nigeria, and A. Kapila from Kenya. Attorneys from Sudan and Ghana who had volunteered to defend Kenyatta were denied entry into Kenya (Slater 1955).

A further indication that freedom of expression lay at the heart of this series of arrests and detentions lies in the charge that was preferred against Wanjaũ. As he himself narrates it:

I was summoned to the office for interrogation. I found all the books and periodicals I had published laid on the table "...And how come you publish Mau Mau propaganda if you haven't taken the oath?" they demanded. I replied that I had all along taken it that I published matters of national concern and not Mau Mau matters. I was told: "Yes, that is the point; those matters of national concern you express is subversion against the legally constituted government, and that is exactly the concern of Mau Mau!" I said: "My writings are admittedly of a political nature but they express concern with the fate and cultural values of my people, and they have absolutely nothing to do with Mau Mau movement" "Why did you write "The Creed of Gĩkũyũ and Mũmbi?" I replied I was trying to express my deep convictions and aspirations. "Why do you express faith in the leadership of Jomo Kenyatta?" I said it was because I considered Kenyatta a great leader of our nationalist movement, the Kenya African Union (KAU). "...Aren't you the man who has blasphemously substituted the name Jomo for Jesus in the Christian hymn, so that you now say 'Jomo is the shepherd of his flock' instead of 'Jesus is the shepherd of his flock'?" I said, "No!" They asked me when I had started writing books and how many people had worked with me in my publishing venture. I was then dismissed. I would be summoned later, I was told (Wanjaũ 1988:10-11).

That freedom of expression was at the core of the independence struggle is also evident in the text of the official detention documents for writers. The majority of the detainees were simply detained under Emergency Regulations of 1952. Some, however, challenged their detention orders and the authorities did respond in some cases, obviously to clothe this whole process with a veneer of legality. They often invited the petitioners before a tribunal or court to argue their case. When this happened, the detainee would receive further clarification about their case, including the reason for the detention.

Wanjaũ's saga is a case in point. After challenging his detention, he received a letter from the court in Nairobi, through the officer in charge of Manda Detention Camp

where Wanjaũ was detained. This letter, after informing Wanjaũ that the Governor had powers under “sub-regulation 2 of Regulation 2 of the said regulation” (Emergency Regulations of 1952), proceeds to inform Wanjaũ why he was detained, and in so doing revealing the real intentions of the authorities to suppress freedom of expression:

In order to furnish you with such particulars as, in the opinion of the Chairman, are necessary to enable you to present your case, you are hereby notified that the allegations against you are to the effect that, up to the date of your arrest, you were an active supporter of Mau Mau and, in particular:

- (a) In November, 1948 wrote and published a pamphlet entitled (in the English translation) “The Spirit of Manhood and Perseverance for Africans” containing a charge of highly inflammatory nature against the European community; and
- (b) In 1952 wrote and published a booklet entitled (in the English Translation) “The Belief of the Kikuyu” containing a “Creed” which was a clear incitement to rebellion against the Government (Wanjaũ 1988: 252).

Clearly, Wanjaũ’s freedom of expression was the issue here. His detention certainly amounted to punitive censorship. The authorities were specifically interested in his authorial and publishing ventures so far as these, in their estimation, affected public views towards the government. Later, we shall analyze these publications to reveal their alleged subversive nature.

What makes it clear that these series of arrests, trials, and detentions were aimed at curtailing freedom of expression is a statement that appeared in the Corfield Report to the effect that “those who uncritically lend support to nationalist movements by themselves preaching doctrinaire concepts of democracy without paying sufficient attention to the practical working out of these concepts may unwittingly encourage those who seek their political ends violently, so far as Kenya is concerned those who

encouraged Kenyatta's overt political activities may well ponder whether in so doing they were providing innocent support for this underground campaign of terror" (1960:29). Put differently, merely expressing ideas of democracy without due regard to how such ideas might be interpreted by others made one liable for any consequences even if one did not participate in consequential events. However, this appears only to have applied to the African and Asian nationalists. The British colonialists who brought the Western idea of freedom to East Africa were not on trial, perhaps because they paid sufficient attention to the "practical working out of these concepts."

Other counter-insurgency measures instituted by the government against the Mau Mau were also geared towards the curtailment of freedom of expression. One such measure was the policy of "villagization." This involved a complete overhaul of the traditional Kikuyu land and settlement system as people were herded into villages. In other words, these measures amounted to the detention of an entire community. People did not opt in; it was a forced concentration. In the "villages," all movement of all individuals was monitored. Permission was needed to leave and entry was reserved for those with proper identification. Dwellings were all uniform, constructed with military precision, in straight lines, and those who lived in them were not allowed to exhibit any kind of creativity during their construction, which almost always happened without their consultation. Individual expression was virtually absent in these villages. People spied on one another and authority, in the form of guards perched in high observation posts, watched over everyone. It was a Benthamian Panopticon in the African context.

But how did Kenya end up in this situation? I will now provide the socio-political context of freedom of expression in late colonial Kenya and contesting notions of free

expression evident at the time. I will also review the situation of the media freedom more specifically and analyze some of the views that shaped the evolution of freedom of expression at this time.

The Social, Political, and Legal Context of Free Expression in Colonial Kenya

In order to understand why the colonial authorities felt compelled to clamp down hard on freedom of expression as part of its counter-insurgency measures, it will be necessary to review the social and political context prevailing between 1945 and 1950, as well as the legal regime governing free expression.

In 1944, the Colonial Office appointed a new Governor, Sir Philip Mitchell, to replace the outgoing Sir Henry Moore (Bennett 1963:99; Gordon 1986:85). This appointment signaled the growing importance of Kenya in the galaxy of British colonies. Sir Mitchell was an experienced administrator, who had served in Tanzania, Uganda and other colonies (Mitchell 1954; Gordon 1986:85). He was also interested in anthropology; it was as if his appointment to Kenya was an ethnographic assignment to study and unravel the simmering disquiet in not only the native population, but also the British colonial settlers and the Kenya Asians. He also held “more progressive, multiracial views than most settlers” (Nicholls 2005: 236), although he was still quite conservative, writing at one time that Africans were “a people helpless by themselves, spiritually hungry, perhaps for hope more than anything; technically and educationally almost wholly incompetent for the world into which they were brought in such a sudden, even violent manner; economically totally dependent on the new enterprises begun for the first time under the colonial government” (Mitchell 1954: 26).

In spite of this, however, from a British perspective at least, prospects for the Kenya Colony could not have looked better. If anybody was equipped to secure a semblance of a sustainable dual policy, the system of separate development based on unequal land distribution in favor of white Kenyan settlers, it was Sir Mitchell, the star colonial bureaucrat. As fate would have it, when Sir Mitchell left Kenya in 1952, Kenya was on the verge of a costly civil war. Sir Mitchell had failed. What happened?

There is a tendency by some historians to see the outbreak of the Mau Mau war as the exemplification of local African nationalists' irrationality. According to such historians, Mau Mau was "an unnecessary gamble in the endgame of the empire" (Anderson 2005:2). After all, Mau Mau broke out a few years after India and Pakistan became independent, and in Malaysia, the British were already planning to grant independence to a compliant leader. In the late 1940s, the Colonial Office began to issue guidelines on how the colonies would evolve into "self-government," the ultimate goal of the British colonial policy. According to Gordon (1986:89), these guidelines had three major components: 1) the development of local governmental institutions on the British model, 2) the gradual evolution of the colonial state into the prototype of a self-governing state, and 3) the gradual increase of local participation in the national executive. In Africa, Kwame Nkrumah had already become the Prime Minister of his country in February, 1952, and he would lead his country to independence in March, 1957 when the Mau Mau war had not been completely put down. Elsewhere in Africa, Sudan, Nigeria, Somalia, and Sierra Leone would all soon become independent. In the words of British Prime Minister Harold McMillan in a speech in Cape Town, South Africa in 1960, "winds of change were blowing through Africa." To underline the irrationality of the

Kenyan nationalists, Anderson poses the question whether these winds would have swept Kenya without Mau Mau (2005:2).

To persist in this kind of second-guessing, however, is to avoid considering events and circumstances on the ground inside the Kenya Colony. It is also to apply the theory of event-imitation selectively. That is to say that Kenyan nationalists should have looked at events in the Indian sub-continent and West Africa and avoided looking at events in South Africa where white nationalists, who shared an ideology of racial superiority with Kenyan colonial settlers, had, in 1948, barely two years after India's independence, voted the Nationalist Party into power, setting South Africa on a course of brutal racial policies that came to be known as apartheid. In Rhodesia, in the French colony of Algeria, and in the Portuguese colonies of Angola and Mozambique, colonialists were digging in, not packing their bags. White power was on the march in Africa. The picture obtaining from the British Empire was mixed and, therefore, liable to be read differently by different colonial subjects. How the nationalists reacted to international events depended very much on local realities.

And the realities inside Kenya were becoming grim. To begin with, the British post-war policy stressed the economic reinvigoration of the colonies as part "of the general recovery program for the British economy" (Gardon 1986:85). Soon after his arrival in Kenya, Governor Sir Mitchell set up, in January 1945, the Development Committee, chaired by the Chief Secretary in the Colony's civil service. In 1946, the Committee released its report. It recommended, *inter alia*, the retention of the racially-segmented approach of the Carter Commission, which had supported the view that European settler agriculture was more commercially and financially productive than that

of the African, which was seen as lacking potential. The report proposed increased settlement by Europeans in order to increase agricultural production in the White Highlands (Colony and Protectorate of Kenya 1946).

This increased settlement meant additional land alienation for the settlers, who already owned a lot of land; the Third Baron Delamere owned 100,000 acres at Njoro, Powys Cobb owned nearly 200,000 acres at Molo and Mau Narok, and the E.A. Syndicate, a settler conglomerate, owned 500 square miles at Gilgil (Blundell 1994: 89). European agriculture in the highlands was seen as the only economic activity capable of jump-starting the economy after the war. Sir Mitchell himself believed this, writing in March 1945 that based “on imperial policy and for future well-being of the native people” there should be a “vigorous and well-established British settlement in the Highlands,” the better to solve the “immense problems which confront us in this part of the world” (quoted in Gordon 1986:87).

What is not obvious here is the impact of such policies on local Africans. The arrival of additional settlers after the Second World War, as well as the expansion of white agriculture, dealt a vicious blow on any prospects for owning adequate land or even for profitable African agriculture. Sir Mitchell knew there was a problem. However, rather than see the problem as one of inequitable sharing of land, he wrote, in a report called *The Agricultural Problem in Kenya*, that the problem lay in an increase of uncontrolled cash crop development and deterioration of lands allocated to the Africans due to poor farming methods (Mitchell 1947). In other words, if the Africans could only adopt better farming methods, all their problems would simply disappear.

The government therefore embarked on a massive program of land rehabilitation, which involved the unpopular terracing of steep hillsides and the development of controlled settlements for the Africans. To the Africans, these projects, undertaken with executive fiat and forcibly enforced by chiefs and agricultural extension staff and other government agents, were immensely disruptive. The projects also revealed that the colonial government was only interested in assisting colonial settlers in their campaign to control Africans. In their enforcement, the projects resulted in a huge increase in European administrative personnel in African areas and a vast increase in their demands on the African populations (Mitchell 1947).

In the cities, Africans were by law restricted to their own quarters where they lived in squalor that appalled even some of the administrators. Unlike many of the white settlers, Tom Askwith, a former Municipal Native Affairs Officer for Nairobi in 1946 and later Commissioner for Community Development, was well placed to see the prevailing level of poverty. He saw “men sleeping ten to a hundred square foot room, men wearing shirts and shorts that were fifty percent patches, the nauseating smell of choked-up sewers, beer halls over-flowing with men drowning their sorrows at weekends” (Askwith 1958:15).

At the same time, settlers mobilized under the umbrella of the European Electors Union, which stated that “European leadership must not only be maintained permanently in Kenya, but that self-government, eventually coming to the country, would also be controlled by the Europeans (as in Southern Rhodesia), enabling them to create a ‘white dominion’” (Gatherũ 1965: 88–89). To the Africans, if this was the endgame of the empire, somebody forgot to tell them.

And so Africans started to demand a major political voice in the affairs of the colony. There was an explosion of grievances expressed in robust political speech. Through their main political party, KAU, the Africans started to mobilize rural opposition to government land reclamation programs. As we shall see, African nationalists also deployed the instruments of mass media such as newspapers to put forth and popularize their grievances.

The response from Sir Mitchell to African nationalism was to refuse to accept it as legitimate, and to see it as a problem that could be solved by administrative will. At the 1947 annual Colonial Governors Conference, for instance, he told his colleagues that African political aspirations “could be dissipated by a show of determination by the Government Concerned” (Gordon 1986: 88). This reference to a “show of determination” was an endorsement of greater insensitivity and brutality by colonial authorities on colonial subjects. In Kenya, Mitchell’s administration responded to African nationalism by enhancing the influence of colonial collaborators such as Chiefs, sub-Chiefs (headmen), and homeguards. These officials comprised the Native Authority system. They were seen in the post-war period as the key to the maintenance of control. The system was enhanced and the officials rewarded accordingly. They in turn became increasingly brutal to their own people.

Another response from the Mitchell administration, which was to influence the events of the early 1950s, was the announcement by Sir Mitchell of the goal of creating in Kenya a “multi-racial” society in which there would be equal rights for all “civilized men.” He told a meeting of the Notary Rotary Club in 1947 that “...what we have set our hands to here is the establishment of a civilized state in which the values and standards

are to be the values and standards of Britain, in which everyone, whatever his origins, has an interest and part” (Mitchell 1954:275). His view was that the future of the colony lay not in “a black state” which became “unthinkable as soon as the first immigrants arrived in the colony,” or in a “white-dominated state,” which was the “unattainable objective” of the Kenya settlers (Mitchell 1954: 217), but in the creation of “a polity in which all the human groups of which it is composed have a share and a vital interest according to their needs and capacities” (Mitchell 1954: 273).

These views sound innocuous enough — until they are discounted for their eurocentricism. By predicating the attainment of equal rights on the state of being civilized as defined by the British, Mitchell’s multiracial policy effectively excluded the majority of the African population who were poor, semiliterate, steeped in traditionalism, and therefore unworthy of being called civilized as civilization was being defined. Although Mitchell’s pronouncements sounded novel, they affirmed the status quo of racial hierarchy and the dual policy in existence in Kenya at the time. The society and polity he envisaged was one:

...in which part of it which is at this stage politically most mature and which is the projection here of the great spiritual and moral force and the long social and political experience of the people of Great Britain has, and will long have, a predominantly powerful and influential part to play (Mitchell 1954:273).

Africans could come to enjoy equal rights at an indeterminate date in the future, dependent, of course, on how British they became. This view was set to inevitably crash with the view of the African nationalists. As we shall see later, an increasing number of nationalist voices, while respecting and embracing modernity, were already

simultaneously advocating for equal respect for African identity and culture.

Sir Mitchell represented the official colonial view, or at least the view of the Kenya Colony administration. Although the views he expressed may have coincided with the views of the Kenyan settlers, he certainly did not exclusively represent the view of the Kenyan settlers, who were at that time a law unto themselves. For starters, Kenya's white settlers looked at Rhodesia and South Africa and liked what they saw there. They wanted an enlarged East African federation comprising Kenya, Uganda, and Tanganyika, with "Europeans at the helm" (Anderson 2005:3), comparable to the federation of Southern and Northern Rhodesia. Mitchell took up this cause of East African federation, imbued it with his own ideas and delivered a proposal to the Colonial Office in a paper called "Inter-Territorial Organization in East Africa" (Colonial Office, 1945). However, the proposal was dead on arrival: Mitchell had made the mistake of basing his proposal on equal representation of racial groups in the three territories. The proposal was withdrawn and replaced with a revised one that gave preferential representation to settlers (Colonial Office, 1947).²⁵

The back-pedaling by the government on proposals that the Africans had supported gave Africans a strong indication that the government was hopelessly beholden to settler interests. And like South African whites, Kenyan settlers worked hard to entrench their privileged position, thereby retarding African advancement. In urban areas and in the White Highlands, self-governing local governments were introduced in the post-war period. The settlers quickly usurped these. At the central government level, settlers joined the Executive in large numbers to head major departments where they

²⁵ The issue of East African federation was not pursued to its conclusion, as some settlers still opposed it on the ground that it was economic federation, not political federation, that was desirable.

would make and implement policy affecting Africans and other racial groups. For instance, a prominent colonial settler, Major Cavendish-Bentinck, was appointed “member for Agriculture,” thus placing a settler in charge of not only European but also African agriculture. As Anderson described the situation:

In the years between 1945 and 1952, from the ending of the Second World War to the beginning of Kenya’s rebellion against colonial rule, the white settlers vigorously campaigned against enhanced political representation for Africans, pushed themselves into key roles in the management of the colonial economy, and tightened their grip over local and municipal government. Some spoke admiringly of the achievements of the National Party in South Africa, of the security of all races to be found in ‘separate development’ (Anderson 2005:3).

In appointing the settlers into key positions in government, the Mitchell administration was of the mistaken notion that it was co-opting a key constituency in the Colony. However, the effect of this co-option was to tip the scale in favor of the settlers who now became so powerful that according to one historian, in the late 1940s, they had, “at a minimum, veto capacity over any major policy issue” (Gordon 1986: 92).

The power of the settlers manifested itself in the issue of *Kipande*, the identity card or pass that the Africans had to carry outside their reserves. It was a humiliating invention: a metal case enclosing identity papers that was to be worn around the neck by Africans. Africans called it *Mbugi*, or cattle bell. The Native Registration Ordinance of 1921, defined the container as “a case of metal for carrying a certificate of registration” and mandated that “every registered native shall carry his certificate upon his person.” The same law mandated that “any magistrate, justice of the peace, police officer, registration officer, employer of labour, or his agent in his farm or premises, or any other person authorized thereto by the Governor may at any time demand from any native the

production of the certificate issued to him under this Ordinance.” Failure to produce this identification was punishable by a fine not exceeding three pounds or imprisonment of up to a month. From a freedom of expression perspective, this mandatory contraption interfered with an individual’s sartorial expression.

In 1947, the issue of *Kipande* reared its head in the Legislative Council, where it pitted African and European members. Eliud Mathu, the first African to sit in the Legco, as it was called, demanded that the *Kipande* be abolished forthwith. The European members ganged up against the call. Once again, the colonial government found itself in the middle. It came up with a compromise under which all races in the Colony would be registered. The settlers raised a storm of protest, and the government once again backed down. It exempted anyone who could sign their name and provide two photographs of themselves, which in effect meant that Europeans, because they were literate, would be exempted, while Africans, the vast majority of whom were illiterate and did not even know what a photograph was, would have to continue wearing the *Mbugi* around their neck (Roelker 1975: 70–75).

The period following the war shows an acute intensification of settler influence in pre-Emergency Kenya. The settlers controlled the local and urban authorities and the government departments, and had an inordinately powerful voice in the central government. As Gordon has remarked, “to the extent that control was being localized, it was overwhelmingly into European hands” (1986:93). The appointment of elite Africans into the Legco without any change in the European-based policies failed to hoodwink the Africans as expected, exposed colonial machinations, and led to the hardening of feelings amongst the competing racial groups.

This move also laid the foundation for a chasm that would develop later between the elite and the elders on one side and the impatient younger nationalists. To make matters worse, the African elite constituted themselves into a political association, KAU, whose membership and allegiance for the first time cut across the entire country. The policies of the government clearly encouraged a nationalistic response. In the end Mitchell “failed to develop a political strategy that could effectively meld the economic and political imperatives, and the metropolitan and local pressures that were placed upon it” (Gordon 1986:85). It was just a matter of time before violent confrontation broke out.

The course of events was largely shaped by the demobilization of many Africans who had served in the colonial forces. Many African leaders, including Waruhiu Itote, Bildad Kaggia, Karigo Muchai, and Gakaara wa Wanjaũ, were either veterans of WWII or had enlisted with the colonial forces. However, discrimination and maltreatment were reported in the army, and this was a harbinger of things to come.

In December 1940, I joined the army. The Second World War (1939–1945) was in progress. My thinking at the time was that I had taken on a job like any other. ...I could not, however, stand aloof from the maltreatment of and discrimination against black servicemen practiced by the British imperialists. ...And my distrust and eventual contempt for imperialists grew from my realization that the British colonialists persisted in treating black people as slaves although they were shedding blood for the British cause (Wanjaũ 1988:x).

The veterans returned with the expectation that they would be treated differently, that the British really believed in what they were fighting for. They therefore expected to be rewarded with jobs, land, and opportunities for earning a decent living just like the immigrant British veteran settlers. But the colonial government and settlers had other ideas.

After the war, things seemed to have changed. Since 1919, the white settlers had threatened to use some secret methods to achieve their political goals if the British government in the United Kingdom did not listen to their demands. But the war put the white settlers' case for white supremacy in a rather dim light; for in that war, the British government had found itself fighting against Hitler's beliefs in a master race. Thousands of British soldiers had shed their blood and many were killed in the fight against those whose belief was that they were superior to other human beings (Muoria 1994:64).

These ex-soldiers have been credited with "widening the cleavage between the government and the Africans as they had returned with new ideas" (Colonial Office 1960:192). Unable to offer increased freedom to its African soldiers and other colonial subjects, the British government was "caught in the ever-present struggle of our nation to resolve the dilemma of being autocratic abroad and democratic at home" (Colonial Office 1960: 28, quoting Mergery Perham).

The returning soldiers soon squandered their demobilization gratuities (Askwith 1995: 65).²⁶ When they began seeking employment, they were often unqualified. In a memorandum he wrote in October 24, 1952, the Commissioner for Community Development explained that the ex-soldiers could not find jobs because the majority of "those who had been recruited were batmen, drivers or labour corps, and in the immediate post-war period the opportunities for further employment in the first two fields were limited" and also because "the conditions of employment in civilian life were not as a rule nearly so attractive as they had been in the forces" (Askwith 1995: 65). The

²⁶ It should not be surprising that soldiers would quickly squander their gratuities. Firstly, the money was a meager amount. Secondly, the cash economy was a fairly new phenomenon at that time, and it could be argued that the African had not learned its fundamental ethos. In addition, the army did not provide training

available jobs were so lowly paid that “they took into account the needs of a single man without a family” because it was assumed that the “family can obtain its livelihood from the land,” (Askwith 1995:67) which was itself not available because it had been set aside for white settlers. Wanjau summed up the situation in his 1952 publication, *Mageria no mo Mahoota* (The Spirit of Manhood and Perseverance for Africans) thus: “...life is slowly being strangled out of the African” (1988:227).

However, the post-WWII African was an impatient African, who had either returned from the war with new ideas acquired from interacting with soldiers from other British colonies, or one with a modicum of modern education, able to express himself articulately in English, vernacular languages, or Swahili, the *lingua franca* of East Africa. The die had been cast. From now henceforth, the African would put forth his views forcefully using a variety of mass media tools, not the least of which were vernacular newspapers and pamphlets.

Legal Regime and Freedom of Expression

Some writers have characterized the regime of laws governing free expression in general and media operations in particular in late colonial Kenya as being “very liberal” (Gadsen 1980: 515). The Corfield Report makes the same argument (1960:191–201). While this is partly true, it obscures the fact that colonial rule was imposed on Kenya with little regard for human rights. As Ghai and McAuslan observed, “Human rights, as defined and protected in the Universal Declaration of Human Rights, the European Convention on Human Rights and the bills of rights in the constitutions of many countries, had little

on how ex-soldiers should use their money. Third, these were young people, susceptible to indiscretion, particularly after life in the military.

place in the colonial regime established in Kenya” (1970: 407). Colonialism was established in Kenya through violence.²⁷

In order to establish control, the Commissioner of the then East Africa Protectorate very early on promulgated the Native Courts Regulations of 1897, giving himself the powers to detain or otherwise restrict the movement of anyone in the Protectorate if such a person was disaffected to the Government, or was suspected of being about to commit an offence or otherwise behaved in manner likely to be prejudicial to peace and good order in the protectorate. Other than a requirement that a report be made to the Foreign Secretary, there was no appeal against the Commissioner’s exercise of those powers (E.A.P.G. 1897).

The following year, the Commissioner promulgated the Vagrancy Regulations under which a person could be detained for asking for alms or wandering about without any employment or identifiable means of subsistence (E.A.P.G. 1898). The Outlying Districts Ordinance gave the Commissioner power to restrict the movement of people not considered to be natives of such districts and to prevent them from entering such districts (E.A.P.G 1899). The Native Passes Regulations empowered the Commissioner to make rules for controlling the movement of “natives” traveling into or out of, or within the limits of the protectorate (E.A.P.G. 1900). These Regulations were capable of depriving a person of freedom of expression in all its manifestations: speech, press, religion, movement, and association. They were in force throughout colonial rule. For example, Regulation 12 of 1900, the Native Passes Regulations, was not repealed until 1961.

²⁷ See Part Two Section II: “Establishment of Control,” which documents the series of punitive expeditions mounted against the Giriama, the Luhya, the Kikuyu, the Swahili, the Maasai, the Embu, and the Somali between 1895-1913 (Mungeam 1978:121–147).

Although these laws were meant to aid the pacification of the tribes, they remained in force, in various reincarnations and enhancements, throughout colonial rule and long after the purpose for which they had been enacted had expired. The colonial government was an authoritarian governmental system with a thin veneer of statutory and administrative legality, characterized by racial discrimination in all spheres of life. This is what Berman has termed the “dialectic of domination” (1990).²⁸ In other words, the colonial administration was all but what it had promised upon the declaration of the protectorate, namely, that it was “resolved to rule these territories in accordance with justice and equity, and to strive to promote the happiness of their inhabitants” (Hardinge 1895).

As far as publishing was concerned, the control of the press was governed by the Book and Newspaper Registration Ordinance of 1906. It established a register of the proprietors of newspapers, printers, and publishers, who were required to submit returns giving the title of the newspaper, the names and addresses of the proprietors and the average yearly circulation. This Ordinance has aptly been described as giving “no control over the products of the press” (Colonial Office 1960: 193). In other words, it did not censor journalistic, popular, or scholarly output. It did not have to. At that time, Africans were largely illiterate, and those with a modicum of literacy were regarded as backward and therefore incapable of undertaking anything as sophisticated as publishing.

It is therefore possible to look at the Newspaper Registration Ordinance and to conclude that freedom of expression was not threatened during colonialism. But the government retained its options for censorship under the Penal Code (1948), specifically

²⁸ The full title of Berman’s book is *Control and Crisis in Colonial Kenya: The Dialectic of Domination*. It describes the evolution of an authoritarian bureaucratic state and how it was able to rule a vast territory and

through the law on sedition. Section 57 of the Penal Code defined a seditious intention as an intention “to promote feelings of ill-will and hostility between different classes of the population of the Colony.” Subsection 2 of Section 57 stated that “in determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under circumstances in which he so conducted himself.” In effect, therefore, colonial subjects were prohibited under this law from voicing grievances, however genuine, against any class of population of the colony, because so doing could potentially result in class and inter-communal hostility or otherwise threaten social order. Even more ominously, the actions of others could always be held against anyone charged with sedition, because under the penal code, a person charged with sedition was deemed to have intended the consequences that might arise from any exercise of free expression.

This law was used but sparingly for prosecution purposes during the decade under review, but this was mainly because the vernacular publications sailed “as close to the wind as possible,” (Colonial Office 1960: 196). Publishers knew how far they could go. Nevertheless, the colonial administration did prosecute some editors and publishers, perhaps to set an example of them. For instance, on June 20, 1950, J. C. K. Kamau and Victor Wokabi, joint editors of *Hindi ya Gikūyū*, together with their printer, V. G. Patel, were convicted on charges of publishing a seditious article. Then on March 19, 1951, Victor Wokabi, editor of *Muthamaki*, was again charged with seditious publication and

contempt of court, but was acquitted after apologizing to the court.²⁹ Another seditious case involved W. K. Kĩhara, editor of *Muramati*, who was convicted on a charge of publishing a seditious article and was ordered to pay a fine of twenty-five pounds.

To understand the circumstances under which the media operated, one has also to understand the climate of discrimination and general intimidation that existed, as well as ignorance of laws and Western liberalism in general. According to Ghai and McAuslan, the colonial powers were applied discriminatively as they were used only against those subject to the Native Court Regulations, that is Africans, and where the law was not expressly discriminatory, administrators were given wide discretion that was exercised discriminatively (1970:408–409).

The government also took to monitoring the vernacular publications very closely. As Corfield explained:

All vernacular papers and news-sheets were subjected to exhaustive scrutiny by the C.I.D.[Criminal Investigation Department], and subsequently by Special Branch, every tendentious paragraph being filed for record and excerpts constantly submitted to the Chief Secretary, the Member for Law and Order and other officers concerned, but though objectionable in substance, subversive in tone, and calculated to foster disaffection, the majority of the matter published did not, in the opinion of the Attorney-General, come within the purview of the Criminal Code. Accordingly, in all but a very small minority of instances, the law officers were reluctantly compelled to advise that though much of the material submitted was indeed highly objectionable, it did not constitute a breach of the law punishable by legal proceedings (1960: 196).

²⁹ It would appear that Wokabi's apology was a mere tactic to get off the hook. Barely three months later on July 7, 1952, he published the following in his *Muthamaki* newspaper:

Europeans are the knives and the Africans are the meat. The time is coming when the Africans will be the knives and the Europeans the meat, and they will be cut to pieces (quoted in Colonial Office 1960: 198).

He was not prosecuted because by this time, the government was already planning its State of Emergency and Wokabi was on the list of those to be arrested and detained without trial.

The main aim of the Corfield report, of course, was to justify the colonial government's controversial conduct during the State of Emergency. The report does this by portraying the colonial government as one that was hamstrung by excessive restraint, and the foregoing quote is a case in point. However, the above quote could also be used to argue that the colonial administration, faced with publications whose alleged seditious nature could not be proven in a court of law, and realizing that it was hamstrung by the unenforceability of existing laws in a normal situation, decided to resort to a State of Emergency. Under a State of Emergency, virtually the entire bill of rights is suspended, thereby removing any pretenses that the rule of law is in effect.

Also important in the climate of intimidation was the maintenance of prestige, which required government officials to "keep a certain distance between themselves and their African charges" in *Barazas* (public meetings) so that it "was a brave or foolhardy African who would stand up and criticize the Government in front of the uniformed District Commissioner, sitting behind his shaded table surrounded by tribal police and the local chiefs" (Spencer 1985:4). The very aura of authority was intimidating. Writing less than a decade before period under study, Kenyatta had written:

Instead of advancing "towards a higher intellectual, moral, and economic level," the African has been reduced to a state of serfdom; his initiative in social, economic and political structure has been denied, his spirit of manhood has been killed and he has been subjected to the most inferior position in human society. If he dares to express his opinion on any point, other than what is dictated to him, he is shouted at and blacklisted as an "agitator" (Kenyatta 1965: 190).³⁰

³⁰ Facing Mount Kenya was first published in 1938, but the edition I relied on was published in 1965. See Bibliography.

The case of Mũgo Gatherũ illustrates this very well. When the young Gatherũ started writing letters to the editors of the settler press, he was a junior civil servant in the Medical Department. Many of his African co-workers celebrated whenever his letters were published, but some of them “advised me not to sign my name but to use a pseudonym in case I found myself in trouble with the Government” (Gatherũ 1965: 80). Some of his colleagues used to help him draft the letters and some even wrote the letters and sent them off to editors with Gatherũ’s name on them, so that Gatherũ views became corporate in their origin, but personal in their identity – and consequences. These letters cast him in the mold of a politician in the eyes of the settlers and in their logic, “dangerous.” Illustrating the pervasive ignorance of the laws, Gatherũ was told that “it was against the law to write all these articles” (Gatherũ 1965: 82).

To make matters worse, the Criminal Investigations Division started inquiring why the articles were appearing, and why a civil servant was allowed to act in this way. Gatherũ was admonished several times by his sympathetic white boss who kept explaining to the police that Gatherũ was “a foolish young man who did not realize what he was doing” (Gatherũ 1965: 83). Finally, one of his letters got him into real trouble when the editor of the *Kenya Weekly News* published it with the comment: “The above letter was printed to illustrate the mentality of an instructed African, R. Mũgo Gatherũ, employed by the Kenya Government....” (Gatherũ 1965:83). This comment by this settler editor illustrates not just intimidation against Africans who wanted to express themselves, but also a certain contempt for “instructed” or educated Africans. Gatherũ lost his civil service job, thus thrusting him into journalism full-time.

Even big-name editors like Muoria were not spared. He almost went to jail when he was charged with sedition in 1947 after publishing a story which claimed that African *Askaris* had disobeyed an order to shoot striking workers at Uplands Bacon Factory in Limuru (Muoria 1994: 53). He escaped jail, but his Indian printer, who was fined, refused to print *Mũmenyereri* anymore. Muoria acquired a duplicating machine but when he went to buy copying supplies in a European-owned shop, an order of four reams of paper, “some ink in tubes and some stencils” raised the eyebrows of the white owners who called “two white police inspectors” on him. The police asked him to explain why he was buying so much duplicating paper. They detained him until he produced his official license to use newsprint (Muoria 1994:56).

Yet, compared to the vicious crackdown that was to follow the declaration of the State of Emergency, it is plausible to argue that the government had given African leaders relatively wide latitude to express themselves in the period following World War II. Pamphlets, newspapers, booklets, and songs were published in the period following the war. Political leaders gave public speeches in which colonial policies were attacked without the authorities taking action. As Muoria has observed:

At the same time, one of the most surprising factors was the decision by the white Kenya government to ignore what Kenyatta was telling the Africans in his speeches. None of them was reported in detail in the white-owned newspapers, even those catering for the African population. He was being deliberately ignored, it seems, for several reasons, not least being the significance and publicity he would receive if the government were to take notice of him (Muoria 1994:11–12).

Thus, what appeared as unfettered liberty may have been a self-serving scheme by the government to deny African leaders the oxygen of publicity. When this approach did

not work, when the African vernacular press stepped in to fill the role which the settler press had abdicated, the government did not hesitate to crack the whip.

African Press and Free Expression

It has been observed that “a decisive factor in fostering political action in Kenya’s cities was the African press, which grew rapidly after 1945” (Rosberg and Nottingham 1966: 211). Most of the press that developed between 1945 and 1952 was an African-controlled vernacular press, with about forty papers being started in this period (Gadsen 1980:515). That most of these publications were in the Kikuyu language indicates the depth of political consciousness amongst the Kikuyu, which was matched only by the range of their grievances against the government.³¹

Publishers and editors were also probably influenced by the Kikuyu saying: *Gūitigunaga Mūthiomerwo*, which literally means, literally: If you want to represent yourself in a case that is being conducted in a foreign language, better learn to speak the language. According to Muoria (1994:63–61), it is this proverb that drove Kenyatta to write *Facing Mount Kenya*, partly to undermine the powerful position of Kenyan whites like Louis Leakey who used their mastery of the Kikuyu language to undermine Kikuyu

³¹ The political consciousness of the Kikuyu was owed partly to their own traditions. As an acephalous society, their traditional mode of governance was fairly democratic with no autocratic chiefs. However, Kikuyu politics in the 1940s were influenced by their proximity to the concentration of white and Asian settlers in Nairobi and the white highlands. Also, as the Kikuyu themselves acknowledge, the introduction of modern education had introduced a new element in Kikuyu culture whose impact was to provide community leaders with the means of arguing their case using the logic of the settler community. Owing to their political consciousness, the Kikuyu were stereotyped as cunning:

Thus, the Kikuyu were regarded as intelligent and industrious, but unstable and untrustworthy; the Luo as straight-forward and stolid; the Kamba as loyal and good-natured; the Maasai as the aloof ‘noble savage’; the Giriama (in the Coast Province) as backward and apathetic; and so on. Each tribe acquired its own stereotype and was the subject of considerable amount of administrative folklore (Berman 1990: 206).

interests. The “language” Kenyatta learned in this process is the language of Western approaches to reason and logic – education.

All these publications were published in major towns such as Nairobi, Mombasa, Kisumu and Nakuru. This was mainly for two reasons. First, only in towns could printing presses be found. Second, only in towns did circumstances obtaining produce a critical mass of literate and politically conscious Africans who saw publications as effective tools for critiquing the status quo and mobilizing nationalist sentiment. Of the publications that were started, only a handful were prominent and regular; the life expectancy of these publications was extremely short owing to shortage of resources. Those that survived became crucial tools in the hands of the nationalists, leading to widespread condemnation by colonial propagandists and media analysts (Scotton 1975). How did this press develop? What were the views of this press regarding freedom of expression and its role in a modern state?

The formal, mainstream media in existence in the Kenya Colony in 1945 served the Colonial government and settler interests. Radio broadcasting was started in Kenya in 1928, but it was at that time a novel elitist medium that did not serve Africans. The 3,400 pounds sterling allocated in 1949 for purposes of broadcasting to Africans was said to be “largely wasted” due to “poor reception in many districts and the meager number of receiving sets available within the districts in places where the programmes can be heard (Colony and Protectorate of Kenya, 1950:3).” The print media was much better established, with the *East African Standard* having been published since 1902. The settlers could also count on *Kenya Weekly News*, and other colonial press. All these

publications were elitist. Published in English, they could be read only by the very few educated Africans.

This settler press refused to give Africans' views the oxygen of publicity, and when it did, the news was often distorted to portray African opinions as unreasonable and therefore unjustified. According to Kaggia, the settler press gave African political activities a complete blackout. Even when he wrote the reports of important KAU meetings and sent the reports himself to the settler press, they went unpublished (Kaggia 1975: 83). Mũgo Gatherũ, who was an assistant editor of KAU's mouthpiece, *Sauti ya Mwafrika* (the African Voice), writes in his memoirs that he was so "disturbed" and "annoyed" by the editorials in the *Kenya Weekly News* between 1945 and 1947 that he decided to write letters to the editor. However, his letters were not published (Gatherũ 1966: 80). And so, with a bee in his bonnet, Gatherũ, trained as a public health technician, joined journalism. His case was not unique; many Africans felt they had to do something to improve their lot at least; the idea of complete independence, with no Europeans around, was not commonly held at that time.

The missionaries also published a number of publications for Africans such as *Wathiomu Mũkinyu* (True Friend),³² but their publications were far from political pamphlets as they stressed Judeo-Christian views of moral probity, salvation, hygiene, and generally how to be civilized and keep up appearances of being civilized. The government also published some newsletters for the Africans such as *Pamoja* (United) which by the mid 1940s was said to be produced in "an unattractive form," using "standard Swahili" that was "too academic for the majority of African readers" (Colony and Protectorate of Kenya 1950:4). *Baraza* (Public Forum or Council), also published in

Swahili, had been taken over by the settler-owned *East African Standard* in 1940 as part of the government strategy to “supply suitable information to African readers” (Gadsen 1980:516), but both newspapers “were consistent supporters of continued settler rule” (Scotton 1975:31).

And so the Africans placed acquisition of media outlet at the top of their priorities. The Kenya African Study Union (KASU), the precursor to KAU which had been formed at the instigation of the Chief Native Commissioner, stated in its rules and regulations that the party would “publish a journal periodically” (Spencer 1985:132). The paper, *Sauti ya Mwafrika* (The African Voice) *The Official Journal of the African Study Union*, was started on April 1, 1945. Francis Khamisi, who had been a journalist with *Baraza*, was its first editor. When KASU was succeeded by KAU in early 1946, it retained as one of its objectives “to publish a political newspaper; to fight for freedom of assembly, press, and movement” (Kenyatta 1968:27–28).

Other African endeavors placed considerable importance on establishing newspapers. For instance, when Odinga founded the Luo Thrift and Trading Corporation, a trading company, a newspaper was among the very first projects the company embarked on in order to “propagate our aims and objects” (Odinga 1967:79). Fortunately, this was before the State of Emergency, when anyone with access to a duplicator could publish a newspaper (Gadsen 1980:532). These newspapers “expressed African opinion” and covered KAU affairs well (Kaggia 1975:83). As Clough has put it, the explosion of vernacular newspapers in the late 1940s and early 1950s, some of which were connected to political organizations or ethnic associations, contributed to the circulation of

³² This publication had been founded by the Consolata Missionaries in Nyeri in 1916 (Wanjohi 1997:35)

“information and [the] raising [of] political awareness and ethnic consciousness among Africans” (1998).

Because many of these newspapers were in vernacular languages, they became known as the vernacular press. According to Muoria, readers demanded newspapers in their own languages in which they could express themselves more easily (Muoria 1994). Thus, the issue of the politics of indigenous languages, later popularized by wa Thiong’o (1986) in postcolonial Kenya, began with the anti-colonial struggle. It is easy to see how language relates to freedom of expression. The new journals were widely read and understood by ordinary people, who used the same vernacular language to write letters that expressed their grievances or views. In other words, the newspapers provided a discursive space that had not been available before. Their large number can also be explained in part “as a response to the political frustrations suffered by Kenya’s African’s during these years” (Gadsen 1980:516).

The Discourses and Views of the Nationalist Press

Gadsen categorizes the African publications of this era into three groups. The first group comprised the “moderate nationalist papers that advocated constitutional change.” These were published in English and Swahili, and aimed at “a colony-wide audience.” The second group consisted of “vernacular papers catering for one language group with primarily local or ethnic interests.” The third group was the “populist press, predominantly a Kikuyu press, which intended to politicize the poor for radical action” and which rejected “the moderate politics of the educated”(1980:517). In considering the views of these publications, however, these classifications are unhelpful. As Gadsen

himself observes in the same article, “much of the content of all three categories of the African press was fairly similar” (Gadsen 1980: 520).

I agree with the view that the “papers expressed general dissent and bitterness over the color bar and the *Kipande*, the insecurity and poverty of the Kikuyu squatter in the Rift Valley, the need for greater African representation in central and local government, and the hope for tribal and national unity” (Rosberg and Nottingham 1966: 211). Contrary to the views of the colonial authorities, the publications and their editors seemed to believe in peaceful, orderly constitutional change at the national level and a gradualist change of law and bylaws at the local level. In other words, the editors believed in the promise of the rule of law. More significantly, they believed in the power of free expression to resolve the problems of power politics. Muoria wrote in 1944 that “If something unfortunate happens to bring disagreement between us and our rulers, it would deserve to be discussed with words, so that the matter may be settled and finished within a way that will make everyone forget it” (1994:93).

The grievances in these papers appear genuine and reasonable. They demanded equal, elected representation for Africans in the Legco (the national assembly) and in local government. Equal representation was a major concession by the editors and nationalists considering that in 1948, the population of Africans was 5,219,865; Asians 123,081; and Europeans 30,524 (Heiley 1950: 87), which means that the Africans were still vastly underrepresented. However, some editors did foresee a future in which Africans would ultimately form the majority in all councils, boards, and committees in Kenya (Gadsen 1980). They reported the news about the government, including changes, transfers and reshuffles, which means that they reported the government as though it was

legitimate. They appeared to respect authority although they disagreed with it. They also reported about commissions of inquiry and how their outcomes might affect Africans.

The papers also complained about how veterans of World War II were hoodwinked into fighting for the freedom of others, yet were not able to enjoy freedom in their own land. Perhaps most vehemently, they railed against the injustice of skewed land distribution in the White Highlands where most of the land was reserved for white occupation. A former editor of *The African Voice* remembers writing many articles “protesting the pass laws, colour bar, and deplorable wages and housing and demanded the opening up of the Kenya Highlands for the Africans” (Gatherũ 1965:88). These publications also served as outlets for complaints from the general public regarding the delivery of social services such as African hospitals, rail transport, and lack of public transport in the towns. Readers would send letters to the editor with their complaints.

Perhaps the most prominent author/journalist of the period was Henry Muoria. A self-taught man (he had been a railway signaller) he studied journalism through correspondence school. He was greatly influenced by Kenyatta, with whom he shared political views as well as ideas of freedom of expression. In his biography, he describes what Kenyatta, soon after his return to Kenya in 1946, had told him regarding the power of freedom of expression:

He further told me: ‘The power of the spoken word is so great that even the Bible recognizes that fact where Saint John speaks these words: “Before the world was created, the Word existed; he was with God, and he was the same as God. From the very beginning, the Word was with God. Through him, God made all things; not one thing in all creation was made without him. The Word had life in himself, and this life brought light to men. The light shines in the darkness, and the darkness have never put it out”’ (Muoria 1994: 11).

Kenyatta had himself learned about the power of the press from the very best, a journalist by the name of Scott of the *Manchester Guardian*, who was “responsible for illustrating the value of Press persuasion, and for paving the way towards a medium of argument and representation at which Kenyatta became increasingly adept” (Kenyatta 1968: 34). Thus, Kenyatta’s ideas of freedom of expression, later adopted by writers like Muoria, emanated not just from the African worldview, but were buttressed by international exposure, education, and the new religion of Christianity, which was invoked when it supported the nationalist cause and reviled when it did not.

The first African newspaper to appear was *Mũthithũ na Mũmenyereri* (The Treasure and the Guardian)³³ which was started in 1945 by Muoria and was the most prominent of the African newspapers until its demise in 1952. Started as a bimonthly selling a few hundred copies, it had become a biweekly selling 11,000 copies per issue when it was banned in 1952 (Muoria 1994:45). It became known as “the paper of Kikuyu patriotism” (Scotton 1975: 31). No other vernacular publication had the reach of *Mũmenyereri*.

These early publications initially served a fare of comedic content, perhaps as a ruse to hoodwink authority. In the first issue of *Mũmenyereri*, Muoria published a humorous story about two brothers and the clash of modernity and traditional Kikuyu life. Here is how Muoria tells the story about the two brothers:

³³ This is Henry Muoria’s translation. Apparently, he adopted a long title to circumvent war-time regulations prohibiting the use of newsprint, thus giving the impression that his publication was a booklet rather than a newspaper. However, within a month, the war-regulations were removed and he reduced the title to *Mumenyereri*, which simply means the “Guardian” or “Caretaker” or “He Who Looks after” (Muoria 1994:48).

One of them had come to town to work there and he had taken a town woman as his temporary wife to cook for him while he was at work. His brother who had been left at home in the tribal rural areas had come to the town to pay his brother a visit. That evening, the two brothers were sitting down in the room where his brother was staying with his town wife and he watched with unusual interest as the town wife made their evening meal. She had to keep on mixing various kinds of spices in it as was the custom of town wives. Soon the brother from upcountry got the funny idea that the town woman was putting some kind of bewitching medicine in the food she was cooking. He soon became so infuriated that he asked his brother: 'Do you think I am so stupid as to eat the bewitched food which this woman of yours is making?' 'It is not a bewitched dinner at all,' protested his town brother.

'How dare you say it is not bewitched when I have been watching her mixing it with medicine with my own eyes?' asserted his brother from upcountry in a furious voice.

'You are nothing but a stupid man who knows nothing about town food and how it is prepared,' said his brother in an angry reply.

As soon as the brother from upcountry heard that word 'stupid' being uttered by his brother, he jumped up from where he was sitting and attacked his brother with a clenched fist.

His brother made a fierce counter-attack and gave his brother a blow that sent him outside through the door of the room where he followed him as they gripped each other in their struggle to gain the upper hand.

The sight of the two men in fierce combat attracted a big crowd from the adjoining houses around the African village. The crowd watched in amazement as the two brothers scratched each other in anger with their nails; they saw them falling down on each other and then rolling over as each man tried to hit the other one with his bare hands. They tried to bite one another with their snarling teeth. The fight went on until both men were so tired that they could hardly manage to hit one another. Suddenly they stopped fighting and decided to go back home where they devoured the food with whetted appetites (1994:49).

Modernity here is represented by town life and the novel culinary skills of the town wife. Kikuyu cooking was fairly simple; you boiled food, and seasoned it with the traditional salt called *igata* (soda ash), which was sourced from the Rift Valley lakes such as Lake Magadi. The town wife in the story is obviously a sophisticate with too much influence from the Asian and Swahili cultures, at that time considered "modern" relative to Kikuyu culture.

Humor offered a safe passage into journalism and authorship. Muoria was amongst the first writers to offer comedy. Part of the reason why Muoria had started off with entertaining content was that he had been warned by Dr. Louis Leakey, who, as Director of Intelligence responsible for Gĩkũyũ Tribal Affairs, used to approve all publications in Kikuyu language, against publishing anything that was “subversive to the government otherwise I would find myself in hot water” (1944:47).

Each issue of *Mũmenyereri* carried humorous, human interest articles. For instance, at the celebration for the elevation of Nairobi to city status in 1950, Muoria reported that African chiefs from various tribes had been invited. This presented problems for the menu because Africans have diverse culinary traditions; foods desirable to one group may be seen by another group as either forbidden or beneath their status. To make things easier, all the chiefs were offered *Ugali*³⁴ with sauce of boiled meat and greens. No one thought this menu would offend anyone, but the Maasai chiefs, whose custom did not allow self-respecting Maasai to eat greens, protested bitterly, and Muoria wrote about it. In another funny story, an African had gone to a barber shop to get a hair cut, but when he could not pay enough money, Muoria reported that the African had had his hair cut so that he resembled a plucked chicken.

Yet another humorous story was based on the Muoria’s serialization of Colonel Grogan’s book, *Cape to Cairo*, a veritable tome of racist views. According to Muoria, Africans, unable to comprehend why anyone would think of them as backward, actually found the views very amusing, and thought that the author ought to be pitied. Because the author was not known to be a cripple or disabled in anyway, disability being forbidden as

a subject for jokes, it was alright to laugh at him, at his stupidity. How could a man be so ignorant as to think Africans were fools? Muoria even published a humorous contribution by Chief Luka wa Kahangara of Lari,³⁵ who penned a threatening op-ed to the effect that anyone found causing trouble in his jurisdiction would be beaten up by his guards and thrown into a goat pen to be urinated on by goats (Muoria 1994:50-51).

Other humorous publications that followed were therefore inspired by Muoria to a large extent. These included Wanjaũ's *Ngwenda Unjurage* (Go Ahead! Kill Me!), *Ihu ni Riau?* (Who Authored the Pregnancy?), *Wanawake Siku Hizi* (Women Today), and *Mwari Mweru ni Magambo* (A Beautiful Woman is a Synonym for Trouble). These stories exploited the dramatic encounter between modernity and tribal life, and opined that modernity had caused moral decay in the culture of the land. In this regard, they were stealth critiques of modernity and the emergent tribal virtue. However, since subversion was interpreted in purely political terms, this material never attracted the ire of the authorities.

Writers pursued this style of cultural documentation and critique because it had been proven to be safe. In 1934, Stanley Kiama Gathiigira had published *Mũkarire ya Agĩkũyũ* (The Gĩkũyũ Way of Life). This was followed by Justin Itotia wa Kĩmacia's *Endwo nĩ Irĩ na Irĩri* (Those of Good Heritage) in 1937. Kenyatta's *Facing Mount Kenya* was published in London in 1938. Because of Kenyatta's status as both an authentically African intellectual and a prominent son of the Kikuyu, *Facing Mount Kenya* came to be

³⁴ *Ugali* is a mash of maize meal that is the staple food in East Africa. Other than flour, the only other ingredient is water. It is rather bland in itself, but it is very tasty when eaten with a side dish of specially prepared greens and meat.

³⁵ After the outbreak of the Mau Mau war, Chief Luka was among the first to be killed by Mau Mau fighters. His headquarters at Lari were attacked and more than 100 people killed in what became known as the Lari Massacre.

regarded as a kind of Bible by the small group of African literati, of which the writers and editors were a part, in the post World War II period.

In his book, Kenyatta castigated colonial intervention and tutelage of the African, arguing that the African enjoyed more freedom in the traditional society. “The African is conditioned, by the cultural and social institutions of centuries, to a freedom of which Europe has little conception,” he wrote (Kenyatta 1965:306). He attacked the racial classifications of the time, which relegated the African to an inferior position, and blamed the perceived inferiority on colonialism itself, which he saw as hindering civilization even as it sought to propagate it:

In our opinion, the African can only advance to a “higher level” if he is free to express himself, to organize economically, politically, and socially, and to take part in the government of his own country. In this way he will be able to develop his creative mind, initiative, and personality, which hitherto have been hindered by the multiplicity of incomprehensible laws and ordinances (Kenyatta 1965: 190).

To Kenyatta, freedom of expression was a fundamental determinant of whether the Africans attained the desired civilization. He argued in *Facing Mount Kenya*, first published in 1938, that:

It is beyond our comprehension to see how a people can reach a so-called “higher-level” while they are denied the most elementary human rights of self-expression, freedom of speech, the right to form social organizations to improve their condition, and above all, the right to move freely in their own country. These are the rights which the Gikũyũ people had enjoyed from time immemorial until the arrival of the “mission of Great Britain” (Kenyatta 1965: 189–190).

Kenyatta's views on the centrality of freedom of expression in African emancipation from colonial rule took a strong hold on authors and writers of the time. His book became an important supplement to earlier publications by Kikuyu writers. Like the works preceding it, Kenyatta's book attempted to record tribal customs for posterity. Taken singly, none of these works posed a major threat to modernity or the colonial project, which in any case, the books did not take on directly. However, taken together, the publications had the effect of providing intellectual fodder to an entire generation of writers who were to come after the war. Their authors became the role models of these new post-war writers, who tended to view mastery of, and pride in, tribal custom as necessary in the fight against colonialism.

Besides the newspapers, it was also common at the time for writers to publish pamphlets. The idea of publishing pamphlets was copied from the government, which used to publish small booklets to educate people on an issue. But the trend was given impetus by war-time regulations, which prohibited the use of scarce newsprint for the publication of newspapers or monthlies. Muoria tells us how an Indian printer in Nairobi could not print his first issue of the *Mũmenyereri* newspaper because of "the government's wartime regulations" which prevented him from "using newsprint for a new monthly or newspaper" (1994:47).

To circumvent these regulations, publishers would publish booklets, as these did not have a fixed schedule of appearance. People read pamphlets (staple-bound booklets) and kept them with the care and the respect accorded to a book. Pamphlets were also deemed appropriate by writers because they had a longer retention time than a newspaper. For instance, when Muoria was charged with sedition in 1947 for publishing

a story that claimed that African *Askaris* had disobeyed an order from a white police inspector, he wanted to publish a more permanent publication:

My second worry was that the trouble in which I was involved might lead to the end of my paper (*Mũmenyereri*). If that happened to be the case again, my worry was what I could do to make sure that the fight for African freedom went on even if my newspaper stopped. I decided that the best thing to do was to write a pamphlet in which I would put my views while tracing the historical progress of the African political fights and which course it ought to take in the near future in the spirit which is needed to drive people towards achieving their goals in spite of all obstacles (Muoria 1994: 54).

Muoria called his new publication *Ngoro ya Ūgĩkũyũ nĩ ya Gũtoria* which translates roughly as “The Gĩkũyũ Spirit is a Winning Spirit.”³⁶ This pamphlet, together with Wanjaũ’s *Roho ya Kiume na Bidii kwa Mwafrika* (The Spirit of Manhood and Perseverance for Africans) became widely read and therefore extremely influential. Five thousand copies of Muoria’s pamphlet sold within one week (Muoria 1994:55). Because of their retention value, topicality, timelessness, and their uncompromising anti-colonial, pro-freedom arguments, as well as their appeal to reason and emotion, these booklets were even more influential than the newspapers. They therefore constituted an important part of the African nationalist press. Interestingly, those who have studied the African press (Carter 1970; Scotton 1975; Gadsen 1980) tend to overlook them, perhaps because they do not satisfy the criteria of newspapers. Yet these pamphlets caused a lot of trouble for their authors, with Muoria ultimately being exiled, and Wanjaũ enduring nine years of

³⁶ Muoria’s own translation is ‘The Gĩkũyũ Spirit of Patriotism is for Victory,’ but I see no allusion to patriotism in the title. However, Muoria writes that the title was used by “many patriotic-minded tribespeople as a form of proverb to describe the actions of someone whose selfish behavior appeared to be devoid of public service spirit. The expression itself was ‘*Mũndu ũcio ndarĩ Ngoro ya Ugĩkũyũ*’” (Muoria 1994: 55). Literally, this meant “So-and-so has no Gĩkũyũ spirit.”

harsh detention, during which he was interrogated incessantly on the contents of his pamphlets in particular.

Wanjaũ, the most prolific of all the writers of the time, writes in his award winning memoir, *Mau Mau Author in Detention*,³⁷ that during the pre-emergency period, he was involved in “spreading nationalist awareness through my publications” (1988:x). He had been a soldier in the King’s African Rifles (KAR), and had fought in various war theatres in the British Empire during World War II, where he met African soldiers from other British colonies in Africa. He writes that he “Learned a lot from these people about the hunger and yearning for freedom of colonized peoples” (Wanjaũ 1988: x).

Upon his return to Kenya, he embarked on a writing career that has lasted ever since. It was not interrupted even by his nine-year detention at the height of the Mau Mau war, as he managed to conceal a diary which was published 30 years later (1988). As a writer, he makes considerable use of the linguistic devices of his Gĩkũyũ language, being an expert in the “use of idiomatic forms, proverbial turns of speech, and analogy” (Elkins 2005: 202). The booklets he published now reveal a defiance of the colonial order, even in their titles, but at that time, they were often seen as innocuous by those uninitiated in the intricacies and nuances of the Kikuyu language.

However, the most virulent in its attack of colonialism was *Roho ya Kiume na Bidii kwa Mwafrika* (Practice Makes Perfect) or *The Spirit of Manhood and the Perseverance for Africans*. This booklet was first published in Kiswahili in 1948 and re-issued in a Kikuyu translation in 1952 (*Mageria no mo Mahota*) a few months before the

³⁷ Wanjaũ’s memoir, *Mau Mau Author in Detention* (*Mwandiki wa Mau Mau Ithamĩrio-inĩ* in Kikuyu) won the 1984 Noma Award for Publishing in Africa. It was translated into English by Ngigi wa Njoroge and published as *Mau Mau Author in Detention* in 1988. Elkins has described it as a “vital historical record” (2005:203). I couldn’t agree more.

declaration of a State of Emergency. Only fifteen pages, it is a strong critique of colonialism and white rule in Africa. Clough calls it one of Wanjaũ's "angrier pamphlets" (1998:91). In its preface, Wanjaũ was categorical that he was going to express himself regardless of consequences:

It is not the intention of the author of this little booklet to bear false witness against anybody or to malign any party. But I have no intention of mincing words in talking about the truth. For the time has arrived when we can no longer be complacent and people must be shocked into the truth. I have no patience with the African who insists to this day in wallowing in ignorance, refusing to have his eyes opened by current reality. I have no patience with the man blinded by blinkers of his own making. I have no patience with those who refuse to acknowledge our grave impoverishment (1952:1).

He went to state his reason for writing the booklet. It was to "incite reflection on our fate, which should be the concern of every African," because any African who did not so reflect was "a man of distorted vision" (1952:1). This "reflecting" alludes to freedom of thought, itself a form of freedom of expression.

The booklet was the product of the horrible experiences, dehumanization, and "virtual slavery" Wanjaũ had witnessed when he migrated to the Rift Valley Province from his native Nyeri district in Central Province. According to Wanjaũ, the booklet expressed his "deep anger and exhorted Africans to show courage and defiance to their tormentors" (1988: xi). The Rift Valley was a cosmopolitan province, with people from all ethnic and racial groups. This perhaps explains why Wanjaũ decided to write it in Kiswahili, the *lingua franca* of East Africa. As it turned out, the booklet became extremely popular and sold as far away as Tanganyika.

The booklet identified the strategy of white people as the maintenance of domination through the creation of self-doubt in the Africans as well as the application of divide-and-rule tactics in the governance of the colony. The booklet also posited African culture as equal to the white man's and cautioned Africans against underselling their labor, arguing that there was no reason why Europeans, Indians, and Arabs should get higher pay than Africans for the same kind of work. African loyalist Africans are also castigated in the booklets for their lack of patriotism (Wanjaũ 1988).

The pamphlet expressed not only the shame of being made landless in one's own land, but also the denial of free expression:

To add to this great shame those of us who dare to question the justification for this state of affairs end up getting their heads bashed; the others see this and cringe in fear. People are not supposed to speak their mind; they may not insist on justice being done. We are therefore denied our freedom of expression. But we will insist on the right to free expression. We do not want to resort to violent struggle. We will say it again and again that we must have our own independent nationalist government, for we have a right to equal membership in the community of independent nations; we have, like other nations, a right to self-determination (Wanjaũ 1952: 13).

These words, published in 1948, were revolutionary in the East Africa of the time. Wanjaũ put freedom of expression right at the top of the agenda and tied it in with the issue of self-government. The words were also prophetic – the violence that was to follow would be a consequence of denial of freedom of expression.

Finally, the pamphlet called on people to exercise their freedom of expression as a way of attaining freedom from oppression. Wanjaũ was convinced that change could only come through the power of self-expression properly exercised, without fear or favor. He therefore ended his booklet with a spirited call on his people not to keep quiet:

From now on, we shall speak the truth out loud and clear. We shall no longer whisper discreetly about our problems, for this only compounds the sense of fear and helplessness and would only mean our crashing under the destructive weight of our impoverishment and oppression... We shall relentlessly demand justice. For our eyes have been opened and we have obtained a far sighted view of our interests and our fate. We have become the proverbial knife which has been sharpened by the grinding of another. We have become the proverbial knife that cuts its sharpener. But we will be guided by truth and justice in waging our struggle (Wanjaũ 1952: 16).

The proverbial knife here refers to the Kikuyu proverb that says: *Kohĩga mũno gatemaga mwene*, or “If a knife becomes too sharp, it might injure its owner.” The author was making the claim that European education had opened the eyes of the Africans to the possibilities of freedom in a new age. This is the sharpening of the knife by the grinding of another; a European education having the unintended consequence of equipping the African with critical skills requisite for envisioning the ideals of modern liberty, appreciating his predicament, and demanding change. Change is the injury to the European by the knife he sharpened.

But what really got the goat of the colonialists and earned Wanjaũ a first-class ticket to detention was *Wĩĩkio wa Gĩkũyũ na Mũmbi* (The Kikuyu Creed or The Creed of Gĩkũyũ and Mũmbi). Modeled on the Christian Creed that the missionaries had popularized in Kikuyu country as *Wĩĩkio wa Atũmwo* (The Creed of the Apostles), Wanjaũ’s creed is remarkable for its genius in interweaving Kikuyu mythology with the Christian religion sweeping across the country at the time. It builds on the similarities between the monotheism of the Kikuyu religion and that of Christianity, which had been so crucial in making Christianity acceptable to the Kikuyu. Wanjaũ’s Creed runs as follows:

I believe in God the Almighty Father, Creator of Heaven and Earth. And I believe in Gĩkũyũ and Mũmbi, our dear ancestral parents to whom God bequeathed this our land. Their children were persecuted in the era of Cege and Waiyaki³⁸ by the clan of white people, they were robbed of their government and their land and relegated to the status of humiliated menials. Their children's children had their eyes opened, they achieved the light of a great awareness and they fought to restore their parents to their seats of glory. And I believe in the Holy Religious ceremonies of Gĩkũyũ and Mũmbi, and I believe in the good leadership of Kenyatta and Mbiyũ and the unbreakable solidarity between Mwangi and Irũngũ generations and the oneness of the nine full Gĩkũyũ clans and the everlastingness of the Gĩkũyũ nation. *Thaai Thaithaiya Ngai Thaai* - God, let it be so, Amen. God let it be so! (Wanjaũ 1988: 250 Appendix 8)³⁹

This Creed seized the initiative from Christianity by equating Gĩkũyũ mythology with Christianity, which the missionaries had represented as a superior religion. The

³⁸ Cege and Waiyaki were prominent elders in Kikuyu country. Cege wa Kĩbirũ was a prophet who enthralled people with his prophesy of a long snake that would pass through Kikuyu country spitting "red" people all over, a people that would cause a lot of problems to the Kikuyu. Waiyaki was an elder when the British first arrived in Kikuyuland. He killed a white man and was subsequently captured by the British and buried alive at Kibwezi along the Mombasa Railway. Both men are regarded as Kikuyu heroes.

³⁹ Wanjaũ Creed was clearly derived from the Two Christian Creeds: *The Apostles Creed* and the *Nicene Creed*. *The Apostles Creed* states:

I believe in God the Father Almighty, Maker of heaven and earth, and in Jesus Christ, His only Son our Lord, Who was conceived by the Holy Ghost, born of the Virgin Mary, suffered under Pontius Pilate, was crucified, dead, and buried: He descended into hell. The Third day He rose again from the dead; He ascended into heaven And sitteth on the right hand of God the Father Almighty; From thence he shall come to judge the quick and the dead. I believe in the Holy Ghost; the holy Catholic Church; the Communion of saints; the Forgiveness of sins; the Resurrection of the body and the life everlasting.

And the *Nicene Creed* states:

I believe in One God the Father Almighty, Maker of heaven and earth, and of all things visible and invisible. And I believe in one Lord Jesus Christ, the only begotten Son of God, begotten of His Father before all worlds, God of God, Light of Light, Very God of Very God, being of one substance with the Father, By whom all things were made. Who for us men, and for our salvation, came down from heaven, and was incarnate by the Holy Ghost of the Virgin Mary; and was made man; and was crucified also for us under Pontius Pilate; He suffered and was buried. And the third day He rose again according to the Scriptures; and ascended into heaven, and sitteth on the right hand of the Father, and He shall come again with glory to judge both the quick and the dead; Whose Kingdom shall have no end. And I believe in the Holy Ghost, the Lord and Giver of Life; Who proceedeth from the Father and the Son; Who with the Father and the Son together is worshipped and glorified. Who spake by the prophets. And I believe one Catholic and Apostolic Church; I acknowledge one Baptism for the remission of sins; And I look for the Resurrection of the dead, and the life of the world to come.

Kikuyu Creeds also updated an important Kikuyu myth, which was at risk of being disregarded under the constant onslaught from Christianity. Above all, it made Kikuyu mythology topical once again by linking it with the main grievance of the community at the time, their stolen lands. The new leaders of the Kikuyu people are pointed out in the Creed, so that the community might know and be proud of them, thereby making colonial authority irrelevant. A Kikuyu who recites this Creed inadvertently enjoins himself, by the mere act of recitation, to the collective Kikuyu cause and destiny. Even more cleverly, the Kikuyu Creed sought to displace the Christian Creed without seeming to do so. Nowhere is Christianity mentioned in the Kikuyu Creed, thus avoiding a direct confrontation with the Church, to which a lot of Kikuyu belonged.

Rather, the Kikuyu Creed was presented as an alternative to the Christian Creed by the very act of its introduction. Given its invocation of Gĩkũyũ and Mũmbi, the “Adam and Eve” progenitors of the Kikuyu ethnic group (including Kikuyu who already converted into Christianity), and of land, the most valuable communal property, the Kikuyu Creed took an unassailable lead in the battle for the hearts and minds of the Kikuyu people. The Kikuyu Creed was also important in another respect; by subverting Christianity, it was a veritable act of self-expression that paved the way for additional questioning of the relevance of foreign religions for native African communities.

Perhaps the most important message in almost all the publications was about the value of self-help. This was a call for Africans to modernize themselves using their own efforts, to pull themselves up by their own bootstraps. The self-help ideology was a form of self-expression, which contained within itself potential for additional self-expression. The nationalists held that self-help that would lead to the economic well-being,

education, and emancipation of the African peoples.⁴⁰ This theme of self-help is what pervades Muoria's pamphlets.

One pamphlet, first published in 1944 and included in Muoria's autobiography, was entitled: *Tũngĩka Atĩa Aiya Witũ?* (What Should We Do for Our Sake?). It exhorted the African people to work hard in order to become self-reliant and therefore free.

The pamphlet opened with *The Writer's Lament*, a poem that served as its preamble:

I feel full of sadness
 And my compassion is great
 As I wonder in my mind when great things
 Will be done by Africans, so as to make them strong.
 Yes, if only these Africans were to agree
 To do what my thoughts
 About these useful things
 Are urging them to do!
 Hurry up, you brother of mine,
 Here is the enemy: bring your sword!
 Foolishness and poverty should be exterminated and spear-stabbed
 Then taken for burial to the banks of the Ruiru river

Tell our women to ululate their traditional '*ngemi*'
 For we have been visited by a stranger
 In the form of new knowledge to show us the way
 To its happy home where we will be given guest-welcome.

Before us a steep hill rises with rocks and stones
 It is rugged and hard to climb
 It requires the struggle of hard work
 Tighten your belts around your loins in readiness

Lazy people do no good
 Stir then to work
 Be of good courage and speed on your job
 To finish so that you can shout, 'we have achieved it' (Muoria 1994: 85).

⁴⁰ In Kikuyu country, self-help manifested itself in the Kikuyu Independent Schools movement, a system of schools which the Kikuyu built themselves in order to give their people an alternative education that did not compromise tribal customs such as female circumcision and ritual songs and dances.

This poem starts on a low note but ends on a high one, perhaps signifying hope, a light at the end of the tunnel. Structurally, it contrasts the sadness of now with the possible joy and happiness of the future. To Muoria, sadness is occasioned by a yearning for a collective African advancement. Muoria is also acknowledging the relative underachievement of the African compared with the Europeans. This is what reference to the lack of “great things,” mainly material things, alludes to. To him, the condition of the African is directly linked to lack of modern education, but all is not lost because the community has been visited by a “stranger in the form of new knowledge,” and this stranger, education, is capable of getting the community out of its predicament, hence the call for celebratory *ngemi*⁴¹ ululation. However, before the community can emerge out of this murk and mire of ‘ignorance,’ everyone has to work extremely hard. Only then can the community shout in unison: we did it!

Here, Muoria launches a frontal attack on a perceived weakness of his society – the love of easy wealth. He denigrates this kind of wealth, urging more hard work as the ultimate means of self-help. The theme of hard work as the precursor to self-independence is also the subject of this passage from Chapter 9, *Our Children’s Future*, of this pamphlet:

Let us say that after working hard, you manage to educate your child to a higher stage and he has been able to leave school. Your responsibility as a father has been done to your satisfaction. The next stage is that of providing him with a job, which you cannot give him directly as a father. But who has the power to give him a job? We know that the only people who can provide him with that job is

⁴¹ *Ngemi* ululations are an expression of gratitude, appreciation, and happiness. They were usually performed by women upon the birth of a child, with a baby girl receiving four ululations and a baby boy receiving five ululations. *Ngemi* are a traditional form of valedictory praise for the mother for successful delivery as well as a celebration of joy for a new life. They are therefore the highest form of expression of joy and praise.

[*sic*] the government of the country or the owners of big companies. But neither those companies nor government itself, for the present belongs to Africans. The government as well as those big companies compose [*sic*] of human beings. And if they are all human beings it means they too have children. And they are educating their own children at the same time as you are educating yours. In such circumstances, do you think it will be possible for them to give your son a job when the son of the owner of the company has no job himself? The key job will rather be given to the son of the person who owns that company first, then the less important work is given to your son because it is not suitable for the owner's son. And all the unimportant jobs will be given to other people who are not related to the owner of it. The question which we are bound to ask ourselves is this: How did those businesses come into being in the first place? We do not mean the government itself, since it is impossible for all the people to be rulers at the same time. The people about whom we are talking are the moneyed owners of those big companies...But is there anything we as Africans could do in order to form such a good company which could be earning money and which could enable us to provide good jobs for our children? (Muoria 1994:89–90).

This is a call for a new application of the Kikuyu commercial ethic, one that is differentiated by modernity. It is modern businesses that will support future generations, so people should start such businesses. There is no hint of an inferiority complex; rather, it is taken for granted that a Kikuyu can run any business that any one else can manage.⁴² Hard work is even portrayed as a ticket to social esteem: “If you refuse to work, you will be valueless among the community” (Muoria 1994:97). This goes to show how important the theme of communal and individual self-help was at that time in Kenyan history.

The nationalist press provided a forum for the airing of grievances against the colonial authorities, not least of which were the restrictions on freedom of expression. However, the colonial authorities were determined to deny this. As the acting Provincial Commissioner for Central Province wrote in September, 1947 in a letter to the Chief

⁴² Perhaps in this passage lies the answer to the perennial question of Kikuyu commercialism that fascinates other Africans and foreigners alike. I have not encountered literature from any writer from any other community writing at this time addressing the issue of commercial ethics among Kenyan ethnic groups. The Luo started the Nyanza Thrift companies, but only after Kikuyu politicians had challenged them to start businesses of their own (Odinga 1967).

Secretary:

It is not freedom of assembly and speech that these people want. They want to undermine all institutions of good government (quoted in Colonial Office 1960: 279).

Obviously, to the colonial authorities, a free press (and, by inference, freedom of expression) did not count as an institution of good government. Any demand for greater freedom of expression was bound to be interpreted as a sabotage of well-intentioned government programs. In the other words, the authorities and the Africans were talking at cross-purposes.

Government Reaction Before the State of Emergency

The colonial government was alarmed by the success of the African press, and felt that it was losing the war for the hearts and minds of the native population. It reacted in two distinct ways. It started holding senior level meetings to discuss the African press, set about reorganizing and strengthening its propaganda muscle, and started seeking anti-media laws in use in other colonies for adoption in Kenya. However, when this approach failed, the government clamped down on freedom of expression after abrogating free expression under its Emergency Regulations of 1952.

The first meeting over the issue was held in October 26, 1946 and was attended by the Labour Commissioner, the Member⁴³ for Health and Local Government, the Social Welfare Adviser, and Mr. H. E. Lambert, a retired administrative officer. This

⁴³ The term "Member" was the designation given to cabinet level position in the Kenya Colony. However, the authorities did not want to call such "Members" Cabinet Ministers, because Kenya was not self-

meeting noted that the “present trend of the vernacular Press constituted a grave menace to the future of the Colony”; that certain vernacular newspapers were financed by “seditiously minded Indians” and that their “object was purely anti-Government and anti-European”; that regarding freedom of the press, “liberty was being taken for license,” and that in addition to “deliberate distortion of facts, many of the articles in such newspapers contained a most dangerous and pernicious form of anti-European propaganda”; that the impact of an “unbridled Press amongst uneducated and politically immature Africans was infinitely more serious than that which could be achieved by inflammatory articles in newspapers in England”; that there was a need “for information as to what legislation existed in any other British Colony for the control of the press,” and the need to consider of the possibility of some form of supervision or censorship.”

The meeting also recommended that a suitable Government publication be subsidized and that the staff of the Criminal Investigation Department should be increased to enable it to undertake closer scrutiny of vernacular newspapers. Finally, the meeting recommended that “action in the courts should immediately follow the slightest infringement of the law and the editors should be so informed at frequent intervals” (Colonial Office 1960:191).

As part of strengthening its propaganda efforts, the government abolished the European and Indian information sections in accordance with the recommendation of the Report of the Standing Finance Committee that “the policy with regard to the Information Office should be completely changed with a view to its activities, for the main part, being directed to the education of the native areas under the direction of the Chief Native

governing yet. These departmental heads were members of the Executive Council, the equivalent of the Cabinet.

Commissioner and the Provincial Commissions” (Colony and Protectorate of Kenya, 1950:2). The reference to the “education of native areas” gives away the existence of an ongoing battle over the control of public opinion in the rural areas and within the ranks of the African people.

The urgency of communicating effectively to the Africans was further emphasized in the Report on the 1947 Draft Expenditure Estimates in which the Standing Finance Committee recommended that “the whole set-up of the Information Office be reviewed with a view to (a) securing greater effect in the dissemination of information about the government’s development and reconstruction activities and intentions; (b) playing its full part in the follow-up work for children who have left school in their early teens; and (c) providing material required for use in adult literacy campaigns” (Colony and Protectorate of Kenya, 1950:2).

In other words, the envisaged reorganization of the department of information for effective propaganda services would be couched in the language of altruistic intentions. In 1948, a special committee was appointed to consider the best means of “organizing the dissemination of news to Africans” (Colony and Protectorate of Kenya, 1950:2). This committee recommended the setting up of a Public Relations Department separate from the Information Office, but this recommendation failed to receive government support, perhaps because the Public Relations Department would be construed as the propaganda department, thereby denying it any form of credibility. However, the government agreed to appoint a Press Officer, which it did in 1948.

The Press Liaison Officer, as he was called, was a Public Relations Officer in all but name. His work was to issue press releases “presenting Government Policy to the

Press,” drawing the “attention of editors to any misstatements of fact affecting the government,” and offer “assistance to African editors with a view to improving the standard of their papers,” while the “liaison” component of his job generally meant “arranging press conferences for all races,” entertaining and providing material to “selected visitors” and “overseas journalists,” (Colony and Protectorate of Kenya, 1950:5) and captivating good relations with editors to ensure positive coverage of government.

On April 28, 1947, the Executive Council (cabinet equivalent) approved in principle a proposal submitted by Chief Secretary that a Government paper be started, and an arrangement be made for its circulation throughout the country, all at an estimated cost of 7,000 pounds. This proposal, however, was not implemented, mainly because of opposition by the *East African Standard*, which objected to the entry of the government in the media. Instead, the *East African Standard* agreed to produce a series of vernacular papers in the Kikuyu, Kiswahili, Kikamba and Luluhya languages. However, only one publication, the Kikuyu *Mũcemano*, was produced in 1948; it survived for only five months. However, a total of sixteen district newsheets were produced through the African District Councils (Colonial Office 1960:193).

Yet, despite these changes, the government was still unable to compete with the African press, mainly because “many of these newspapers had circulations in the thousands” with single editions of a newspaper like *Mũmenyereri* being “read by one African to dozens of illiterate villagers” (Scotton 1975:32). The government resorted to high-handedness in its treatment of these publications. On April 19, 1947, F. M., Ruhinda, the editor of *Habari*, was fined fifty pounds or three months imprisonment in

default for the publication of a seditious article (Colonial Office 1960:198). Six months later on October 21, 1947, Muoria was charged with sedition when he published a report to the effect that African *Askaris* had disobeyed a white officer's orders to shoot picketing workers at Uplands Bacon Factory. The editor and his Indian printer were each fined 150 shillings or three months imprisonment in default. At the same time, the government persisted in trying to silence the newspaper, with the District Commissioner for Kiambu and the Director of Intelligence both asking that prosecution be brought against the publication (Colonial Office 1960: 196).

On August 9, 1949, the Legco appointed a committee of nine members to inquire into the Colony's information services "in view of public doubt as to the effectiveness of the Kenya Information Office" (Colony and Protectorate of Kenya, 1950:1). In its report, issued March 1, 1950, the committee concurred with "Her Majesty's government that provision of adequate machinery for information is an integral part of modern Administration" and that it was necessary to "concentrate on providing a machine geared appropriately to the task of promoting the accepted policy of raising the standard of living of the majority of inhabitants of this country as soon as possible, and to the maintenance of tranquility and good relations" (Colony and Protectorate of Kenya, 1950:6-7).

It therefore recommended, among other things, the creation of an African Information Service to "supply information about the Government's plans and activities" and "instructional material designed to promote the social and economic advancement of the African community"; better co-ordination between administrative and information functions of the government; preparation by the central office of "talking points" in line with "instructional objectives" of the government for use by district administration

officials in public *barazas* (rallies); that the government desist from establishing newspapers, but that the Press Officer take on the role of assisting African editors to “improve their papers by providing Professional help and advice”; the strengthening of such information activities as district news sheets, and the production of booklets, pamphlets and posters, cinema, film strips and still photographs, demonstration teams and broadcasting. By offering to help African editors, the government was groping for an opportunity to influence the direction that the African nationalist press would take.

In addition, the committee defined the duties and function of the Press Officer as being to “act as a channel to the Press of all races, for the supply of Government hand-outs, communiqués and special articles”; arrange press conferences and special interviews with senior officers when necessary, although the media would still be able to arrange their own interviews; monitor publications and draw attention of editors to any misstatements of fact affecting the Government; provide assistance and technical advice to African editors with a view to improving the standard of their papers; be responsible for the two-way channel of information between the United Kingdom and Kenya; edit the *Kenya Information Fortnightly* and *Pamoja*; prepare for the information of the Government a periodic survey of views expressed in the press on matters of importance; keep in close touch with the press of all races; and to suggest the issue of a Government statement when necessary.

Of all these recommendations, the one that was really central to the plans of the government was the establishment of the African Information Service. While the service would provide information and material for rural Africans, it was the Africans in towns that the government was most concerned about as is revealed by the committee’s

suggestion that a “determined attempt” be made to “try to fill the after-dark leisure hours of Africans in the towns by providing a service to individuals rather than on a community basis,” by providing the then new “battery receiving sets” such as those already in use in Northern Rhodesia, and by recalling receiving sets already in the districts and placing them in town, “in such places as eating houses, clubs and market places” (Colony and Protectorate of Kenya, 1950:14).

The African Information Service was to be placed “under the person or authority responsible for advising the Government on the direction and promotion of community development” and be “under the Head, Provincial Administration,” although it would be subject “to the immediate attention of the Chief Native Commissioner” (Colony and Protectorate of Kenya, 1950:9). The location of the African Information Service under the head of the Provincial Administration reflects the seriousness with which the government viewed its role. The Head of the Provincial Administration was effectively the third most powerful office in the colony after the Governor and the Chief Secretary, who was the head of the civil service.

The material and information produced by the African Information Service was not for everyone’s consumption. The government did not want some racial groups to be exposed to the kind of information meant for the natives. The thinking at the time was that Kenya’s multiracial society was “at different cultural levels” (Colony and Protectorate of Kenya, 1950:4) a euphemism for the perceived African backwardness. In the view of the government, the information services should be “primarily designed to supply information and instruction to the African section of the population,” because although other communities could benefit from such services, the “country can not at

present afford to set up a section of the Information Service to provide instruction to the non-African communities.” The “instructions” — meaning education — for non-African communities was left to the Social Services Department and the local authorities which were either being run by the colonial civil service bureaucrats or controlled by the settlers (Colony and Protectorate of Kenya 1950:14).

The recommendations of the committee constituted a total overhaul of the colonial information services with a view to making them effective in the dissemination of information in a changing context of heightened politics. It offered the tools for effectively countering the political views of the nationalist press. However, the committee still gave the government additional tools to fight the war of public opinion if its recommendations failed to work. Tucked in the middle of page 11 of the committee’s report was the committee’s warning to the effect that, in its view, a time might come “when the legislature will have to consider granting powers to the Governor in Council to suspend papers guilty of deliberate and persistent misrepresentation of fact” (Colony and Protectorate of Kenya 1950:11).

The colonial administration already had the power to proscribe publications, and it had already used it, in the case of *Müigwithania* which was banned in 1940. It also had considerable powers under the Penal Code to prosecute what it deemed to be offensive publications. This report appeared barely two years after the Universal Declaration of Human Rights which guaranteed freedom expression in its Article 19. In recommending more draconian measures of dealing with a wayward press, the committee, probably felt compelled to gloss over such an arrogation of government authority with a veneer of legality. All members of the committee except one, including J. Arap Chemallan, the

only African member, signed on this recommendation. The lone dissenter was C. B. Madan, an Asian lawyer, later to become the Chief Justice of Kenya in the 1980s. His dissent, also published in the report, is a brave and eloquent restatement of role of the press in a democratic society and a spirited defense of the freedom of expression:

I do not believe that in a free and democratic state the time can ever come, except when a state of war or some such grave emergency exists, to make it necessary to suspend any newspapers. If the newspapers are guilty of deliberate and persistent misrepresentation of facts, then the Information Services and other means at the disposal of the Government should prove adequate to counteract the effect created by such newspapers and the ordinary law of the land is adequate to deal with any offence committed by reason of such misrepresentation. The very idea of giving powers to suspend newspapers is contrary to the idea of freedom. . . Healthy, independent and fearless criticism is necessary for the proper functioning of democratic states and the fear of suppression will affect not merely the newspapers which have no genuine desire to be fair or accurate but also those who have an earnest desire to observe the rules of high journalistic ethics and will form the very foundations of the state (Colony and Protectorate of Kenya 1950:16).

Madan wrote that all wrongs that newspapers may commit must be tried in a court of law, and that such cases should not be determined by an executive authority “before which an adequate opportunity to defend oneself may be absent or may be denied.” In his view, it was better to have newspapers that misrepresented facts persistently and deliberately, since, in any case, they were liable to penal legislation, than to contemplate legislation to proscribe such newspapers. He concluded thus:

Newspapers are too vital a medium of public expression of opinion to be left to the mercy of an executive, and particularly in a multi-racial society where power is largely concentrated in the members of one race and where accordingly the Government never enjoys quite the same degree of support or trust as in a more homogeneous or uniform society. Suppression or danger of suppression of a newspaper through the executive would spread the roots of distrust and fear even

more widely than is normal in such a society. It is better that people should continue to enjoy freedom of speech and action and the unchallengeable right to criticize freely within the limits imposed by the laws of sedition, libel, etc., as is and should be accorded in all democratic countries, than to suppress the organs which provide the means to do so because some newspapers are guilty of misconduct. The freedom of the press should be maintained. It is this freedom which is one of the mainstays of any democratic country and a denial or weakening of that freedom could hardly fail to end in the denial of all true liberty (Colony and Protectorate of Kenya 1950:16).

In making these recommendations, the committee exposed the presumptions of authority whenever it curtails freedom of expression, namely, that it was acting to protect people from themselves:

We believe that in order to maintain tranquility and good relations, it is of first importance that the policies, actions and future intentions of the Government should be conveyed to the public; and that on the other hand, the Government should be appraised of public opinion, as far as possible, on all matters of importance (Colony and Protectorate of Kenya 1950:7).

As is clear from these events, however, protecting people from themselves is often an excuse for unwarranted high-handedness. Governments, when they take measures to curb freedom of expression, do not always acknowledge their own contribution in the circumstances that necessitate robust exercise of freedom of the kind that is often deemed to threaten order and stability.

As if to fulfill the committee's recommendation, on October 3, 1952, a few days before the declaration of a State of Emergency, the Printing Presses (Temporary Provisions)⁴⁴ Ordinance was enacted. It gave the Registrar of Printing Presses, after consultation with the Member for Law and Order, the power to withdraw any printer's

⁴⁴ According to the Corfield Report, this "sunset" provision was preferred by the Colonial Secretariat to forestall attacks by the Commonwealth Press Union and the UK parliament (Colonial Office 1960:193).

license if it appeared to him that the licensee has kept or used, or was likely to keep or use, a printing press for unlawful purposes, or for the printing of any document prejudicial to, or incompatible with, peace or good order in the Colony. This was an ingenious but lethal attack on press freedom; by focusing on printing presses, it dealt a death blow to publications without appearing to attack the publications themselves.

Freedom of Expression During the State of Emergency

The declaration of a State of Emergency affected all fundamental freedoms of the individual. Officially, what the Governor invoked were the Emergency Powers Order in Council, a decree made at Buckingham Palace to bolster security through extrajudicial powers. The Order gave the Governor power to proclaim an Emergency in any part of or on the entire Colony. Once the State of Emergency was declared, the Governor could then make regulations that were in his opinion necessary for securing public order, and for the suppression of mutiny, rebellion and riot.

Among the very comprehensive powers given to the Governor was a provision for the detention and deportation of persons from the territory. The Governor could also amend any law, or suspend the operation of any law and apply any law with or without modification. He was also empowered to apprehend, try and punish persons offending against regulations (Colonial Office 1960: 243). The Governor exercised all this power without “limit in time” and without being required to submit any regulations to the Legislative Council (Colonial Office 1960: 243). In short, the Emergency regulations gave absolute powers to the Governor to legally — legally because the order itself was

legal — do things that he could not have done under ordinary circumstances where rule of law was operative.

These dictatorial powers were trained on all freedoms of expression. After the State of Emergency was declared, leaders were arrested and detained, and entire communities were put in concentration camps. All African vernacular periodicals were banned. The declaration of a State of Emergency gave the “government the power to suppress newspapers considered a danger to public order” and it “took immediate advantage of these powers and banned twelve newspapers and twenty-nine leaflets and pamphlets” (Gadsen 1980:531).

The following year, it became illegal to produce newspapers in the Gĩkũyũ, Kiambu and Kimeru languages (Gadsen 1980:531). According to Muoria, “for any one to be seen with an old copy of *Mũmenyereri* meant being sent to jail for six months” (1994: 23). The 1906 ordinance concerning the registration of newspapers was amended to require registration of such publications within two weeks (Gadsen 1980:531), thus eliminating the loophole that publishers had exploited in the past to produce short-lived newspapers. According to one media historian “these measures effectively killed the African press” as printers risked having their licenses revoked if they printed African-run Gĩkũyũ newspapers (Gadsen 1980:532). The few surviving African newspapers such as *Ramogi* had to appoint Europeans on their board in order to survive (Gadsen 1980:532).

To the publishers, the ban resulted in pecuniary hardship, as the newspapers had been businesses on which their publishers had depended, besides being tools for agitation. The ban also emboldened bureaucrats to deny licenses for the importation of better printing machines. In Nairobi, city authorities refused to grant Muoria a license

“for my printing press” under the pretext “that the owner might publish something which did not agree with the official policy during the State of Emergency” (1994:44).

It became increasingly difficult for Africans to gain coverage, particularly fair coverage, from the remaining settler dominated press. The remaining press was largely settler owned and dominated by settlers and favored European views which were given wide, often undeserved coverage. For instance, according to Tom Mboya, a prominent trade unionist and nationalist, “a speech, however trite, by a settler leader to fifteen Europeans would be given a front-page column, while a speech by an African leader to ten thousand people might get an inch in an obscure corner” (Mboya 1963:75). In spite of Mboya’s prominence in politics and trade unionism, “the *East African Standard* and other English-Language papers were distinctly reluctant to give him a platform” (Goldworthy 1982:40). A story about Odinga was carried by the settler mouthpiece *Kenya Weekly News* with the headline: “Oginga Odinga Brays Again” (Odinga 1967: 159). As for Kenyatta, *Kenya Weekly News* said he was not merely the leader of a violent movement, he was “stained with the mark of the Beast” (Odinga 1967: 160).

The new African nationalist leaders found ways of launching new publications to give coverage to African leaders and interests, but these new publications were a pale shadow of the robust vernacular press that had existed before the State of Emergency. For instance, Tom Mboya launched his own publication, known simply as “Newsletter,” with financial assistance from the ICFTU’s Regional Activities Fund. It was published in both Swahili and English and was edited by Arthur Aggrey Ochwada, assistant general secretary of the Kenya Federal of Labor (KFL). The Swahili version was distributed among trade unionists, while the English version was circulated among selected people in

politics, government, pressure groups, and media institutions at home and abroad (Goldsworthy 1982:40). It was an American-style corporate newsletter that eschewed confrontational politics.

Inside the detention camps, the nationalists asserted their right to express themselves despite torture (Elkins 2005). Many letters of petition were smuggled out; the colonial government, instead of investigating the claims of inhuman conditions, sought to prevent such letters from leaving prisons.⁴⁵ Other hardcore detainees devised means of resistance; they would change the wording of slogans they were forced to chant as part of their reeducation or rehabilitation. According to Archer, detainees were forced to chant in chorus:

“Englishmen will rule this country forever. Jomo Kenyatta is a dog. Mau Mau is bad.”

Instead, many muttered:

“Englishmen will not rule this country forever. Jomo Kenyatta is a god. Mau Mau is grand”(Archer 1969:109–110).

To the white prison officers who presided over detention camps, the chant sounded innocuous enough. The majority of the African guards were illiterate and could not speak English. Occasionally, however, detainees would be overheard by an English-speaking African guard and would be beaten mercilessly (Archer 1969:109–110; Elkins 2005; Anderson 2005).

⁴⁵ See *Kenya: White Terror*, a BBC documentary about torture in detention camps and the rape of women by British soldiers and African guards. <http://news.bbc.co.uk/2/hi/programmes/correspondent/2416049.stm>

The State of Emergency, therefore, dealt a severe blow to freedom of expression. By outlawing Kikuyu, Kiambu, Kimer, and Kikamba vernacular publications, the colonial government altered the course of media development in Kenya, injecting fear in the remaining press, a fear that was to cast its long shadow on the postcolonial press. At the same time, the declaration of a State of Emergency provided precedents for dealing with the wayward press. Later regimes were to find these precedents useful.

Conclusion

The development of freedom of expression in late colonial Kenya exhibits a very steep evolutionary curve. With a few years, a largely docile society was thoroughly transformed, and started using modern mass communication methods to agitate for fundamental political changes. As Kenya emerged from World War II, the appointment of a new Governor gave hope that the colony was poised for the kind of change that would lead to prolonged British rule in Kenya. However, deteriorating conditions for the Africans, diminished land for Africans, increasing political consciousness in the ranks of returning war veterans, the rise of an educated class, Asian support of African nationalism amid increasing intransigence on the part of the colonial settlers -- all conspired to change the course of events in Kenya. Amongst the rising voices were those of nationalist journalist-authors who used the little liberty available to critique the status quo passionately, but, remarkably, within the law. These journalists, authors, and publishers provided a hitherto unavailable discursive space to the *hoi polloi* and the African elite alike.

These papers gave much-needed publicity to the African nationalist leaders.

Kenyatta acknowledged the crucial role played by *Mũmenyereri* in giving him coverage and popularizing the cause of nationalism. For instance, before Muoria left for London on his way to Switzerland to attend a meeting of the Moral Rearmament Movement in 1952, he had lunch with Kenyatta and a few others, during which Kenyatta acknowledged the role Muoria had played in Kenyatta's political career:

Before Muoria leaves us for Europe, I want to say a few words about him. And what I want to tell you is this: When I came home from England a few years ago, if I had not found someone like Muoria, who came to meet me at Mombasa and wrote down what I said to our people, and who followed me up and down the country where he did the same things while publishing it all in his newspaper *Mũmenyereri*, by now I would have been a forgotten man. I would have gone home to do my farming. But because of what Muoria did, I did not become a forgotten man at all. Those are the words I wanted to tell you about Muoria and his work before he leaves us for London (Muoria 1994: 37).

In effect, therefore, when the colonial government's counter-insurgency measures were put into gear, various forms of freedom of expression emerged as sites of contestation, with the colonial government keen to suppress or at least regulate them more stringently. The declaration of a state of emergency, while it had other adverse effects on people's lives such as hunger, restrictions on movement, and general impoverishment, was more effective in terms of curbing freedom of expression in late colonial Kenya. No longer could Africans exchange views freely in public, and certainly not through the mass media. The full might of the colonial state machinery was brought to bear on freedom of expression. This period in Kenya's history offers a striking case study of the perpetual contest between liberty and authority. So vicious was this contest that the censorship measures put in place by colonial authorities continue to astound

researchers, fifty years later:

I found out that countless documents pertaining to the detention camps either were missing from Britain's Public Record Office and the Kenya National Archives or were still classified as confidential some fifty years after the Mau Mau war. The British were meticulous record keepers in Kenya and elsewhere in their empire, making the absence of documentation on the camps all the more curious. I came to learn that the colonial government had intentionally destroyed many of the missing files in massive bonfires on the eve of its 1963 retreat from Kenya (Elkins: 2005:xii).

Probably among the destroyed documents were Kenyatta's papers, which were seized in 1952 in such quantities that it took the police three weeks to sort them out. The papers were never returned (Kenyatta 1968:26). In taking books and literature of all kinds and destroying such material, the government set a precedent that was later to haunt post-independent Kenya. This mode of silencing critics of authority would persist even in postcolonial Kenya where authorities would cart away books and newspapers belonging to critics who were invariably either detained or sent to prison on trumped-up charges.⁴⁶ As we shall see in the next chapters, the methods devised and perfected by the colonial authorities to suppress dissent were later applied by successive postcolonial governments for the same purpose with little variation despite the "independence" that had been achieved in 1963.

⁴⁶ Special Branch police took a huge collection of research material belonging to Maina wa Kinyatti when he was arrested in 1982. This material was never returned to him and has never been recovered.

CHAPTER THREE

Freedom of Expression and the Struggle for Kenyatta's Succession, 1974–78

There were two events that really defined the decade of the 1970s in Kenya. One was the murder in 1975 of the popular Member of Parliament for the Nyandarua North constituency, Josiah Mwangi Kariuki, known as JM. This event has been described as the most serious crisis that the regime of Jomo Kenyatta ever faced (Arnold 1981:79). The other was the spate of arrests and detentions without trial of novelist writer Wa Thiong'o and other writers and politicians. Except for perfunctory protests from a few international human rights organizations, the detention of Wa Thiong'o and others, occurring as it did at the height of Cold War, attracted relatively little global attention.

On the face of it, these events appear unrelated — not just for their highly differentiated political impacts. JM was a wealthy politician, part of the emergent postcolonial elite, and therefore an unlikely critic of the government. Wa Thiong'o was an uninspiring public speaker, a university Professor of English Literature who appeared to relish interacting with villagers more than with his fellow elite.⁴⁷ I will argue here that these events were not only connected, but were part of a bruising contest between authority and free expression during a very uncertain era in Kenya's history, a time when the young nation was contemplating a future without its beloved, omnipresent founding father. This period has been called the “Kenyatta succession” (Karimi and Ochieng 1980).

⁴⁷ At the launch of his novel, *Petals of Blood*, in July 1977, Wa Thiong'o said that most “writers are wordless when it comes to speeches. Politicians are much better at that kind of thing. We who use our pens are maybe writers in politics, but we are not necessarily politicians” (Wa Thiong'o 1981: 94).

These events represent a continuation of this contest, which started in colonial Kenya, peaking after the Second World War and particularly in late colonial Kenya, when considerable state resources were mobilized to put down the Mau Mau insurgency. It is noteworthy that counter-insurgency institutions that emerged during the early 1950s,⁴⁸ and the institutions put in place to implement the development ideology after World War II, rather than being dismantled at the time of independence, were deliberately retained by a postcolonial regime intent on maintaining law and order.⁴⁹

Thus:

Kenya had a particularly strong bureaucracy as a result of colonial developments. In fact, Kenya's civil service was better developed than elsewhere in East Africa, built as it was to serve the White settlers and provide them with security during the Mau Mau revolt. Thus the strong civil service was an offshoot of the Mau Mau movement (Srinivasan 1979:54).

This strong civil service has been acknowledged by various scholars (Bienen 1974; Hyden 1984; Widner 1992; Branch and Cheeseman 2006),⁵⁰ and was clearly being relied upon by the government for the maintenance of political stability, which Kenyatta

⁴⁸ There are military-specific measures as shown by Anthony Clayton in his *Counter-Insurgency in Kenya*, and these are given full treatment by Elkins (2005) and Anderson (2005). However, outside of the military campaign, the colonial government strengthened the civil service, and particularly the provincial administration, the elite arm of the civil service, which became the most powerful branch of the prefecture system (See Berman 1990; Bienen 1974). Kenya's fabled political stability, relative to other African countries has been forcefully attributed to the institutional capacity and experience of the Kenyan civil service (Branch and Cheeseman 2006), contrary to the argument posited by Tamarkin (1979).

⁴⁹ The law-and-order ideology of the Kenyatta government is legendary. Daniel arap Moi in 1966 defended the Kenyatta government by saying that it was not "a government of disorder" (quoted in Gertzel, Goldschmidt, and Rothschild, 1969: 126). Kenyatta's own speeches also emphasize political stability (1964: 1968).

⁵⁰ According to Bienen:

At the time of independence in 1963, Kenya had a relatively well-developed Civil Service. The size of the Kenya Civil Service was about one-third larger than the then Tanganyika's, although the latter's population was about ten percent larger. Kenya's Civil Service was more developed than those elsewhere in former British colonial territories in East Africa because it had been constructed to provide services for a white-settler population and because during the Mau Mau

and other leaders of the time elevated to a creed. Various commentators have linked this desire for political stability with the intolerance of dissent in Kenya in both Kenyatta and Moi eras (Bienen 1974; Srinivasan 1979; Throup and Hornsby 1998).

Kenyatta's obsession with political order was a perhaps a response to pressure he felt throughout his life to prove that the African was more than a glorified ape, a human being capable of governing himself. He appears to have taken this need to prove African ability and capacity to handle his affairs without reliance on the white man as a personal crusade, devoting an entire book to celebrate precontact Kikuyu political and cultural traditions that had engendered social stability in traditional society (Kenyatta 1965). His need to prove African capacity to self-government was also probably driven by the dent the African image had suffered as a result of the Mau Mau War which had bequeathed a legacy, deserved or undeserved, of violent atavism and chaos. Kenyatta therefore felt compelled to maintain law and order using all means necessary, including extra-constitutional ones, in order to prove African capacity to maintain social stability. In many of his speeches, he argued that development was impossible without political stability.

Seen in this light, JM's murder and the detention of Wa Thiong'o represent the inevitable head-on collision between the bureaucratic-executive state (Branch and Cheeseman 2006) that Kenya had evolved since the pre-independence days, and free expression as it sought fissures through which to escape. These two major events occurred in mid 1970s, toward the dying years of Kenyatta's rule. They should therefore be seen in the contest of the struggle for succession of the then aging and ailing President.

period, both provincial administration and security forces in particular had been strengthened to deal with law and order problems (Bienen 1974:30-31).

The two events represented a dangerous descent into a very threatening crisis for a country that had enjoyed relative peace since independence. True, Kenyan politics have always been volatile (Arnold 1981:78), but these events in the 1970s were particularly noteworthy. While the clampdown on dissent before the mid seventies had involved mainly groups outside Kenyatta's own ethnic group of the Kikuyu, the attacks against free expression in the mid 1970s focused on the Kikuyu dissenters, or what Throup calls "left-wing Kikuyu opposition" (Throup and Hornsby 1998: 11). JM's murder marked the first time that the death of a prominent critic from Kenyatta's own ethnic group had been linked to the government in postcolonial Kenya. Suspected political murder victims prior to JM's death included non-Kikuyu Kenyans such as Tom Mboya in 1969 and Pio Gama Pinto in 1965. The murder of JM, and Wa Thiong'o's detention, therefore, represent a radical change in Kenyan politics. These events were taking place at the height of Cold War geopolitics and were the byproduct of a vicious interethnic fight among the Kikuyu, pitting two sets of the community's elite against each other. On one side stood those who were attempting to protect power and business interests. On the other side stood another section of the elite who were challenging the first group. This latter group was often aided by disparate voices of a multiethnic provenance.

In this chapter, I intend to analyze how freedom of expression was contested in the mid 1970s and how it evolved to set the stage for the ruthless suppression that occurred in the 1980s. As is becoming increasingly clear, suppression of freedom of expression in Kenya appears to build on prior experiences and tactics. That is to say: the experiences of late colonial Kenya informed how dissent was suppressed in the 1970s

and later in the 1980s, leading to the decisive change that occurred in the 1990s. I start by placing freedom of expression in its proper political, historical, and legal context. I then examine the two specific events; the murder of JM and the series of persecutions of politicians and writers.

From 1960 to 1964, Kenya was a multi-party state with two main political parties, KANU and KADU, and a slew of smaller parties. However, KADU was dissolved after the 1963 elections and was absorbed into the ruling party, KANU. However, trouble started almost immediately, centering on “moderates” and “radicals” (Hornsby 1989:276). It began after the fallout between Kenyatta and his Vice-President, Jaramogi Oginga Odinga, in 1965 over Odinga’s suspected, but unproven, conspiracies with communist regimes. Kenyatta explained in a radio address to the nation on April 26, 1966, that the break away from KANU by Odinga and his group was a “kind of emotional spasm” by a “small number of dissident members” who had “suddenly abandoned their past loyalty to Kenya nationalism” (Kenyatta 1968: 302). The fact of the matter, however, was that the independence coalition was disintegrating on account of different ideological commitments of the key figures in government (Nyong’o 1989).

Kenyatta and those close to him then purged the ruling party of Odinga (he was forced to resign in 1966) and his supporters, forcing them to form the Kenya People’s Union (KPU), which sponsored MPs from mainly Luo Nyanza to Parliament. It operated with impunity for at least three years until it was banned in 1969. What provided the excuse for the ban were events following the assassination of Tom Mboya.

Unlike the murder of Pio Gama Pinto in 1965, and the death in a mysterious road accident of the Minister for Foreign Affairs, C. M. G. Argwings Kodhek, in January

1969, Mboya's assassination was unique. He was not a critic of the Kenyatta regime. Rather, he was a prominent minister in Kenyatta's cabinet who posed a threat not by dint of his brilliance, eloquence, and international connections, all of which he obviously had, but because these endowments combined to make him unstoppable in the contest for succession to Kenyatta. Thus, Mboya was killed because there was no other way to stop him from ascending to the presidency. His assassination was linked to a clique of die-hard Kikuyu politicians around Kenyatta, who were concerned about Mboya's independence from foreign control and their own ability to control him were he to take over the government (Goldsworthy 1982).

Such conspiracies by politicians were not an anomaly at the time; beneath the umbrella of Kenyatta's charisma, legitimacy, and power, were fierce rivalries (Arnold 1981:78), the very prerequisites for conspiracies. Mboya's assassination sparked off bitter demonstrations in major cities. A few months thereafter, when Kenyatta toured Kisumu in Nyanza province, home of the Luo, there was a bitter confrontation between him and Odinga, and people pelted him with stones, forcing the Presidential guards to open fire killing at least forty-three people. Subsequently, Odinga was placed under house arrest and Kenya became a *de facto* one-party state, with no move being made to convert the country into a *de jure* single-party state until 1982 (Widner 1992).

What this means is that dissent was not completely outlawed, although it was severely circumscribed. Politicians could, at least in theory, form political parties if they so wished. However, this was highly discouraged. Everyone was expected to join KANU. The party's revised constitution of 1974 stated that a member should be Kenyan aged eighteen and over "who believes in African Socialism and who accepts the objectives,

policy, programmes, and discipline of the union,” and should not be a “a member of any political union or of any organization whose policy is inconsistent with that of the union” (KANU 1974). This meant that Kenyans could only express their political choice within the narrow confines of a single party.

The fact that dissenters were sent to jail rather than murdered meant that anger against the regime, which obviously existed, never welled into the critical mass required to push the country over the brink. Kenyans, particularly non-Kikuyu, reacted by largely withdrawing from open opposition and participating in the affairs of the ruling party as far as doing so was permitted. Kenyatta and those surrounding him probably thought they had it all sewn up. However, they failed to contend with opposition from at least three quarters. These included internal opposition from Kenyatta’s own ethnic group, the Kikuyu; backbench members of parliament; and the academics. This opposition, and the government’s reaction to it, is what animated the four-year period leading up to Kenyatta’s death in 1978, and is the subject matter of this chapter.

The attack on critics from within the House of Mũmbi, as the Kikuyu refer to themselves, represented a reach into hitherto uncharted area. It amounted to a cannibalism of sorts, an ethnic group eating its own. Although definitely not at the same scale, it was reminiscent of the Mau Mau era when loyalists and nationalist Kikuyu had faced each other in a bloodletting for control over the direction of not just Kikuyu, but also Kenyan history. What had led to this situation? How did some Kikuyu become such prominent critics of the Kenyatta regime? Who were the other non-Kikuyu critics? How, why, and when did the academics intervene? Why did they tread on a path that had proved so dangerous to earlier critics of the government? How did they express their

grievances and under what kind of legal and political climate? Which media did they use? How did the media handle the crises? These are some of the questions that are addressed in this chapter.

The Context of Freedom of Expression in Mid 1970s

On the surface, the start of 1974 was hardly portentous. Nothing portended the events that were to follow barely a year later, or those that were to follow five years down the line, particularly Kenyatta's death. Yet, deep down, there were signs of a simmering, albeit latent discontent. A small group of backbench parliamentarians were increasingly outspoken. Student riots at the university were becoming equally common, although they avoided confronting the executive directly, preferring instead to target allegedly racist professors and lack of facilities at the college. Even the image of the President himself was a statement on the fluid state of affairs. Despite the ubiquity of pictures of Kenyatta at the State House with numerous delegations from all parts of the country on the front pages of daily newspapers, it was clear to all and sundry that the aging Kenyatta was no longer a paragon of health. Still this atmosphere of quiet but rational foreboding was a statement on how far the country had come since independence when it was all but expected to disintegrate. It was also a statement of fear born of the questions: What would happen when Kenyatta was longer there?

It is important to recall that when Kenya gained independence in 1963, it was one of the most fragile states in Africa. It had just emerged out of a bitter war that divided the country between Gikūyū Embu and Meru (GEMA) and some of the other communities. The GEMA communities themselves were split down the middle, between the

nationalists and those who had been loyal to the colonial government. Across the nation, the country was also divided across tribal, racial, rural-urban, traditional-modernist, and small-tribe big-tribe axes.

In this context, the observation that the country “faced severe problems at independence”(Throup 1998:7), appears as an understatement. Even one wrong move by the incoming government leaders would have propelled the country into a path of self-destruction and mayhem. Perhaps fully aware of the poisoned chalice he was handing over to Kenyatta, the Duke of Edinburgh asked Kenyatta, at the precise moment when the British flag was lowered and the new Kenyan flag raised in 1963, “Would you like to change your mind?”(Mans 1977:3). Kenyatta’s response remains unknown. However, fully conscious of the dire situation, Kenyatta embarked on a three-pronged process of national reconciliation and peace building.

To the bitterly split GEMA community, he said in Kikuyu: *Twaigire tūtikahe hiti keeri*, which translates literally as a vow that GEMA “would never feed the hyenas again.” By this he meant that the communities should not revert to intracommunal killings, as they were better off not feeding scavengers with the bodies of their own people, as had happened during Mau Mau war. To allay the fears of the white settlers, Kenyatta went to Nakuru in the heart of the settler country where he gave his now famous “vengeance is not mine” speech, in which he said that he had no intention of seeking revenge despite the mistreatment meted against him by the colonial government. “It is the future, my friends, that is living, and the past that is dead.” He asked them to take up Kenyan citizenship without fear, and work hard to build the new nation (Kenyatta 1964; Howarth and Koff 1979).

To the different tribes in the country, his strategy was one of encouraging unity. “National unity was believed to be threatened by the divisiveness which a confrontational electoral system entailed” (Throup and Hornsby 1998:12) and by a multi-party, Westminster-style process of confrontational politics. Offering justification for the single-party system in 1964, Kenyatta couched his explanation in terms of national unity, political stability and what he called “Africanism” — perhaps meaning African political culture.

We have a two-fold job to do: to secure our people from aggression emanating from our enemies, and from subversion originating from some of our self-appointed friends both within and without. Our aim in Kenya is to cultivate a social and political order, which is consistent with our needs and our conditions. We will borrow what is relevant, and compatible with our aspirations, from any country of the East or West. African socialism — which continues to gain momentum — will thereby become a powerful instrument for elevating our Continent and accelerating development... We reject a blueprint of the Western model of a two-party system of Government because we do not subscribe to the notion of the Government and the governed being in opposition to one another, the one clamoring for duties and the other crying out for rights... The necessity for a one-party system in most parts of Africa — including Kenya — stems from two predominant factors. First, African society traditionally revolves around the family tree, the wider pattern of blood brotherhood, and the wider network of clans and tribes. At no time did the African tribes, or groups of tribes, see the state in the same way as the Greek City States. At no time did African tribes see themselves as tinpot ‘nations’ (Kenyatta 1968: 227-229).

The federal constitution that had been negotiated at the Lancaster House series of constitutional conferences was abandoned because, according to Kenyatta, it had “created tribal and regional groupings,” and contained “discordant forces,” including “every imaginable safeguard to protect the interests of non-Africans” (Kenyatta 1968:269). This was the very antithesis of Kenyatta’s own vision of political unity necessary for political stability. The opposition quickly dissipated as politicians bought into Kenyatta’s

formidable rhetoric of national unity. This rhetoric was reinforced with a big stick, thus quickly consolidating authority and making it clear that the Westminster-style winner-take-all approach was detrimental to the political careers of elected leaders who supported it because they would have difficulties accessing development funds for their constituents.

In November 1964, a few days before the celebration of the new nation's first anniversary of independence, KADU members crossed the floor in parliament and joined the ruling party (Murray-Brown 1963: 314-315). Kenya was to remain a *de facto* one-party state until 1966 when the KPU was formed. In the intervening years, Kenyatta sought to form an inclusive government within the constraints of a poorly educated populace, ethnic balance issues, and pressure to Africanize the bureaucracy. At the same time, he was weighing demands to compensate the nationalists without overly antagonizing those who had supported the colonial government, who, in any case, constituted the largest pool of experienced civil servants.

Issues such as poverty, disease, wealth disparity, and others were viewed in a more long-term fashion. Given the scarce resources at the disposal of the nation, Kenyatta's government came up with a strategy for creating wealth in the long term and distributing development largesse as it became available. The strategy was simple: focus available development resources in the most productive areas to make them more productive, then use tax money gleaned from such productivity to gradually develop areas with less potential (Government of Kenya 1965). This was later to become a major

bone of contention as areas with less potential saw this strategy as discriminatory (Oucho 2002).⁵¹

However, the peace and stability that Kenyatta desired had to be buttressed by a strong government. Kenyatta and those around him immediately moved to build a strong central government. He retained “political institutions similar to those bequeathed in 1963” (Hornsby 1989:275), because, according to him, it was “unwise to start by demolishing the whole structure created by the Colonial Government, in favor of some untried experiment” (Kenyatta 1968:269). First, he preserved “what he most needed from the colonial structure, and particularly its law and order aspect.” He also changed little of the “the judiciary, civil service and parliament” which continued to “function according to their British models and with white men still in senior posts” (Murray-Brown 1979:312).

In devising a Kenyan constitutional and administrative system, the overriding intention was to shield Kenyatta, and the presidency, seen as a symbol of national unity, from being soiled by, or stuck in, the muck and mire of routine politics. The strategy was to put Kenyatta on a pedestal where the mud splashes occurring below would not affect him. As Mazrui observed, “any challenge to the reigning President [Kenyatta until 1978 and Moi after that] has usually resulted in repressive treatment of political dissenters” (1986:199).

All this was happening in the pursuit of national stability, which Kenyatta vaunted so much that it was the subject of his address on the eve of his last *Jamhuri* (Republic)

⁵¹ See also John Oyuke and Gordon Opiyo, “How our country’s wealth is shared,” *The Standard* Tuesday November 1, 2005 http://www.eastandard.net/hm_news/news.php?articleid=31540 (accessed November 2, 2005)

Day in 1977. He asked Kenyans to be ready to defend their hard-won *Uhuru* and to beware of “foreign elements bent on dividing the people.” He told Kenyans that since *Uhuru* had been won with blood and sweat, anybody threatening peace from within or from without would be dealt with ruthlessly (*The Standard*, December 12, 1977).

Kenyatta repeated the same message the following day during his official address to the nation:

“Since 1964, Kenya has proved that rapid and lasting development can only be built upon stability, which should be chosen as a way of life... Let us move unitedly into a year of nation building, upheld by the foundations already laid through stability and hard work, and inspired, as always, by the meaning of the spirit of our motto: HARAMBEE” (*The Standard*, December 13, 1977).

In Kenyatta’s view, therefore, everything had to be subordinated to the imperative of political stability even if it meant silencing dissenting opinion requisite for the evolution of a democratic culture.

However, Kenya appeared to be free – at least by the standards of the African continent. The government could be mildly criticized, and members of parliament could speak their mind so long as they did not directly touch on the presidency or the President, symbols of national unity, or any of the pillars of political stability such as the bureaucracy, the police, and the military. The media was even seen as free, although this perception could not stand strict scrutiny. In 1977, the Permanent Secretary in the Ministry of Information and Broadcasting, Mr. Darius Mbela, could even afford to tell *Kenya News Agency* journalists not to “praise a Government official or an institution when that official or the institution is infested with shortcomings, as doing so is sheer hypocrisy and a disservice to our country” (*The Standard*, October 3, 1977).

While this might appear as a guarantee that all officials were fair game, none of the assembled journalists would have dared criticize the President or those close to him, or vital institutions such as the police, the military, or the judiciary, or civil servants. However, journalists could still critically examine a whole range of important government officials, including Ministers and Members of Parliament.

This law and order ideology also appeared to recognize the value of free and fair elections to national stability. Although there was but a single party, there is evidence to suggest elections were competitive and not widely rigged and that they generally reflected the will of the people. As an example, during the 1974 general election, one of the most powerful ministers, Dr. Njoroge Mungai of Foreign Affairs, lost his Dagoreti constituency seat because he apparently neglected his constituents, causing one admiring British analyst to comment that perhaps “there is a good lesson here for ministers in so-called more sophisticated democracies!” (Mans 1977:6).

Kenyatta’s regime also set about instituting laws to seal up any holes not covered by colonial legal structures. The constitution was rapidly amended, several times in quick succession, to protect Kenyatta from factional feuding and to prevent the emergence of an effective opposition (Okoth-Ogendo 1972). The Sixth Amendment, passed in 1966, empowered the President to detain Kenyans without trial, thus handing him a tool that he was to use effectively against the opposition in the period under review. The tenth constitutional amendment removed the power to elect the President from a majority in parliament to his election by popular vote, thus transferring Kenyatta’s fate from the small cabal of elite politicians to the gullible masses, the majority of whom viewed Kenyatta synonymously with the presidency. The amendment also barred independent

candidates from elections, eliminated the bicameral legislature and allowed press censorship (Okoth-Ogendo 1972; Mueller 1984).

Much of this happened under the nose of Western powers, who were reluctant to criticize a reliable ally in the Cold War. What made it possible for the Kenyatta administration to muzzle its critics was the Cold War ideology under which everything was viewed in black-and-white terms. If you were not with us, you were against us. A kind of African McCarthyism was witnessed, with people being accused of harboring sympathies to communism even when available evidence was not enough to justify such conclusions. Every time the boot came down on a perceived dissident, Britain and the United States, Kenya's most influential development partners, opted not to criticize Kenyatta too harshly.

Two of the most prominent critics of the Kenyatta regime were Kenyatta's former Vice-President Odinga, and JM Kariuki, the MP for Nyandarua North. Both were often accused of being communists. There was some truth in these allegations, but it was often badly exaggerated.

Clearly, the two leaders kept a close eye on the Eastern bloc countries. JM, for instance, set Wa Thiong'o thinking about Eastern bloc politics when Wa Thiong'o interviewed him for newspaper article in 1964. In that interview, JM "mentioned Yugoslavia and the people's resistance movement against the German occupation forces in the Second World War" (Wa Thiong'o 1981: 83). Odinga could be said to have worn his admiration of socialist regimes like a dress; he was fond of Mao suits and had secured Russian aid for his Nyanza region, and sent his sons to Eastern Bloc countries for further studies. Odinga was once described as a man of "great personal charm" whose "views on

the development of his country and of Africa as a whole were very different from those held by Mboya and indeed Kenyatta and his government today.”

His involvement with “the Russians and their satellites” was said to have “caused considerable embarrassment” particularly a “disastrous secret bargain with the Russian Ambassador in Nairobi in April 1965 [that] resulted in the dispatch of a shipload of second-hand arms to Kenya” which Kenyatta returned commenting that “Communism is as bad as imperialism” (Mans 1977:6). It is not clear, however, that in soliciting aid from the Russians, Odinga had offered to turn Kenya over to the communist bloc in return for this aid. But this was evidence enough to convict him in the eyes of the regime and the Western nations that supported it such as Britain and the United States.

However, according to a long-term commentator on Kenyan affairs, Guy Arnold, nothing could be further from the truth.

Odinga has often been described as “left” and his name coupled with communism yet he is hardly a radical; nor was Kariuki, though he specialized in attacking the elitism of the powerful and their wealth, emphasizing the gap between them and the wananchi. Odinga could at best be described as a mild socialist and Kariuki as a populist who knew how to focus attention upon the glaring discrepancies in his society. The point is that there are no deep ideological rifts in Kenya; the political elite wants to maintain the broad status quo of a reasonably capitalist-oriented society whose state interventions are geared to ensuring maximum Kenyan participation in this process rather than a more radical development towards some form of socialism (Arnold 1981:79).

Only recently have reports emerged which provide one explanation of the events of that time. On July 2, 2000, the *Daily Nation*, in a special report headlined “CIA plotted Odinga’s removal from office,” reported that Odinga’s fallout with Kenyatta had been instigated by the Central Intelligence Agency (CIA), which feared that the left-leaning

Odinga was becoming too influential in a country ruled by an aging and ailing leader, and that Odinga could not be relied on to maintain Kenya as a bastion of capitalism in a region surrounded by socialist regimes and encroaching communism. Kenya was seen as the gateway to a number of land-locked countries and an important conduit for CIA arms to insurgents fighting socialist regimes. A plan was hatched to use the shrewd Tom Mboya, a cabinet colleague of Odinga who had had ties with the Americans since the 1950s to edge Odinga out of government. When in June, 1964, Odinga returned from a trip sanctioned by President Kenyatta to the Soviet Union and China to beg for arms to help the young country to fight the Somali irredentism in North Eastern Kenya, the trip and the arms he had secured were used as evidence that he had sold out to the communists. Odinga's goose was cooked and he never regained a foothold in Kenyan politics.

To minimize criticism and to create a semblance of political stability, the regime relied on a plethora of laws enacted for this purpose or inherited from colonialism. Amongst the laws preventing free expression of ideas was the Penal Code 1960, Chapter 63, Section 40 (1), which made it a treasonable crime for:

- Any person who owing allegiance to the Republic, in Kenya or elsewhere —
- (a) compasses, imagines, invents, devices, or intends —
 - (i) the death, maiming or wounding, or the imprisonment or restraint, of the President; or
 - (ii) the overthrow by unlawful means of the Government; and
 - (b) expresses, utters or declares any such compassings, imaginations, inventions, devices or intentions by publishing any printing or writing or by overt act or deed, is guilty of the offense of treason.

Section 52 of the same law, gave the government power to proscribe publications if it considered it necessary to do so in the interests of public order or morals.⁵² The act also established a Prohibited Publications Review Board comprising the Attorney-General or his representative, the commissioner of police or his representative, the Director of Medical Services or his representative, two persons from the religious community, and two other persons of good character and good standing. The task of the board was to review all prohibited publications with a view to lifting a ban. This stated that any person was guilty if he or she printed, made, imported, published, sold, supplied,

⁵²*The Standard* of January 13, 1978, reported that the Legal Advice Center, a non-profit organization whose patron was Attorney General Charles Njonjo, released a list of publications banned by the government since independence. The list was dominated by publications banned between 1965 and 1966. The list was contained in the Penal Code (Prohibited Publications Order) Section 52, and included all past and future issues of the following publications:

Revolution in Africa

Sauti ya Urafiki

News (from German Democratic Republic)

Who Rules Kenya?

The Reds and the Blacks – A personal Adventure (written by William Attwood)

Cheche Moja Yaweza Kuanzisha Moto Mbugani by Mao Tse-Tung

Quotations from Chairman Mao Tse-Tung

The importation of all past and future publications purporting to be published by the Foreign Languages Press, Peking

The African Communist, published by the South African Communist Party

Adam, published by Knight Publishing Corp. or Los Angeles

Cavalier, published by Arizill Publishing, Co

Men Only, published by Proprietors City Magazine

The Uganda Crisis 1968 – Two Years After the Battle of Mengo Hill by N. Nasamba

The Nationalist, published in Dar es Salaam

World Revolution, published by the Progressive Labor Party

Sauti ya Wananchi by Progressive Labor Party

Africa and the World by Kenya Socialist Group, London

Africa and the World by PANAF Publications Ltd., London

Voice of Africa, published by Nairo-North Company Limited.

Following the release of this list, A columnist for *The Standard*, Frank Toboa Cararuku (appellation for “Be Frank” in three languages – English, Kiswahili, and Kikuyu), instead of asking why any publication should be banned, suggested, in an article published on January 16, 1978, that foreign embassies in Nairobi were distributing the banned publications.

There is one point I would plead with the Legal Advice Center to clear up: “How far could one stretch diplomatic immunity? Supposing any member of diplomatic mission received (and kept within the precincts of his country’s embassy) a whole volume of Thoughts of Mao Tse-Tung or any other banned literature which may be redistributed in Kenya? It might be a good idea for the authorities to circulate and display as widely as possible lists of all the banned publications. Some of the lists should be posted to lamp posts and walls at our airports and harbors and hotels.

offered for sale or supply, distributed, reproduced, or possessed a prohibited publication. This law also gave any police officer or administrative officer authority to seize and detain any prohibited publication which he may find in “circumstances which raise a reasonable presumption that an offence” under act has been or is intended to be committed. It is this provision that was to cause so much trouble for government critics in the 1980s as the Special Branch of the police pursued prohibited publications in homes and offices of perceived dissidents.

The chief architect of the regime of laws governing freedom of expression in Kenya was none other than Charles Mugane Njonjo, son of colonial Senior Chief Josiah Njonjo. One of the very first Africans in Kenya to study law, he was so thoroughly anglicized that, with his admission to the bar in England, his Servile Row suits imprinted with his initials, the rose petal in the breast pocket of his three-piece suit, his bowler hat and swagger stick, his English girlfriends, his frequent trips to shop in London, and his sympathies to the South African apartheid regime, he was seen as whiter than white, and often confirmed this impression by his utterances. In November 18, 1977, for instance, he called African lawyers a “disgrace to the legal Profession despite the fact that they have done well in their examinations” (*The Standard*, November 19, 1977).

Njonjo served as a prosecutor during the State of Emergency in the 1950s (Wa Thiong'o 1983:17–18). He owed his rise to the top of the law docket in Kenya to his British and settlers connections. According to one writer, the “young Njonjo was a man to be pitied.” In Kenya, he was “isolated from his African brethren” and had “nothing in common with his countrymen.” He was a man who had received an education that was “by far superior to that of his compatriots” with the result that the only people “he could

get along with were the English.” To him, notions like “Africanisation were sheer nonsense” and this outlook made the “white community in Kenya, especially the White Bar, ...very quick to realize how valuable Njonjo could be to their cause” and “he willingly became their great defender, always rising in their defense” (Mwangi 2001).

He saw himself as a future President of Kenya and sought to clear the path to the State House for himself while doing everything possible to block everyone else. Now, in the 1970s, he saw one way of protecting his chances of becoming President— as the defense of the incumbent against criticism. He had been instrumental in the dismantling of the independence constitution in order to give Kenyatta more space, and to prepare for his own potential future presidency in his own way. He therefore found it necessary to issue a statement restating the provision of the penal code to the effect that it was:

a criminal offence for any person to compass, imagine, devise, or intend the death or the deposition of the President. Further more, it is also an offence to express, utter or declare such compassings, imaginings, devices or intentions by publishing them in print or writing (cited in Tamarkin 1983:63).

This directive was issued first to protect the President from any discussion about his health, in keeping with the imperative of the ideology of public order pursued by the government since independence, and also in response to the competition for the Kenyatta succession by rival groups surrounding the President. One group, comprising mainly GEMA⁵³ politicians, wanted the constitution changed to make it impossible for Vice-

⁵³ GEMA was one of the ethnic associations characterizing Kenyan politics in the 1970s. The others included the Luo Union (East Africa), the New Akamba Union, and the unions of Kalenjin and Luhya peoples. Formed in 1971, GEMA was the last of the major ethnic associations to be formed, but it soon garnered more than two million members, rivaling KANU, the ruling party, according to *The Standard* of January 13, 1978. The ethnic grouping also had deep pockets. Through its economic arm, GEMA Holdings Ltd., it owned multi-million properties around the country. The General Manager of GEMA holdings Mr.

President Daniel arap Moi to succeed Kenyatta. Njonjo therefore issued this directive to try and stop any further discussions on changing the constitution as doing so would amount to compassing and imagining the demise of the President. However, the directive had a wider implication. It declared that “Anyone who raises such matters at public meetings or who publishes such matters does so at his peril” (*The New York Times*, October 11, 1976). Thus, it was interpreted as a direct assault on the freedom of expression by the most powerful law enforcement officer in Kenya. It is noteworthy that the statement specifically mentions publishing. The effect of this was to put a chill in a lot of publishers, both of newspapers and of books.

This directive — and the penal code itself from which it was derived — contradicted the bill of rights contained in Chapter 5, Article 79 (1) of the constitution, which states that: “Except with his own conscience, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.” It even contradicted Kenyatta himself, who had in a speech at the inauguration of the East Africa Publishing House Limited in February 16, 1965, stressed the link between nation building and freedom of expression which he defined as “freely pursued thought, inquiry and design” pursued by “men everywhere” because they “have yearnings to reach new horizons of understanding and enjoy the luxury of reasoned thought” (quoted in Ogot 2003:211).

Reuben Kiggathi, was reported by *The Standard* of January 13, 1978, as saying the organization had assets worth Kshs. 50 million which was a lot of money at that time. It was disbanded along with other ethnic

However, it was by no means the only contradictory guideline in either law or policy. The same constitutional rights governing assembly and association were effectively superseded by the Preservation of Public Security Act, an omnibus law which had been inherited from the colonial state⁵⁴ and which law disregarded recourse to the judiciary or any other authority.⁵⁵ Part III, Section 4 of this law empowered the President to detain people and otherwise restrict movement. Section 4 (2)(d) made provision for “the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports,” while subsection (2)(e) provided for the “control or prohibition of any procession, assembly, meeting, association or society.” The Police were also given powers under Chapter 56, Section 5 subsection (1)(a) of the laws of Kenya which states that:

A police officer in charge of a Province division, may, if it appears to him to be necessary or expedient in the interest of the public order so to do in such a manner as he may think fit, control and direct the extent to which music or human speech or any other sound may be amplified, broadcast, relayed or reproduced by artificial means in public places within the area of his responsibility.

The combination of these laws gave provincial administration officials and the police the power to control public gatherings and the conduct of public communication. These tools of repression were further augmented by the Societies Act (1968) under

groups by Moi in 1979 (Widner 1992).

⁵⁴ The earliest segments of this law were first introduced in Kenya in 1901 as *The Preservation of Order by Night Regulations, 1901* (Ghai and McAuslan 1970; Mungeam 1978).

⁵⁵ The only protections in this law was a stipulation that detainees must be informed of the reasons for their arrest within five days, and a right to have their case reviewed by a special tribunal. However, the president, the same authority under which people were detained, appointed this tribunal. Its meetings were also held in camera. To make the matter worse, the findings of this tribunal were not binding to the government. This act was amended in 1997 to provide for the detention of persons “provided that no person shall be restricted on account of his political beliefs or activities” (Amendment 10 of 1997).

which the government registrar could refuse registration to any group whose activities it suspected might be harmful to public order or security. The KPU for instance, was proscribed under the Society Act in 1969.

The Books and Newspapers Act (1962) required all publications to be registered with the registrar of books and newspapers who retained wide discretionary powers over registration of publications. Apart from registering, all periodicals also had to secure annual licenses in order to continue publishing. In the period under review, no major newspaper was threatened with deregistration, perhaps because newspapers were quick to apologize for their mistakes, and also because the removal of an editor was often deemed as appropriate punishment. For instance, in 1977 maverick editor, Gethi, was removed from the *Daily Nation* following Arab complaints over the pro-Israel content of his newspaper (Nelson 1984:216).

The totality of these directives and laws had a chilling effect on the mainstream press. Although still regarded as amongst the more vibrant in Africa, the Kenyan press in the 1970s was distinguished by its avoidance of any criticism of the executive and a propensity to appeal to the lowest common denominator. David Lamb, who reported on Africa from Nairobi from 1976 to 1980, observed that the Kenyan press “combine some intelligent editorial comment with a great deal of sex, crime and scandal” resulting in a “healthy circulation” and an “X-rated product” (Lamb 1982: 254). The result was vibrancy in the media sector that gave the wrong impression of excess freedom in Kenya.

Even in Kenya, though, freedom of the press is deceptive. It is not so much that journalists have no restrictions as it is that they understand how far they can go. They know which cabinet ministers are out of favor with the President and can be attacked with impunity, which African countries can be criticized without drawing official scorn. They also know that members of the General Service Unit,

a state-police force working directly under the President, will come knocking at their door in the night if they question national policy or suggest that the government is not working or criticize the President and his family (Lamb 1982:254–255).

In the circumstances, many Kenyans felt they could not depend on the mainstream media to express themselves and sought other non-mass communication forms of expression. As we shall see, Wa Thiong'o's plays are a case in point.

The Rise and Intensification of Discontent and Dissent

Although Kenyatta's greatest achievement has been noted as "healing of wounds of the 1950s" (Mans 1977:3), it is also true to say that the personal rule that Kenyatta devised at independence with a view to forging one nation, coupled with an unmitigated capitalism that failed to distribute resources equitably as had been expected by nationalists, as well as an apparent surrender to external influences, particularly British, became the basis for much discontent and dissent. The concentration of power in the executive, the emasculation of the political opposition, the acquiescence of the media, and the lack of an heir apparent were characteristic of the first years of Kenyatta's rule. It soon began to look:

as though the old colonial power had simply transformed itself into one where Kenyatta was a new-style governor and the Kikuyu had replaced the Europeans as top dogs. There was a constant problem of unemployment, many of those out of work being former members of the Mau Mau forces. Old KCA leaders looked enviously at the smart cars and European secretaries enjoyed by younger men, the fruits, their elders felt, of their sacrifices" (Murray-Brown 1979:316).

Discontent therefore arose also partly because of growing realization among politicians and intellectuals that although Kenya had attained its *Uhuru* in 1963, it was

what Wa Thiong'o, at a conference of teachers of literature in Kenya held at Nairobi School in 1973, called *Uhuru Wa Bendera*, or "freedom of the flag" (1981:3). This brand of freedom was seen as an empty freedom; a freedom bereft of substance, which did not encompass cultural and economic freedoms. It was a view shared by many of the Kenyan liberals, then grouped together and derided, as per the prevailing Cold War parlance, as socialists or communists. JM, the most prominent critic of the Kenyatta regime certainly held a similar view. He told parliament in early 1974 that the country needed to be wary of colonialists, whom he saw as controlling the country's leadership through all manner of advice:

If we are really going to have a stable nation, the leaders and *wananchi*⁵⁶ of this country must try to drive out the colonial mentality that whatever the white man does is the right thing to be done for this country. I am saying this because colonialists are very intelligent; before they hand over independence to any country, they make absolutely sure that whoever is going to run the affairs of that country is going to take interest in the colonialists when they go back to the metropolitan cities of Europe...In order to sustain life in Kenya, I feel we have to change our approach and thinking (Munuhe 1975:19).

The consolidation of power in the presidency was one of the main sources of discontent. The entire decade since independence had been spent in dismantling the federalist independence constitution and consolidating power in the executive (Okoth-Ogendo 1972; Ojwang 1990). In July, 1974, Kenyatta was made life-President of the ruling party, KANU, during its Governing Council delegates conference. The implication

⁵⁶ *Wananchi* is a Swahili word meaning citizen. Literally, however, it means "children of the land." The word is usually changed slightly to *Wenenchi*, which literally means "those who own the land" which is a both a reference to citizenship and a critique of wanton appropriation of public land, and a reminder that the land has its real owners – the people.

of this was enormous; because KANU was the only political party in Kenya at the time, its life-President would inevitably be the country's President for life.

The full import of this was perhaps lost on most Kenyans, assuming they would have minded given Kenyatta's charisma, stature, and legitimacy as a nationalist. Only the *Daily Nation* questioned the wisdom of the KANU functionaries, arguing that regardless of how just a ruler was or his sagacity, he should periodically present himself to the people for a reassessment of his performance and standing. However, in case anybody accused it of attacking Kenyatta, the newspaper argued that Kenyatta had always presented himself to his constituents in Gatundu for re-election (*Daily Nation*, May 4, 1974). The *Daily Nation* was, of course, able to get away with this perhaps because its editor, George Gethi, Kenyatta's former private secretary, was one of Kenyatta's staunchest supporters. What appeared to be his opposition to Kenyatta amounted to nothing but loyal opposition.

A section of Kenyan intellectuals of whom Wa Thiong'o was probably the most prominent saw Kenya's freedom as meaningless because of what they saw as an inordinate control of Kenyan affairs by outside forces. The ruling elite were seen as guardians of the property of an absentee landlord. To use a term commonly applied in Kenyan political parlance at that time, it was the "comprador bourgeoisie,"⁵⁷ an

⁵⁷ Wa Thiong'o wa Thiong'o, writes about this group in *Detained*, thus:

The members of a comprador bourgeoisie of a former settler colony count themselves lucky. They don't have to travel and reside abroad to know and copy the culture of the imperialist bourgeoisie: have they not Learned it all from the colonial settler representatives of metropolitan culture? Nurtured in the womb of the old colonial system, they have matured to their full compradorial heights, looking to the local Europeans as the alpha and omega of gentlemanly refinement and lady-like elegance. With racial barriers to class mobility thrown open, the deportment of a European gentlemen – rosebuds and pins in coat lapels, spotless white kerchiefs in breast pockets, tail-coats, top-hats and gold-chained pocket watches – is no longer in the realm of dreams and wishes... The most popular columns in the old settler papers... were the social pages... Well, the columns are now back in the glossy bourgeois monthlies.... The settler played golf and polo, went

unpatriotic, bloodsucking, not-very-intelligent class that had acquiesced to the wiles and machinations of an alien capitalist class that was out to exploit hapless Kenyans. These foreigners, and their local representatives, both native and naturalized Kenyans, were said to control every aspect of the Kenyan economy from agriculture to manufacturing and tourism. More importantly, this class had grabbed property, particularly land, and monopolized plum government jobs (Widner 1992: 75). Even in matters of culture, this class was comprised of “mimic” men distinguished by their “infantile imitative mentality” and a “total lack of any originality” (Wa Thiong’o 1983:20).

The origin of this elite class can be traced back to the period after the Second World War, discussed in Chapter Two of this dissertation. In order to appease a native population that was becoming increasingly restless, the colonial authorities recruited pliant African elite into the legislature and the civil service. Later, after the pressure exerted by Mau Mau, Africans were elected into national office and recruited to man the elite provincial administration. As coffee and tea farming was opened to Africans, some loyalists even became large farmers and businessmen. By independence, there was a well constituted elite class in Kenya that shared the same interests with the departing colonial settlers and administrators, namely the need to protect their privileged position in the Kenyan society.

Together with the representatives of transnational capital, it was this group that maintained political and economic control and who were amongst the chief beneficiaries of independence. These elite not only attained control of the commanding heights of the Kenyan economy, they also assumed, through their

to the horse-races or on the royal hunt in red-coats and riding-breeches... The black pupils now do the same, only with greater zeal; golf and horses have become “national” institutions (Wa Thiong’o 1981:58–59).

dominance in the legislature and the bureaucracy, the capacity to reproduce that position. The post-colonial state must therefore be conceptualized as a representation of the interests promoted during the latter years of colonial rule. In the Kenyan case, the post-colonial state represented a ‘pact-of-domination’... between transnational capital, the Kenyan elite, the provincial administration and the executive (here understood to be the colonial governor, the post-colonial President and their closest advisors, formal or otherwise). The ability of this coalition to reproduce itself over time lay in its capacity to demobilize popular forces, especially the radical elements of the nationalist movement that questioned both the social and economic divisions of the post-colonial state (Branch and Cheeseman 2006:15).

The representatives of transnational capital were local country directors of multinational firms, of which there were several in Kenya established during colonial and postcolonial eras and wooed relentlessly as Foreign Direct Investment (FDI) by the postcolonial state as a measure of its healthy investment climate. The Kenyan ‘pact-of-domination’ referred in the quote above involved the enlargement and perpetuation of the cleavage that emerged at the height of the anti-colonial struggle between nationalists and loyalists. Some writers see the evolution of this pact, the hasty formation of an economic class, as a divide and rule counter-insurgency tactic (Sorrenson 1967: 118). Seen this way, it debunks the tendency to see postcolonial Kenya and indeed African condition as separated by a thick line called Independence, precisely the point Cooper (2002) makes.

The elite in this pact were also seen as controlling channels of mass communication. At this time, Kenya was the “only country in black Africa where the national press is privately owned, one of the few where there is no covert censorship, and probably the only one in the world where the major dailies are owned and controlled by nonresident foreigners” (Lamb 1982:254). This impacted freedom of expression directly. For anyone with something to say, the choice was:

between the *Nation* Newspapers owned by the Aga Khan in Paris, or *The Standard* Newspapers owned by Tiny Rowland's Lonrho in London. Thus the two major means of mass communication to Kenya's reading public are owned by foreign imperialist firms. The editors may be Kenyans. But when there is a conflict between the editorial policy and that of the foreign owner, it is the interests of the Kenyans which must give way (Wa Thiong'o 1981:42).

To make the matter worse, the press was either in the hands of Kenyatta supporters such as *Nation* editor George Gethi, a former private secretary of the President, who once wrote that he found Kenyatta to be "very, very tolerant" (Gethi 1971:63) or manned by editors who were too afraid to take on the government. Others generally believed that adequate freedom of expression existed in Kenya. One such journalist was the assistant editor of *The Standard*, Joram M. Amadi, who told a seminar for trade union leaders in January 16, 1975, that Kenya was unique because private ownership of the press made for greater press freedom. He addressed the meeting on the topic of "The Press in Nation Building" and stressed that "the media in Kenya supported the government efforts in this regard." He then espoused the development communication theory of the media then popular with most developing countries, saying that the press must act as a channel through which the government communicates with the people (*The Standard*, January 17, 1975).

The relationship between journalists and the government was also compounded by the perception that journalists, most of whom had sided with nationalists during the liberation struggle, should continue to support the nationalists, now that the nationalists were in power. This compelled Hillary Ng'weno to remind journalists at a luncheon of the Kenya Press Club in October, 1977 that the role of journalists had changed from that

of rigid nationalists of pre-independence days. His remarks were reported by *The Standard* of October 5, 1977, as follows:

Speaking on the challenges facing Kenya pressmen today, Mr. Ng'weno said while the pre-independence journalists often had a clear-cut role of fighting the colonialists, the present journalist's role had become more difficult given the changed circumstances. The journalist then had to stand by the African masses in fighting for freedom, and had many sympathizers. "If you landed in jail because of your clear sense of duty to the people, you went into jail a hero, and often came out a greater hero," he said.

What Ng'weno was saying, without saying, was that the journalists needed to change their blind support of the regime and start playing their rightful watchdog role in the Kenyan society. Ng'weno tried to live up to this Professional role of a journalist in his publication, the *Weekly Review*, and the *Nairobi Times* launched by Vice-President Moi in October 28, 1977, winning the John D. Rockefeller Third Youth Award for 1977 for his incisive news analysis and hard-hitting commentary.⁵⁸

In general, therefore, the Kenyan media, although considered among the freest in Africa, had been turned into torpid and timid tools. Such scandals as the snatching of the ruby mine from two American businessmen by Kenyatta's wife, Mama Ngina Kenyatta, as well as her virtual control of the ivory trade, were never reported by the local press. Kenyans only heard about them from the foreign press such as the *Daily Telegraph*, the *Washington Post* or the BBC. No wonder the Minister for Information, Mr. Daniel Mutinda, could afford to commend the media for doing a good job: "The press here in Kenya enjoys a considerable measure of freedom and on the whole, it uses this freedom

⁵⁸A combination of bad investment decisions coupled with increasing executive highhandedness made him change from the "gadfly" that unsettled Kenyan politics in the 1970s and to a mere "fly" so that by the

with a sense of responsibility” the minister told students at the School of Journalism, University of Nairobi on January 3, 1975 (*The Standard*, January 4, 1975).

This situation was exacerbated by a lack of indigenous publications. Kenyan-owned enterprises had a difficult time surviving; the *Nairobi Evening News* and the *Weekend Star* “flared up for a day only to disappear the following day for lack of advertisements from the mostly foreign firms in Kenya; for lack of adequate capital and also because of the severe restraint of a self-imposed censorship for fear of overstepping the boundaries” (Wa Thiong’o 1981:45). An indigenous media was deemed more capable of identifying with local aspirations, unlike foreign-owned media which, it could be argued, serve the interests of their foreign owners.

The only indigenous publications that survived for any length of time were the *Weekly Review* and the *Nairobi Times*. Regarding these publications, Wa Thiong’o observed that “their content and outlook however is entirely another matter” (1981:45). By this he meant that these publications, just like their foreign-owned counter-parts, were not performing their proper role as watchdogs of the regime. Lamb quotes one Kenyan journalist who told him:

“When you talk about freedom of the press, sure, we have it if you’re writing about sports or traffic accidents or the courts,” “But I’m not going to write anything that would embarrass the government and I’m not going to question anyone in high places even if he is a crook. It’s all relative. You understand what you can say and what you can’t say, and if there is any question in your mind, you don’t say anything” (Lamb 1982:255).

1980s, his own journalism, although still a rarity in on the Kenyan media scene, had lost the bite it once had.

At the same time, the critics could not hope to use the medium of broadcasting as the entire broadcasting media was controlled by the government. The only radio and television station that existed in the country was the government-owned and-controlled *Voice of Kenya* (Heath 1992).

To make matters worse, there was a huge shortage of trained and experienced journalists. Although untrained writers had played a crucial role in the liberation struggle, an aspiring modern democracy required trained and experienced journalists to function properly. The government had started training its own journalists at the Kenya Institute of Mass Communication, which was first started as Voice of Kenya training school in 1968. The School of Journalism of the University of Nairobi also contributed to the training efforts, but it was not until 1975 that it received a \$270,000 grant from Sweden for expansion (*Africa Research Bulletin*, September 30, 1974).

Faced with poor training, oppressive laws and acquiescing editors, the emasculated media took to criticizing one another instead of criticizing the government. At the height of the JM murder saga, *The Standard* of May 26, 1975, assuming a moral high ground it did not possess, attacked the *Voice of Kenya*, thus:

From the spate of political meetings which have been the feature of the last few weeks, it has been difficult for the ordinary Kenyan...to decide what is going on in his own land. He listens to the Voice of Kenya and gets nothing that is worthy of the name news...

In the same editorial, *The Standard* wrote:

Political rallies are not the answer to the problems the country faces, it is no good preaching to the people. Unless they believe what is said, unless they really mean it when they cheer, such exercises are without meaning. What should be asked is

simple. Have the people received the fruits of independence? Have they tasted the pleasures which are known to the few? Are they content that the leaders of the country are doing their best for all?

This convoluted commentary exposes the ambivalence of the newspapers on the issue of equity in Kenya. On the one hand, the newspaper is arguing against political rallies, in effect against freedom of expression, but on the other hand, it is suggesting that this same freedom should be used to ask hard-hitting questions. However, without freedom, how can questions be asked? But even this lack of clarity was offensive and unacceptable to the authorities. The following day, *The Standard* carried an apology to President Kenyatta “for inferences which were drawn” from the editorial. “It is deeply regretted that sections of the article may have resulted in considerable embarrassment which was genuinely not intended,” the apology read (*The Standard* May 27, 1975). As a result of this altercation, the editorial writer at *The Standard*, Mr. Malcolm Payne, a Briton, was forced to resign, and Mr. Henry Gathigira was appointed Editor-in-Chief (*Africa Research Bulletin*, March 31, 1975). In those days of Africanization, the replacement of a white editor with a black one was viewed positively and the mettle and political orientation of the new editor was treated as irrelevant.

What this meant is that anyone desirous of expressing him or herself freely was extremely limited in the number of channels of communication he or she could use as all channels of were in the hands of the government or in the hands of pliant private owners and acquiescing professionals. And free expression was not just curtailed by lack of communication channels. And it was restricted by law. For anyone with a different view, the mainstream media offered no outlet.

Excluded from accessing the mainstream media, the critics of the regime resorted to using some novel, non-mainstream channels. The few courageous MPs used the absolute privilege they enjoyed within the chambers of parliament to criticize the government. The academics, on the other hand, started their criticism by initially penning their discontent in ethereal poetry, literary works, and other scholarly products. Later, an increasingly radicalized and emboldened academic cadre decided to take their case directly to the people through village theater. For the first time, the academics, who had always been viewed as detached from the people and, therefore, unthreatening to the regime, were seen as a real threat. In the following section, I examine each of these modes of criticism individually.

Freedom of Expression, Politicians, and the Kenyatta Regime

In spite of Kenyatta's charisma and legitimacy as a freedom fighter, his rule faced challenges that he tried to contain by eliminating what he considered to be quarrelsome multiparty politics. The arrest, brief detention and subsequent house arrest of the doyen of opposition politics in Kenya, Jaramogi Oginga Odinga in 1969, as well as the jailing of the coup plotters in 1971, put a chill on government critics. Kenyatta opted to restrict the business of politics within a single-party, KANU. However, this did not eliminate political squabbles entirely. Widner tells us that the politicians within the ruling party:

...sought to eliminate centers of electoral opposition by framing other candidates for criminal action – or occasionally by resorting to political violence, including murder. At other times, they tried to change the rules of the game by seizing control of party institutions or by securing passage of laws to restrict the activities of others. The critical difference between the early Kenyatta period and the later years, when Kenyatta was ill, and when Moi took power, was that efforts to

pursue these tactics often met with opposition in parliament, usually from the KANU backbench, which was often quite strong (1992:67).

It is safe to say that, politically, the years between 1971 and 1974 were largely uneventful. These were the years when Kenyatta's regime had succeeded in eliminating the opposition. The Kenyatta regime was dominant and virtually unchallenged, the big, unspoken question being who amongst Kenyatta's inner circle of friends and confidants would succeed him. Whatever infighting was taking place within the Kitchen cabinet before 1974, however, did not spill into the open. The young nation, therefore, went on with certain predictability. Its aging and ailing President was routinely moved around between various State Houses in Nakuru in the Rift Valley, Mombasa at the coast, and his home in Gatundu near Nairobi. The front pages of the newspapers would carry reassuring articles, often with a picture of Kenyatta, on his "working vacations" at the coast as they were called, or of the numerous delegations of traditional dancers who entertained him at any of his favorite abodes.

However, this tranquility always belied a simmering discontent. This discontent was spearheaded by a clique of brave members of parliament, including JM Kariuki, Waruru Kanja, Martin Shikuku, Mark Mwithaga, Elijah Mwangale, and Jean Seroney and later his protégé, Chelagat Mutai. These MPs were able to effectively use parliamentary privilege to criticize the government. In a house with 188 members, this was a tiny fraction of parliamentarians who could have attacked the government but did not.

There are several reasons for this. For starters, parliament was packed with semi-literate politicians, unable to comprehend their role as the countervailing institution to

executive fiat. Even more importantly, before 1974, debates in parliament had to be conducted in English, a language in which not many politicians were fluent. Swahili only became an acceptable official language in parliament in 1974 when Kenyatta's decree to adopt the language for parliamentary business was adopted by the Governing Council of the ruling KANU party (*The Standard*, July 5, 1974). In parliament, however, a lot of politicians were neither fluent in Swahili nor English, so they did not take advantage of parliamentary privilege to air their views for fear of exposing their handicap in these languages.

However, the main reason for lack of a critical parliament can be traced back to the early days after independence. As Srinivasan has put it:

In June 1964, KANU backbencher's criticism of the government's ambiguous silence on the question of East African Federation made Kenyatta feel uncomfortable. This and other clashes in parliament made him call a meeting of all Ministers and MPs in August 1965, at which it was unanimously resolved that KANU backbencher's group stood dissolved and that all matters of concern to MPs would be discussed in meetings of a new organization called KANU Parliamentary Group. The unanimously elected chairman of this new group was Jomo Kenyatta himself. MPs would not, after this, dare criticize the government within the hall of Parliament. Kenyatta had, by a brilliant stroke, thrown Parliament out of political limelight. He had prevented it from playing its most vital role of acting as a check on the Executive and, above all, he had taken away its freedom of speech – its duty to criticize the government (1979:58–59).

Thus, parliamentary privilege was undermined through the denial of the right of free association in the august house and the restriction of parliamentary conduct to confines dictated by the presidency. The only option left for MPs was to air their views during the meet-the-people tours in their constituencies. But even here, Kenyatta was in charge – through his provincial administration, whom he had authorized in 1965 to

ensure that MPs obtain a license to hold public meetings in their constituencies, causing Martin Shikuku to ask Daniel arap Moi, Minister for Home Affairs in Parliament in February 1966, “Is this Government, which is an African majority Government, also afraid of us?” (quoted in Gertzel, Goldschmidt and Rothschild, 1969:126).

Thus, by the mid 1970s, MPs spoke out at great personal risk to their political careers. Under such circumstances, it is no wonder that only a handful of the most courageous parliamentarians and aspiring politicians took the risk. Yet Parliament remained the only place where the few courageous MPs could express themselves. Despite the move to usurp the freedom of the backbenchers by eliminating their formal organization and placing them under the umbrella of the a large amorphous government-heavy parliamentary group with the head of state as its Chairman, “the problem of dissent became very acute; it rose from the lower party levels and became a subject of public debate” (Srinivasan 1979:60). The few courageous MPs constituted themselves as the watchdog of public interest. They had no formal organization; they were tied together by their backbench status and moral compass. Ideology was not a factor – some, like JM, were wealthy; others were poor by comparison. Some, like Seroney, came from the rural areas, and others, like Charles Rubia and Waruru Kanja from urban areas. Some were in the former opposition party, KADU, while others were in KANU. According to one scholar:

And, within one-party state, they felt they alone were the conscience of the government. They did not restrict themselves to criticism of matters of detail in legislation. They criticized the government on major issues like land, nationalization and education. In the absence of any major opposition party in parliament, the place seemed “safe” and homely for the airing of all dissenting views (Srinivasan 1979:61).

However, despite their spirited attempt at opposition, the backbenchers were still largely ineffectual as an opposition. They could not force the government to change its legislative program or cause a cabinet crisis. They could criticize a minister, but not force him to resign. As a result, their criticism sometime served to bolster the very government they were criticizing. Here is how the situation has been explained:

The constant criticism aired by KANU backbenchers had the advantage of making parliament a lively body – an interesting showpiece of democracy and not a dull, rubber-stamping body. Another advantage was that the free ventilation of grievances prevented tensions from building up in the body politic. A third advantage also accrued to the President: when KADU was dissolved and incorporated into KANU, friction increased: and criticism, not only increased, but became more acrimonious; as a result, the bargaining power of parliament, as a Legislature, were greatly weakened vis-à-vis the Executive (Srinivasan 1979: 61).

These backbenchers criticized what they saw as skewed distribution of government factories, unequal distribution of land as well as general tribalism in government jobs and provision of services.⁵⁹ They demanded that ethnic-based quotas be instituted in the admission of students at the university (Widner 1992: 80).

The obvious leader of this cabal of parliamentarians was JM, the flamboyant, populist ex-Mau Mau fighter who had at one time served as Kenyatta's private secretary. I use him as a case study because of his prominent role in the debate about freedom in this period, and also because he was the only to have paid the ultimate price for doing so in the period under review. He had been born in 1929, attended schools in Kenya and Uganda, but had not attended college for a sustained period of study. By the standards of the time, however, he was still a highly educated man because anyone with a high school

⁵⁹ After independence, Kenya practiced mixed economy, with the government owning companies alongside the private sector. Thika, a town near Nairobi, was designated an industrial town, causing resentment in

education was a rarity. His family had migrated from Nyeri in Central Province, the home of the Kikuyu, to the Rift Valley Province, part of the former White Highlands, where he became involved in political activism, and took several Mau Mau oaths binding him to fight for independence. For this, he was arrested and detained between 1953 and 1960. In detention, he distinguished himself as a fearless advocate of better prison conditions, writing many letters to authorities requesting improvements in living conditions for the prisoners (Kariuki 1963).

After his release from detention in 1960, he had traveled to Oxford University where he wrote, with “some literary assistance from an English friend” (Kariuki 1963: xxiii), his seminal autobiography, *Mau Mau Detainee*, for which Margery Perham wrote a forward.⁶⁰ It was among the very first of the “Mau Mau memoirs” (Clough 1997), but certainly the most influential. Its publication mythologized JM as a hero of no mean repute, and he entered politics and won with ease in Nyandarua North constituency in Nyandarua, a new district carved from the former White Highlands. In comparison with the rest of Kikuyu country, it was a kind of a backwater, with no roads, electricity, schools, and running water for the thousands of the Kikuyu, many of them Mau Mau veterans, who had settled here. Unlike other Kikuyu members of parliament, therefore, JM represented a rich but extremely underdeveloped district. This factor, coupled with his sympathies with, and fidelity to, the cause that had sent Mau Mau fighters into the forest, land, ensured that he spoke out against inequality, even though he himself was

other areas. This criticism was not altogether justified, since government manufacturing concerns had been established in other towns as well, including Mombasa, Kisumu, Eldoret, Nakuru and Nanyuki.

⁶⁰ Her forward is largely sympathetic to JM, but is nevertheless remarkable for the way it skillfully questions, without seeming to, the authenticity of JM’s account in detention between 1953-1960. She describes JM’s account as being “substantially true” but points out, as if it had been suggested, that her personal impression is not enough to authenticate this record. She calls for “a balanced view” of the counter-insurgency measures undertaken by the government.

among the wealthiest people in Kenya. As Throup and Hornsby have observed, JM “spoke from within the Kikuyu community on behalf of those have-nots who had gained little from the first decade of independence”(1998:19).

As a wealthy man, he did not speak out against acquisition of wealth. What he loathed was the abdication of the responsibility that the haves often owe to the have-nots, their failure “to support the advancement of others” (Branch and Cheeseman 2006: 27). Therein lies the source of his popularity; in attacking the diminishing sense of social responsibility amongst the rich, he was speaking in terms that were easily understandable to the rank and file Kikuyu, specifically the Kikuyu moral ethnicity and civic virtue that regarded wealth accumulation and duty to relatives and the poor in equal measure (Lonsdale 1992:315–504). He became “an articulate spokesman for the interests of the ‘disadvantaged’ in Kenya” (Widner 1992:75), not just Kikuyus. To the Kikuyu poor, however, he was probably seen as one who reminded them of their traditional ethnic morality, now appearing threatened by a modernity that they could not fully comprehend.

To him, criticism of the government was necessary part of the democratic process. He had expressed his views on differing opinion soon after independence when he told parliament that he did not believe disagreement among human beings were natural and that differences between politicians should not be taken personally (Munuhe 1975).

JM’s fond subjects were land and inequity in wealth distribution.⁶¹ He criticized the “system of unrestricted land acquisition, a system merely bent on replacing the white

⁶¹ The Kenyan craving for land is legendary. Shiva Naipul, in *North of South*, a book that irked many African readers, expressed this hunger for land in vivid terms after seeing hordes of street urchins in Nairobi:

The Government constantly exhorts the people to leave the fleshpots of the city and go back to the land. But where is the land to be found? Everybody in Kenya, from President to bell-boy, wants land. It is the national obsession. ‘We all feel,’ a Kenyan economist told me, ‘that we must have

settlers with black settlers” protesting that “substituting Kamau for Smith, Odongo for Jones, and Kiplangat for Keith does not solve what the gallant fighters of our Uhuru considered an imposed and undesirable social justice” (Kenya National Assembly 1975:13). This inequity, in his view, had implications on national food security.

Why is it that we do not have enough food in this country? This is because up to this day, after ten years of Independence, most of our land is still in the hands of foreigners — people who do not believe in the welfare of this country. At the moment, we still have thousands and thousands of acres of land in the hands of foreigners, they have freedom to decide on the types of crops to be grown; they do not come under the guidance and direction of the government. I would like to suggest that the land which is in the hands of foreigners should now come into the hands of Africans. All this land should be under our government. None of us owns land in India, Europe or anywhere else. I think we have become too good and too kind in allowing foreigners to continue to own land in independent Kenya. I feel that it is high time we took this measure whether or not it is going to be painful to some leaders in this country for the benefit of the majority of our people (Munuhe 1975:20).

For him, equitable distribution of the national cake was central to the formation of one nation of Kenya out of its many tribes. Nation building was more than the sum total of invented public rituals and ceremonies. In his view, it took “more than a National Anthem, however stirring, and a National Coat of Arms, however distinctive, a National Flag, however appropriate, a National Flower, however beautiful, to make a Nation” (Kenya National Assembly 1975:2). He therefore spoke against inequity in not just

our own piece of land, no matter how small. A man may work in town, may live there for most of the time. But the town isn't really home to us as yet. We haven't evolved to that stage. Land. Land. Land. We must have it. Without it a man feels rootless, feels that he is nothing.' The trouble is that most of the worthwhile land has already been grabbed. (I have driven past a farm belonging to the President: the immaculate wire fencing stretches for miles. The land opposite belongs to his daughter, ex-mayor of Nairobi). The half-starved children watching us had arrived too late. The fruit of Uhuru had already been eaten (Naipul 1978:56)

Central Province, where his Nyandarua constituency was based, but in other parts of Kenya as well.

In 1972, for instance, he had told a political rally in Western Kenya that the country needed to overhaul its “existing social, economic and political systems” in order to turn the tables on a “a small but powerful group of greedy, self-seeking elite in the form of politicians, civil-servants, and businessmen” who had “monopolized the fruits of independence to the exclusion of the majority of our people.” It was in this same rally that he uttered his most famous dictum: “We do not want a Kenya of ten millionaires and ten million beggars,” (*Daily Nation*, September 25, 1972), thus setting himself up in the cross-hairs of his opponents — the clique around the aging President and perhaps even the owners, both black and white, of large tracts of land in Kenya.

He complained bitterly that Kenya should not have a “government of a few by few on behalf of many, whether the many like it or not,” because under such circumstances, it will ultimately “have to be freedom for everybody or freedom for nobody” (Munuhe 1973:17). He also exposed the scandal of leaders who were using Maasai gullibility to appropriate Maasai land under the pretext that they were starting experimental farms to teach Maasai how to farm (Munuhe 1975:36).⁶² When he tried to introduce a bill in parliament on Presidential elections,⁶³ the check he issued so that the bill could be published was not cashed, causing an inordinate delay that was only

⁶² Traditionally, the Maasai were pastoralists. By the 1970s and even the 1980s, they had not adopted farming as a way of life, leading to much effort being expended in training them to practice agriculture.

⁶³ The bill, among other things, sought to ensure that elections were conducted using a “secret ballot.” Until then, voters cast their votes in the presence of a Presiding Officer. Another proposed change was that instead of allocating a ballot box for each candidate, a ballot box be allocated to each political party on whose behalf the election was being held (*Africa Research Bulletin July 30, 1974: 3166*). This proposal sought to focus the limelight on the fact that Kenya’s politics were not competitive because all candidates were sponsored by KANU. It was therefore another attack on arrangements perfected by the regime to control public participation.

resolved when he ordered his bank to send the money to the National Assembly (Munuhe 1975:60). This bill created a lot of bad blood between JM and those around Kenyatta, as it was seen as an attempt to reduce the powers of the presidency.

Another pet subject of JM was the fate of Mau Mau veterans and their children in postindependent Kenya. He felt that these heroes had been shortchanged, as many of them had not been given the land they were fighting for and were living in abject poverty. JM raised the issue on many occasions,⁶⁴ but his speech in Parliament on March 21, 1974, implicated Kenyatta indirectly in the neglect of the country's heroes.

The other point I would like to bring forward is about Mau Mau Foundation Fund. Since independence, we have been talking about the Mau Mau who brought independence in this country. All this time, I have never heard anybody say that we [ought to] establish a Mau Mau Fund to assist the children who cannot get education and yet they are brilliant enough to further their education. We should ask the people of this country to give donations to cater for orphans and old men and women who were fighting alongside H.E. the President for independence. I have in mind people like Jesse Kariuki. Who is thinking about him today? All we are waiting for is to hear that he is dead then go there with flowers and later on name a street in one of the main towns after him. He does not want flowers when he is dead. He wants the flowers now so that he can see the beauty of the flowers, and be able to touch and smell them. The important thing for him now is something to eat. I feel ashamed to see leaders going to the funeral of a deceased man when he is dead. I believe that if H.E. the President started such a fund after we have completed the construction of Gatundu self-help Hospital, many people will contribute generously (Munuhe 1975: 21–22).

This speech touched a sore point in that it was a major assault on Kenyatta's policy of forgive and forget the past in order to build a united country beholden to the future. Kariuki also exceeded himself by directly linking Kenyatta to the problems of the

⁶⁴ For instance, in 1963, he had supported the motion to the effect that:

In view of the fact many people in this country died during the war of independence from 1952 to 60 and left behind many children without parents, this House urges the Government to take responsibility and educate these unfortunate children free of charge and assist the windows financially (Munuhe 1975:29).

Mau Mau veterans. This could not have gone well with the clique around Kenyatta, who had worked hard to insulate Kenyatta against just such criticism. JM was clearly treading on very dangerous ground.

The move to isolate him started early on after gained independence. Although it did not raise hackles at the time, JM ceased being Kenyatta's private secretary immediately after independence in 1963 and became a candidate for elections in Nyandarua North. This may be seen as an innocuous move, an ambitious young man trying out his luck in politics. But it may also betray an early misfit between their two personalities. At any rate, Kenyatta did not make JM a full cabinet minister after his victory in Nyandarua,⁶⁵ although he was placed in charge of the National Youth Service, a public program for the training of youths in marketable technical skills, a position that he could have used to affect the lives of many young people and therefore amass considerable public goodwill.

His pronouncements and activities had already elicited some reactions from the government, which portended what was to follow. This included restrictions on international travel, despite being an Assistant Minister with a diplomatic passport,⁶⁶ so that, as he told parliament, he could not "address students in the United States or anywhere in East Africa" (Munuhe 1973:17). His meetings were also banned on security grounds (Kenya National Assembly 1975:15).⁶⁷ In the run-up to the 1974 general

⁶⁵ JM was made an Assistant Minister for Agriculture in 1968. He was to work under a former settler, Hon. Bruce McKenzie, who was the full Minister for Agriculture. These two were strange bedfellows; a white Kenyan settler working side by side with an ex-Mau Mau detainee. JM also served as Chairman of the Betting Lotteries Licensing Board, "a position that he appears to have used to his advantage (Widner 1992: 86). After the 1969 general election, he became an assistant minister for tourism and wildlife a position in which he served until 1974 (Kenya National Assembly 1975:11).

⁶⁶ Diplomatic passport is a privilege usually reserved for senior government officials, who, however, must seek government approval before traveling abroad.

⁶⁷ According to the JM Report:

election, local administration officials refused to grant him licenses to campaign in his constituency⁶⁸ (Kenya National Assembly 1975:15; Munuhe 1975:62). He circumvented this obstacle by publishing “a poster reminding his constituents that he was still a candidate” and he “also compiled a pamphlet entitled *JM Kariuki Speaks His Mind* which crystallized his political aspirations and strategy” (Kenya National Assembly 1975:15).

He was re-elected with a huge majority. However, his detractors⁶⁹ were bent on frustrating his continued rise in political stature. When the new government was formed after elections in October 1974, JM, together his political friends such as Martin Shikuku, Charles Rubia and Burundi Nabwera, were dropped from the new government. They became backbenchers in parliament. The unintended consequence of Kenyatta’s action is

A notable incident in this respect was the cancellation of his forty-second birthday party on March 21, 1971 to which many dignitaries had been invited. On January 8, 1972, a meeting in his constituency which was to be attended by Cabinet Ministers and Members of Parliament was disallowed on grounds of public security. In utter indignation he remarked in Parliament: “This anti-JM campaign is now bordering on stupidity and constituting an encroachment on the constitutional and human rights of the people whose interests I have sworn to represent.” He therefore took refuge in Parliament where his speeches were privileged (Kenya National Assembly 1975:15).

⁶⁸ In those days, prefectural administrative officials had the power to grant licenses for political rallies. All politicians, indeed anyone desiring to host more than a handful of people, had to apply for a license from a Chief of the location where the event would be held. This included events like weddings and funerals.

⁶⁹ JM appears to have been aware that he had some formidable enemies. He described them as people with access to the President, who often misled him on various issues confronting the nation and on the activities of other politicians.

Instead of telling the President the right things, some people go behind [sic] and him, “Your power is being taken away by some individuals.” That is not the case, and I would like some of the civil servants, before they also go to the see the President, to seek the advice of the Attorney-General. I think and believe that somebody somewhere might have gone to mislead the President, and we do not want this type of misleading to continue (Munuhe 1975:61).

He also appears have been both fearful and frustrated by the campaign to cut him to size to such an extent that he felt compelled to issue a threat of his own. He told parliament, just before the 1974 elections:

I want to say this: anything short of this type of a Bill [Presidential Elections Bill, which JM himself had introduced in parliament to eliminate possibilities of rigging], and anything like bad machinations by some quarters to try and deprive the public of their right of electing their representatives, will be met by the same threat. It is going to be a tooth for a tooth and a nail for a nail (Munuhe 1975:63).

that backbenchers are unencumbered by the imperative of collective responsibility in government, so they have more freedom to criticize the government. JM intensified his criticism of the government using parliament's absolute privilege, describing the grabbing of land by senior civil servants as a "greedy situation" and threatening to lay the list of the land grabbers on table in parliament (Munuhe 1975:34).⁷⁰

This elicited a vigorous reaction from the "Family" as those closest to Kenyatta were called. Most of the lifting was left to the Vice-President, Daniel arap Moi, who regularly attacked government critics. He was reported by the *Daily Nation* of January 24, 1974 as having attacked some people who were "going around the country issuing statements in the Press which tended to suggest that there was no democracy in Kenya. The Kenya government, Moi added, did not believe in using coercive measures to suppress freedom of expression, individual liberty, or worship [but] the Government would not entertain destructive criticism or views which transgressed these freedoms such as claiming that the Government was based on dictatorship."

Even Kenyatta himself, who had appeared to exist above the fray, joined in when in June, he attacked "disgruntled elements" whom he said included members of parliament "who move around the country, *payukaring* that the government has done nothing for *wananchi*" (*Daily Nation*, June 15, 1974). JM had offended very powerful forces indeed. The use of the word *payuka* is instructive indeed. It is a Swahili word meaning to speak purposelessly, without much thought, akin to making animal noises. It is, therefore, an insult. This statement by Kenyatta conveys his indignation, contempt and

⁷⁰ In parliamentary language, to "table" a document means to release it for scrutiny by other members, parliamentary staff, and, if the proceedings are not in camera, to the general public.

anger all at the same time, and was a reminder to JM and Kenyans in general that what was offensive to the government was free expression.

Intellectuals and the Kenyatta Regime

If the politicians were the loudest critics of the Kenyatta administration, it was the intellectuals who mounted the most sustainable, coherent, and rational assault on the regime. By intellectuals, I mean those Kenyans who were highly educated at this time, people who were living the life of the mind. They include an occupational class, comprised of teachers, writers, journalists, lawyers, and doctors. Subsumed in this class were cultural intellectuals, the writers and others who used their intellect to produce various cultural products. In postindependence Kenya, this class comprised a tiny minority of Kenyans.

The origin of this class goes back to the advent of missionary work when the first Africans were converted into Christianity. They became *Asomi*, a Kamba term meaning the literati (*Athomi* in the closely-related Kikuyu language), people who “had rejected the institutional framework of traditional society,” accepted unidirectional authority of the missionaries and become “tools of accelerated societal penetration by the missionaries as catechists and by administrators as clerks and petty functionaries in colonial society” (Mutiso 1975:10).

These postcolonial intellectuals, because they employed more sophisticated forms of criticism than the politicians, often did not attract attention to themselves and often went unnoticed even by the authorities they were criticizing. Their critical intellectual output was also almost always shielded by other goings-on at the institutions of higher learning. Students were constantly rioting over a whole range of issues: poor

accommodation, poor food, allegedly racist white professors brought in to supplement an inadequate academic cadre, lack of facilities, to mention but a few. Given this level of student activism, therefore, whenever the authorities thought of the university, it was not the intellectual output that concerned them, but student picketing and riots. The university (at that time only one, the University of Nairobi, and its constituent college, Kenyatta University College, existed) became known for pitched battles between police and students. In this heat of battle, the professors and their views were largely irrelevant. The violent expression of student grievances succeeded in stealing thunder from the painstaking, rational, pedantic, qualified multi-syllable expressions of their teachers.

There were several other reasons why professors enjoyed such a low profile. First, African professors did not constitute a critical mass of scholarly workers. The country had just attained its independence, with few university graduates (Harper 2006). The number of people with graduate training, a requirement for teaching at college, was even lower. What became known as the “Airlift,” a scholarship program started by Tom Mboya and Dr. Gikonyo Kiano with the aid of US President John F. Kennedy and the African-American community (Harper 2006), produced a number of highly qualified Kenyans, but most were invariably quickly absorbed by the civil service and the burgeoning private sector where there was great demand for trained manpower. Others were absorbed by the East African Community (EAC), a regional integration initiative involving Kenya, Uganda, and Tanzania. The University of East Africa, with constituent colleges in Nairobi, Makerere, and Dar es Salaam, could not produce postgraduate students fast enough. The educated, the *Asomi*, were spread too thin and this affected their visibility.

Another reason why the Professors were less visible was related to their own perception of their own role in nation building. Many were sympathetic to the idea of nation-building; they were part and parcel of the emergent African elite. Indeed many were age-mates and friends of the new African leaders. Many of them had been influenced by the nationalist rhetoric of such leaders and did not feel inclined to attack them, believing that such leaders were always acting in the national interest. There were also those who felt that the young nation was a delicate experiment that could be upset by strident criticism. Some scholars also felt a sense of belonging as they were also co-opted into the private sector and were consulted in the formulation of government development strategies. According to William Ochieng, a prominent Kenyan historian, Tom Mboya and Mwai Kibaki, ministers in the Kenyatta government, used to walk to the University of Nairobi for consultations during the writing of *Sessional Paper No. 10* of 1965 (Ochieng 2001).⁷¹ Although highly trained, some academics had an umbilical link to the tribe, and were unwilling to upset the applecart for their tribe. Simply put, they had a stake in the survival of the government.

But what mostly prevented widespread criticism of the state was the preoccupation of the intellectual community with what were deemed more pressing intellectual pursuits. Like other African scholars, and indeed scholars from other erstwhile colonies, Kenyan intellectuals were caught in their own project of “writing back to the empire,” in an effort to correct what were seen as deliberate colonial distortions of the story of Africa.⁷² As Atieno-Odhiambo observed, African scholars felt that the

⁷¹ See William R. Ochieng, William, 2001. "Our varsities should come out of slumber." Nairobi. *East African Standard*. <http://www.eastandard.net/sunday/Letters/letter2.htm> (Accessed December 2, 2001).

⁷² The Phrase “The Empire Writes Back” was first used by Indo-British author Salman Rushdie who was punning on the American TV title, *The Empire Strikes Back*. It refers to the totality of decolonization

history of the African had been written “badly” and they must, now that they were independent, write “our own history in our interest” (1974:55).⁷³ Ochieng distinguished between purposive history and idealistic history, arguing that the African historian “must, and should, not bother with whether history is a science or an art.” He must “not waste his time in pursuit of idealist objectivity” (1972:24). In other words, knowledge was to be seen as functional and useful to the new nation. To apply an American phrase in African context, African intellectuals had to ask themselves these questions: “Whose social scientist are you?” “What parts of society want what type of knowledge, to be used by whom, towards what end?”⁷⁴

Four years earlier, Wa Thiong’o had stated that the “African writers ought to be addressing themselves more and more fully to the present needs, especially what I call the crisis of conflict between the emergent African bourgeoisie and the African masses” (quoted in Bjorkman 1989: 1). The African intellectual must engage himself in the task of rectifying the misrepresentation of imperialistic output in order to set the record

strategies used by intellectuals from the former colonies in setting straight the record of their history and culture which had been distorted by the whole process of colonialism. See Zabus’ Article “The Empire Writes Back to and from the Centre.” <http://www.eng.fju.edu.tw/worldlit/empire.htm> (accessed June 3, 2007).

⁷³ A perusal of the titles published around that time reveals the predominant preoccupation of the intellectuals at that time with the project of setting the record straight and writing back to the empire. Examples include Bethwel Ogot’s *History of the Southern Luo*; G. S. Were’s *A History of the Abaluhya*; Humprey Slades’ *The Parliament of Kenya*; Kaggia’s *Roots of Freedom*; Kenyatta’s *Suffering Without Bitterness*; Okot p’ Bitek’s classic poem, *Song of Lawino*, a veritable critique of modernity; Rubadiri’s *No Bride Price*; Kibera’s *Potent Ash* and *Voices in the Dark*; lo Liyong’s *The Last Word*; Odingo’s *Kenya Highlands*; and, Kokwaro’s *Luo-English Botanical Dictionary*, to mention but a few. Ogot, a leading Kenyan historian, was involved in the compilation of UNESCO’s *General History of Africa* (Ogot 2003:381), perhaps the most significant effort at writing a collective history of Africa from the perspective of Africans. Other projects included the translation of key texts by local authors and a few canonical foreign texts into Kiswahili in order to make them accessible to more people. Example in this category included *Mau Mau Kizuizini*, a translation of JM’s *Mau Mau Detainee, Naushangilia Mlima wa Kenya (Facing Mount Kenya)* by Jomo Kenyatta, and *Mtawala* (Niccolo Machiavelli’s *The Prince*) all of which were brought out in 1965.

⁷⁴ W.J. Mckenzie, quoted in Oculi (1968: 34).

straight.⁷⁵ Some of the very early books dealt with this issue: the literary output of Wa Thiong'o, p'Bitek, Leonard Kibera, and others; history texts by Bethwel Ogot, William Ochieng, and Gideon Were; and geography textbooks by F. Ojany and Simon Ominde, were efforts in this regard. In the case of Wa Thiong'o, Nazareth has observed that because so much had been written in England and America about Mau Mau, "Wa Thiong'o had not only to write, he had also to rewrite" (Nazareth 2000:5).

However, a casual examination of the scholarly output of Kenyan scholars indicates that they started their critique of authority almost immediately after independence. This critique began to appear in the form of poems, literary works, essays, and academic papers that questioned the state of things in postcolonial Kenya. For instance, in his novel, *A Grain of Wheat*, published in 1967, Wa Thiong'o portrays the arrival of independence as momentous event for some, but hardly so for the heroes of *Uhuru* who remain tortured by their own frustrations at the meaninglessness of independence. The *Uhuru* celebrations themselves are ushered in by a huge rainstorm, likened to *Ngai's*, God's, tears, that uproots trees, breaks branches and even whole stems (Wa Thiong'o 1967: 233). Earlier in the evening, the villagers of Thabai, a typical Kikuyu village named after a weed that burns the skin on contact, perhaps symbolizing inherent contagious instability, had, in the thick of euphoria occasioned by the arrival of independence, attempted to convey their gratitude to one of the heroes, who is himself deeply pierced by guilt of his personal deeds in the thick of war:

⁷⁵ This project of setting the record straight had an auxiliary imperative, that of preservation of indigenous knowledge, described by Oculi as the capturing of the "essence or the substance of what might be lost by the interferences of change and abandonment" (1968:32).

Somewhere a woman suggested we go and sing to Mũgo, the hermit, at his hut. The cry was taken up by the crowd, who, even before the decision was taken, had already started tearing through the drizzle and the dark to Mũgo's hut. For more than an hour Mũgo's hut was taken prisoner. His name was on everybody's lips. We wove new legends around his name and imagined deeds. We hoped that Mũgo would come out and join us, but he did not open the door to our knocks (Wa Thiong'o 1967:232).

What Wa Thiong'o was expressing in this passage is the fact that those who had fought for independence, the Mau Mau veterans, were not the ones who were celebrating independence. Although celebrated by unheroic, undifferentiated masses, this was not the Uhuru they had fought for; it was a strange Uhuru chaperoned by strangers to the fight. This was among the very first of Wa Thiong'o's expression of the betrayal of independence, a theme that would eventually bring him into confrontation with the authorities barely ten years later.

A few years later, in his first collection of essays titled *Homecoming*, Wa Thiong'o, questioning the disparity between the poor and the rich, said there are only two tribes in Africa, the "tribe of haves" and the "tribe of have-nots," and that it is the tribe of haves who are the minority, but who exploit the tribe of have-nots who comprise the majority (1972). This critique was often encouraged by expatriate academics such as historian van Zwanenberg who called on African scholars to "interpret the heroic in the recent past and to articulate the purpose and meaning of independence" (1972:19). The call to engage the recent past was a call for the re-examination of the contemporary Kenyan politics to assess whether or not the ideals that provided the motor force for the liberation struggle had been met or had a chance of been achieved in the postcolonial Kenya.

However, these calls for an engagement with the past in order to correct its distortions and to articulate the purpose of *Uhuru* were outrightly rejected by some of the younger scholars. One young historian asked: “Why should anyone want to sing songs of false freedom?...The two learned Doctors of Philosophy in History [Van Zwanenberg and William Ochieng] are asking us to do a very bourgeois thing: to buttress the current political system in Kenya and sing songs of freedom” (Atieno-Odhiambo 1974:57). This impatience amongst some scholars was almost palpable. It manifested itself in all manner of intellectual output: poetry, novels, plays and academic articles.

A major target of criticism was Kenyatta’s slogan of “forgive and forget” the bitter liberation episode of Kenyan history. This slogan had translated into the government’s policy of amnesia. While good on paper, in practice, it appeared to many like a sanction to the erstwhile African loyalists of the colonial government, who had bitterly opposed the nationalist movement, to amass wealth wantonly through unscrupulous means. As a result, this policy was attacked by many writers, both at the university and outside it. Leonard Kibera, a young scholar at the university of Nairobi, wrote in his novel, *Voices in the Dark*, that:

Now a freedom fighter who can’t sleep because his stomach aches never wakes his neighbour to recount for the tenth time his bravery in the forest, or to complain that his role lies forgotten, buried under the pavement. For how can he be forgotten when he is actually and in fact registered in writing as unemployed, of no fixed address...the process of forgetting the past so as to build the future is, as the expatriates never weary of saying, a very sensitive affair. But there will always be some people like Irungu here who think that because they lost a hand here and a hand there in a brief engagement with the enemy...they shouldn’t tighten their belts a little on the long road to Prosperity (Kibera 1970:16–17).

Kibera's was a satiric take on this policy of forgiving and forgetting the past. The genius of this excerpt lies in its ability to expose the fate of national heroes, specifically how they had suffered and disappeared between the cracks of apparently well-meaning national policies. "Forgive and forget" amounted to a double sacrifice on the part of the *Uhuru* heroes: although they had sacrificed immensely in order to attain *Uhuru*, they were now expected to sacrifice their lives again in order to support the same *Uhuru*.⁷⁶

Kibera, who was a student of Wa Thiong'o at the University, was continuing with the examination of a theme Wa Thiong'o had started with his *A Grain of Wheat*, and which preoccupies him today with such works as *Matigari* and *Wizard of the Crow*. In the 1970s, however, the engagement with this theme reached its apex with the publication of *The Trial of Dedan Kĩmathi*. Originally written for the Second World Black and African Festival of Arts and Cultures (FESTAC) held in Lagos, Nigeria in January, 1977, the play, co-authored with Mĩcere Githae Mũgo, who was at that time also teaching literature at the University of Nairobi, renovated the memory of the foremost Mau Mau leader, Dedan Kĩmathi, which had been buried at the behest of official amnesia. In the play, Kĩmathi is depicted as an unmitigated patriot in search of freedom and prosperity for all, in contrast to the pseudo freedom, inequity, and personal aggrandizement visible in the Kenya of the 1970s.

By 1974, the picture of the detached scholar existing in the hallowed hallways of citadels dispensing knowledge to students in hefty doses was crumbling fast, and was being replaced by a kind of socially engaged scholar eager to reach out to the people – a kind of public intellectual. This scholar questioned government policies more robustly,

⁷⁶ Unfortunately, Kibera did not produce any more literary works as he died in 1975. His death was not linked to politics.

and was not satisfied with the publication of such views in learned academic journals; the scholars now sought to expose their views to the wider public. The mainstream media, newspapers such as the *The Standard* and the *Nation*, were too close to the establishment for this purpose, so the scholars resorted to other means of reaching the public. They started writing novels and plays and poetry that critiqued the status quo or an aspect of it. Finally, as we will see, they decided to take their intellectual activities directly to the people through village theatre.⁷⁷

The most prominent academic critic of the Kenyatta regime was, of course, Wa Thiong'o, a professor of literature at the University of Nairobi. Educated in Kenya, Uganda and Britain and having taught and practiced journalism in Kenya, Uganda, Britain, and the United States, Wa Thiong'o was obviously a cosmopolitan intellectual, with varied influences. However, he himself acknowledged the influences that JM had on him, although JM had much less education.

But throughout my studies and teaching in England, Kenya, Uganda, America and back in Kenya in 1972, I had kept on following Kariuki's activities, speeches, and writings with keen interest. For here was a writer and a critic raising issues which were troubling me as a writer; neo-colonialism, imperialism, the rise of an African ruling class of wealthy people, the need and the necessity for unity among the peasants and workers from the ocean to the lake. I wanted to meet him again or to hear him talk. But he was never allowed a political gathering (1981: 83).

⁷⁷ However, I should point out that Kenyan intellectuals did not share a monolithic view and approach. Writing for the UK's *Guardian* newspaper, Wa Thiong'o stated that most Kenyan writers had not attempted a critique of the prevailing situation, and history, of Kenya. Such writers had used their literary work to espouse the "same class, sometimes the same racist values, of their Western foreign counterparts. An example is Kenneth Watene's *Dedan Kĩmathi* which depicts Kĩmathi, the brilliant Mau Mau guerilla leader against the British colonial presence, in the same terms as he was last depicted by racist Ian Handerson in the *Hunt for Dedan Kĩmathi* twenty years ago." The inability of such writers to counter the colonialistic worldview was hinged on the fact that they tended to "operate within the same structure of values, assumptions, political outlook, language, audience, as the foreign theatre establishment" (Wa Thiong'o 1981:46).

This stated admiration of JM by Wa Thiong'o establishes a connection between the thinking of the two men that is often overlooked. Wa Thiong'o was the natural successor of JM in terms of his criticism of the status quo at the time. Wa Thiong'o's admiration of JM was such that when JM's book, *Mau Mau Detainee*, was reissued in 1975 after his death, he wrote a postscript in which he portrayed JM as a courageous and determined freedom fighter. He also argued that JM's example brought out "patriotism at its purest and most luminous" and praised the book as a "profile in political courage, indestructible human will and determination" (Wa Thiong'o 1981:88). He saw the murder of JM as a wake up call to all freedom-loving people, and especially the intellectuals. It was time, he wrote, that "Kenyan intellectuals and all the progressive youth, students, church-leaders, workers, took up Kariuki's call and resolutely denounced and struggled against all the economic, political, and cultural forces that condemn our people to starvation wages, to landlessness, to lack of shelter, clothes and schools" (1981:92).

By the early 1970s, Wa Thiong'o was already an established writer, having published novels, essays, and plays. He had also served as a journalist at the *Daily Nation* in the early 1960s after this education at Makerere University in Uganda. In his intellectual and creative endeavors, Wa Thiong'o was primarily concerned with the task of reconstructing the history of Kenya with a view to correcting colonial and neo-colonial distortions, a task that he believed would strengthen the new nation. He further believed that the role of an African author was to "banish the people's sense of inferiority and contempt in which they held their own culture, a contempt inherited from Europeans" (Bjorkman 1989:1).

As far as Kenya was concerned, Wa Thiong'o believed that *Uhuru* had been won by Mau Mau, ordinary peasants and workers, through sweat and blood. Strangely, however, power during the postcolony was appropriated by an African bourgeoisie that neglected the peasants. Under these circumstances, the task of the intellectual is to address "what I call the crisis or conflict between the emergent African bourgeoisie and the African masses" (Friedberger 1969: 41) with a view to bringing a more just social transformation. He believes deeply in freedom of expression, and maintains that Africans "must be able to express ourselves" and that "nobody should ever be penalized in Africa for having a different idea from another person" (Ali 2006:364).

Apart from his and Mĩcere-Mũgo's *The Trial of Dedan Kĩmathi*, which threatened the establishment by rehabilitating the memory of Kenya's foremost freedom fighter at a time when official policy was to forget him, Wa Thiong'o also offended the authorities by resorting to write in his mother tongue – Gikuyu. The last of Wa Thiong'o's work to be authored in English was *Petals of Blood*, itself a fitting finale to Wa Thiong'o's career in English that served to offend the authorities even more. It has been called "one of the more complex and extended works of post-independence fiction" (McLaren 2000: 187). Like *The Trial of Dedan Kĩmathi*, Wa Thiong'o revisits the subject of historical memory through narratives of the stories of four characters, Munira, Karega, Wanja and Abdulla, who are suspected of being involved in the murder of some tycoons.

Wa Thiong'o then goes on to narrate, through a complex deployment of literary devices such as multiple narratives and flashbacks, how Ilmorog, a rural village, transformed from a sleepy, innocent location, to a Westernizing place where the peasants are marginalized. The novel's clincher is the possibility of a peasant rebellion. The novel

established Wa Thiong'o's support of a Marxist interpretation of history. The ending of the novel, pointing as it does at political organization and action, the decidedly Marxist ideological message, the depiction of the conflict between the poor and the rich as inevitable, and the pronouncement that this would be Wa Thiong'o's last work in English as he would be writing in Gikũyũ henceforth, all conspired to create interest in Wa Thiong'o from the authorities. Of this, it was the switch to vernacular languages that was extremely threatening to the authorities. As he himself explains it:

The percentage of people speaking and understanding English in our country is very small. It is true that English is the language of education, of administration; it is the official language, it is the language of state coercive power, of justice. Every Kenyan who has gone to school will understand English. But the English-speaking population is still a minority vis-à-vis the working people, who would understand Swahili, for instance, as well as speaking their different languages – Gikuyu, Somali and so on. When you write in an African language, particularly if what you write also expresses critical views, what you write reaches the masses – in class terms, it reaches the working people. Of course there are contradictions; there are many nationality languages in Kenya, meaning that if you write in one of the nationality languages, you do not necessarily reach all the peasants and all the workers of Kenya simultaneously. But at the very least, when you write in an African language you are reaching that social class, whereas when you write in English you do not reach those social strata at all (During and Lee 1991:291).

The artistic work that really set Wa Thiong'o on a path of confrontation with the authorities was a play in Gikũyũ called *Ngaahika Ndeenda*, later translated into *I will Marry When I Want*. According to Wa Thiong'o, it was "the first major modern play in one of Kenya's languages" (Wa Thiong'o 1981: 47), and the first the play in an indigenous language to be performed in Kenya (Bjorkman 1989: 1). It was co-authored with Ngugi Wa Mĩriĩ (No relation). In 1977, Wa Thiong'o, together with villagers from

his rural village formed the Kamiriithu Community Education and Cultural Center,⁷⁸ where the play was first performed by an amateur theatre group comprising of Kamiriithu villagers who had never acted before (Wa Thiong'o 1981).

The play depicts how a multinational corporation, symbolizing the many multinationals that had established Kenya as their regional headquarters, colludes with a bank and the African bourgeoisie to unscrupulously take a piece of land owned by Kĩgũũnda, a peasant, on which the multinational wants to build an insecticide factory. In conjunction with other peasants, they realize that they are being conned, and there is a sharp focus on the social conditions of the working class in Kenya. The play ends with a powerful call for action against exploitation (Wa Thiong'o 1980).⁷⁹ Although the play

⁷⁸ The center was an expression of the frustration that Wa Thiong'o felt as result of the relegation of indigenous Kenyan culture into secondary place. At the National Theatre in Nairobi, for instance, English plays predominated. It appeared to Wa Thiong'o as if indigenous Kenyan culture was being slowly suffocated to death. For instance, when Wa Thiong'o and his group of artists wanted to stage their play, *The Trial of Dedan Kĩmathi* at the Kenya National Theatre, the administrators at the Theatre allocated Wa Thiong'o's play together with *Betrayal in the City* by Francis Imbuga, a total of four nights. In comparison, European plays were allocated long runs at the Theatre. Wa Thiong'o, protested, asking in an article published in the *Daily Nation* of October 15, 1976:

Why have the two plays, which will be representing Kenya in Lagos [venue of the Second World Black and African Festival of Arts and Culture], been crammed into four nights each between European shows, Bossman's *Jeune Ballet de France* (10 to 18 October), and the City Players' *A Funny Thing Happened on the Way to the Forum* (1 to 21 November)? This means that, between them, the two foreign cultural shows will have a total of thirty-one days at The National Theatre while the two Kenyan plays will have only eight days. . . It is interesting, for instance, that The National Theatre was opened in 1952. . . to entertain the British soldiers who came to Kenya to fight against Mau Mau guerillas and to suppress the Kenyan people. . . At a time when theatre in Kenya is trying to reflect national history and a national struggle, the foreign management of our Cultural Centre is selling Christmas cards that commemorate The National Theatre as it was in 1952, flying a colonial flag (Wa Thiong'o 1981:49-51).

In order to preserve Kenyan culture, wa Thiong'o had collected Kenyan oral tradition, including songs, mimes, proverbs, and stories from various ethnic groups in Kenya. Kamiriithu would be a kind of active diorama for the enactment of this culture.

⁷⁹ This ending with a rendition of a powerful possibility for change, this call for the public to place its own destiny in its own hands occurs frequently in Wa Thiong'o's work at this time. For instance, in the *Trial of Dedan Kĩmathi*, the hero, Kĩmathi, utters what amounts to a final will:

KAMATHI: In the court of imperialism!

was co-authored with Wa Mirii, Wa Thiong'o has maintained that the creation and the production of the play was a communal effort.

Because the play was written in a language they could understand the people could participate in all subsequent discussions on the script. They discussed its content, its language and even the form. The process, particularly for Wa Thiong'o Wa Mirii, Kimani Geau, and myself was one of continuous learning...learning our language, for peasants were essentially the guardians of the language (Wa Thiong'o 1981:45).

The involvement of the peasant in this authorial process, while beneficial to the writers, was most threatening to the authorities. The play was too close to home. It captured not only the grievances, but the voice and idiom of the villagers. The peasants identified with the characters, with the tribulations of the main characters and probably identified what looked like the options at their disposal for overcoming the galloping

There has never been and will never be
justice for the people.
Under imperialism
justice is created
through a revolutionary struggle
against all the forces of imperialism.
Our struggle must therefore continue,
our people will never surrender.
Internal and external foes
will be demolished
and Kenya shall be free.
So go!
Organize in your homes
Organize in the mountains
Know that your only
kindred blood is he
who is in the struggle.
Denounce those who weaken
our struggle
by creating ethnic divisions.
Uproot from you those
who are selling out to imperialism.
Kenyan masses shall be free! (Wa Thiong'o and Micere-Mũgo 1976)

This fictional account of Kĩmathi's trial in 1950s enacted in 1976, elides times and makes it appear to the audience as if Kĩmathi is addressing them, not the Kenyans of his time. It is this literary license that makes the play so powerful and therefore threatening to the Kenyan authorities in the 1970s.

exploitation. They were, in Wa Thiong'o's own words, creating a "culture of revolutionary courage and optimistic determination" (Wa Thiong'o 1981: 69). As a consequence, *Ngahiika Ndeenda* was seen as a threat to the authorities, who rightly assumed it would provoke disfavor in the government and the wealthy whom the government was seen as protecting.

While writers like Wa Thiong'o took the establishment head on, other writers -- perhaps in a bid to avoid arrests and detention -- opted to practice the approach of *Telling The Truth Laughingly*.⁸⁰ In other words, they hid their biting critiques of the status quo behind a veneer of drama comedies set in mythical lands and addressing universal themes, unlike Wa Thiong'o whose literary works could be linked to local politics in a more direct way. Watching these plays, the targets of criticism could actually laugh at themselves without realizing that the joke was on them. Reviewing Francis Imbuga's play, *Betrayal in the City*, for instance, Miriam Kahiga, a drama critic for the *Daily Nation*, writing in May 13, 1975, was impressed by the play's "stinging wit and pithy humour" which was presented in such a way that it did not "detract too much from what is good entertainment with a surprising sting-in-the-tail."

In other words, Imbuga's play was easily categorized as a harmless comedy. This probably explains why the author of *Betrayal*, Imbuga, was not detained. Yet the play is a serious indictment of post-colonial greed and human rights abuses. The play even sneaks in the disillusionment of the freedom fighter with Uhuru. Imbuga's fictional character, Mosese, after being arrested for criticizing the regime of the Boss, speaks in terms which must have been familiar to Kenyans in the mid 1970s: "For years, we waited for the

kingdom, then they said it had come. Our Kingdom had come at last, but no, it was all an illusion...It was better while we waited. Now we have nothing to look forward to. We have killed our past and are busy killing the future” (1975:31–32).

It is noteworthy that Mosese was a fictional name, unlike Kĩmathi who was a real historical character that people could still remember and whose name the authorities wanted forgotten. By relying on fictional characters and by restricting performances to the University and other elitist drama fora, Imbuga’s play managed to appear unthreatening to the authorities. In contrast, Wa Thiong’o, by reverting to historical characters and performing in villages, brought attention to himself and his activities so much so that all his works subsequent to the *Trial of Dedan Kĩmathi*, elicited considerable interest from the authorities. Apparently, the utterances of a fictional character like Mosese were less threatening than those of a renovated historical figure like Kĩmathi.

Taking his plays to the community meant that Wa Thiong’o was competing for the same constituency with the political elite who depended on the gullibility of the rural majority for their continued grip on power. Wa Thiong’o’s plays aimed at educating the people, equipping them with the critical skills necessary to see clearly what was going on. Under these circumstances, the authorities could not survive since authoritarianism thrives on popular gullibility as much as it does on executive coercion. Wa Thiong’o was therefore treading on very dangerous grounds and it was a matter of time before the authorities reacted.

⁸⁰ This is the title of John Ruganda’s book on Francis Imbuga’s plays. The full title of the book is *Telling The Truth Laughingly: The Politics of Francis Imbuga’s*. See Ruganda (1992)

Government Reaction to the Rise of Dissent

It was clear very early on after independence that the government would not brook any dissent, particularly any dissent that might undermine the authority of the President. The government reacted to dissent in several distinct ways: co-option, bribery, curbs on freedom of expression by law and by Presidential decrees, intimidation and warnings against rumor mongering, ostracization from the political process, and expulsion of offending foreign journalists, as well as detention of local dissidents.⁸¹

In so doing, the government relied on the executive branch. As has observed, “in the context of a tension-ridden, disorganized national party, only one institution that Kenyatta could use with confidence in the governance of the country – the civil service” (Srinivasan 1979 54). What rendered the civil service so susceptible to manipulation by the presidency was the fact that the Constitution of Kenya (Amendment) Act (No.28, 1964), vested wide powers with the presidency, including the appointive discretion for such important positions as the Attorney-General, the Permanent Secretaries, the Commissioner of Police, Provincial and District Commissioners, as well as members of the Public Service Commission, which was itself responsible for hiring and firing civil servants. Thus, all civil servants in Kenya held their positions at the pleasure of the President.

By dint of his executive powers, his legitimacy as the foremost nationalist and founding father of the nation, coupled with his personal charisma, Kenyatta bestrode the country like a colossus. He was the *Mzee*, the strong and wise patriarch figure, the father of the nation. He did not even need to contest the Presidency in 1963 when the Republic

status was declared – he just elevated himself from Prime Minister to President using an appropriate constitutional amendment, and was to be returned unopposed through out his remaining political and mortal life. According to Kenyatta’s biographer, “in November, 1963, disrespect to the person of the Prime Minister (as he was then) was made an offence and any sign of it from old colonials, even in jest, was met with an instant expulsion from Kenya” (Murray-Brown 1979:315). When oath-taking activities started in 1969 to buttress Kenyatta’s rule after the challenge posed by Odinga’s opposition and the Tom Mboya assassination, “journalists were discouraged from reporting it” and some foreign journalists were deported (Murray-Brown 1979:317). Only the Christian publication, *Target* took a stand against these activities, leading the way for “other newspapers to pick up the story” (Murray-Brown 1979:319).

Politicians from mainly Luo Nyanza, who had joined the KPU, were barred from contesting elections in 1974. They included former Vice-President Oginga Odinga. In May 1974, the government announced that such politicians would have to fulfill certain conditions in order to be allowed to contest elections. For those who had been detained, they had to demonstrate three-year KANU membership after release from detention, and satisfy KANU that they fully identified themselves with the development policies and programs of the party and the government (*Africa Research Bulletin*, September 30, 1974). Essentially, this meant that these politicians were at the mercy of KANU, since, irrespective of the force of their demonstration of agreement with party policies, the final decision was at the discretion of KANU officials.

⁸¹ In an article assessing the life of the former head of the Kenya Police Special Branch, Mr. James Kanyotu, the mysterious deaths of prominent personalities were linked to the government (*Daily Nation* May 26, 2008).

When Lord Chalfont, a BBC journalist and a former UK Minister, made a documentary that portrayed Kenyatta in bad light, he was declared *persona non grata* (prohibited immigrant) in February 1974. Although the British Government apologized to Kenya, the Kenya Government wanted the BBC to run another program to be seen by the exact number of people, estimated at 80 million, who had seen the “distorted” program. “Let this be a warning to other foreign journalists here... This journalist has distorted everything which Mzee (President Kenyatta) has done...,” a spokesperson of the Kenyatta government was quoted to have said (*Africa Research Bulletin*, July 31, 1974). The then Minister for Foreign Affairs, Dr. Njoroge Mungai, warned that Kenya would not tolerate any abuse of the freedom of expression that the country was enjoying by elements jealous of Kenya’s political stability who wanted to create instability (*Africa Research Bulletin*, October 30, 1974).

On August 16, 1974, President Kenyatta, noting the wave of strikes in educational institutions and the commercial sector, banned all strikes of any kind with immediate effect, until further notice. A directive from the office of the President promised severe punishment against anyone who incited, organized or took part in strikes, and asked trade union leaders, workers and students to channel their grievances through the normal established channel. The government justified this step as necessary because the country was then in the middle of a general election. The reaction of the trade union movement to this directive is a testimony to the coercive atmosphere existing at the time; the secretary-general of the Central Organization of Trade Unions (COTU), the umbrella organization for trade unions in Kenya, Mr. Dennis Akumu, quickly supported the directive as being in the national interest (*Africa Research Bulletin*, September 30, 1974).

Upon being sworn in as President for the third term on November 5, 1974, Kenyatta told his critics that he now had the mandate from the people to deal with them firmly and would not hesitate to take action. He said “he had dedicated his whole life to the freedom and service of Kenya and was ready to lay it down if necessary to ensure that Kenya remained free” (*Africa Research Bulletin*, October 30, 1974). He also warned the foreign press that the government and people of Kenya were not afraid of their malicious propaganda against the country, but warned that they would be dealt with mercilessly if they continued with their activities of spoiling the country’s name (*Africa Research Bulletin*, October 30, 1974).

After the 1974 general election, the government prevented the election of Mr. Jean Seroney, one of its harshest critics, into the position of Deputy Speaker of parliament, when Kenyatta exercised his constitutional powers to prorogue parliament within an hour of swearing in its 172 members. This is how it happened. In Kenya, the only time when the President, who is an elected member of parliament, attends parliamentary business is during the reading of the budget and during the official opening of a new session of parliament, although he might attend at any other time at his own discretion. After the elections of October 17, 1974, parliament met in November 6, 1974, with Kenyatta in attendance to be sworn in as an MP. After the swearing in ceremony, the first item on the agenda was the election of the Speaker. The former Speaker, Fred Mati, was re-elected without opposition.

However, when Seroney’s name was proposed as deputy speaker, the Speaker attempted to postpone the election until another day. This was met with considerable

opposition from Seroney's fellow backbenchers.⁸² To shield the spectacle from public eyes, Kenyatta ordered both the Press gallery and the Speakers gallery to be emptied.⁸³ Kenyatta then addressed parliament after which a statement was issued from State House to the effect that the President had prorogued parliament effective November 7 (*Africa Research Bulletin*, October 30, 1974).

The effect of this closure of parliament was to give the government side time to assess the situation and to plan its strategy. However, it also had the effect of preventing the discussion of embarrassing issues of corruption. To prevent public discussion of corruption, vice-President Daniel arap Moi was reported by *The Standard* on November 20, 1974, as having issued a statement warning against the spreading of rumors "about the current general situation and a host of other issues concerning the country" and warned that anyone found spreading such rumors would be asked to substantiate them to the authorities. The purpose of this statement was to intimidate Kenyans into silence and therefore check the spread of the reports. However, all this pales in comparison to the reaction of the government to the threat posed by JM Kariuki.

JM was ruthlessly murdered on the night of March 2, 1975. His body, doused with acid, was left in the bush along side a footpath Ngong Hills, about twelve miles from Nairobi, where it was discovered by a local herdsman on March 12. Earlier on March 1, JM's car had been trailed by a car belonging to Senior Superintendent Patrick Shaw of the Kenya Police Reserve (*Kenya National Assembly* 1975:18). JM was last seen leaving the Nairobi Hilton in the company of Mr. Ben Gethi, the commandant of the paramilitary

⁸² The independence of Parliament was asserted when the government could not find a candidate to oppose Seroney, who was elected Deputy Speaker on February 5, 1975, a day after Kenyatta officially opened parliament.

General Service Unit (GSU) of the Kenya Police on March 2, (*Kenya National Assembly* 1975 23).

The news of the murder was received with consternation throughout Kenya. In Nairobi, university students boycotted classes and stoned motorists, sparking off a brutal confrontation with the police.⁸⁴ Shops in downtown Nairobi were closed, and bus services were cancelled. When Parliament met on the afternoon of March 10, it was immediately adjourned, perhaps to forestall heat-of-the moment speeches by MPs.⁸⁵

The *Weekly Review*, launched in 1975 by Hillary Ng'weno, argued that the murder amounted to a frontal attack on freedom of expression. In the aftermath of the JM's murder, the publication launched a strong defense for freedom of expression, and warned the country of the potential danger that lay ahead should dissent be totally crushed. For one brief moment, as the government watched public reaction with consternation with its own palpable inertia, Kenyans were treated to journalism of very fine quality by an indigenous publication that was barely three months old. In reciprocation of this quality journalism, Kenyans loved their *Weekly Review*, whose

⁸³ The Press Gallery is where journalists sit in the parliament. Here, note-taking is allowed. The Speakers gallery is where members of parliament may witness parliamentary debate without taking notes.

⁸⁴ Later, one observer would look at this episode and use it to generalize on government reaction to student demonstration across Africa:

African governments are too ready, as a rule, both to fear and then over-react to the political activities of their students; they are willing to use strong-arm tactics when students demonstrate, as they normally do, and this had been the case during the Kenyatta years (Arnold 1981:84)

⁸⁵ Debate, however, resumed on March 13, and all fingers pointed at the government. Waruru Kanja, MP for Nyeri, said: "We are being ruled by gangsters...are we being ruled by people or devils?" Charles Rubia, another close friend of JM, told the government to tell the truth as the JM had last been seen with its members. "The GSU is a government organization. The enemies may be within the Government itself," he said (*Africa Research Bulletin*, March 31, 1975:3562)

circulation continued to rise.⁸⁶ In an editorial on March 24, 1975, the political magazine summed up the impact of the murder on freedom of expression as follows:

...the brutal murder of Josiah Mwangi Kariuki, the M.P. for Nyandarua North, threatens the very system of government upon which our society is based...Kariuki's death instills in the minds of the public the fear of dissent, the fear to criticize, the fear to stand out and take an unconventional public stance. For Kariuki was a dissident, the most celebrated of all dissidents in Kenya since independence (*Weekly Review*, March 24, 1975).

The *Weekly Review* strained to focus the attention of the grieving public away from the act of the murder and the heat of the moment to the future and its possibilities. In so doing, the magazine acted like Kenyatta himself had done at the time of independence when he asked the nation to forget the past and look into the future, thus showing that quality journalism could play a unifying role just like political leaders.

The fear to express one's own convictions threatens the whole democratic system of government upon which Kenya's society is supposedly based. Without room for dissent, there can be no room for democracy; without democracy, nothing else in a society is really worth anything...But it is important that every Kenyan, and especially those in positions of leadership should realize the stark alternatives that lie ahead. We can either give up on democracy in a misguided quest for quicker and easier solutions to political problems, or we can persevere in our building of a just and democratic system of government. It would be a tragedy of the first magnitude if we in our grief and anger over Kariuki's murder we were to abandon the strides Kenya has made towards democracy. History would never forgive our generations for such folly (*Weekly Review*, March 24, 1975).

The murder threw the country into a period of uncertainty. For a brief moment, the government, which had appeared unassailable before the murder, seemed weak. It became the target of barbs by Parliament, the people and the Press. Both *The Standard*

⁸⁶ Until the 1980s when the Daniel arap Moi regime brought it to its knees, the *Weekly Review* remained the

and the *Daily Nation* agreed that the murder was a shattering blow to Kenya and described it as a national tragedy. At his funeral, attended by only one cabinet minister, Mwai Kibaki, then Minister for Finance, emotions ran high. It was a student leader, Wanyiri Kihoro, who tied JM's murder to freedom of expression when he told the assembled crowd that the MP had been killed because he spoke out against a "new style of colonialism and on behalf of the poor" (*Africa Research Bulletin*, November 30, 1975).⁸⁷

The Government representative was the Central Province Provincial Commissioner who was prevented from reading President Kenyatta's speech at the funeral by an enraged public, which indicates not only that threat to freedom of expression can also be posed by an enraged mob, but that norms of public address are rooted in perceptions of legitimacy. Subsequently, unexplained past deaths and apparent "misadventure" of a number of government critics began to be openly linked to the Government in popular discussions. Clearly, JM was more of a problem to the Government in death than in life.

To regain the upper hand, Kenyatta on March 21, 1975, barely five days after JM's burial, addressed a pass out parade of the army and police recruits. Curiously, this was done in downtown Nairobi instead of their respective colleges in Lanet and Kiganjo, each of which is more than a 100 km from Nairobi. After the ceremony, the recruits passed through Nairobi streets while Air Force jets flew past barely above the rooftops in the city. Kanja, an MP, claimed that British troops had been flown in to shore up Kenyan

most authoritative publication on Kenyan affairs.

⁸⁷ Elsewhere in Africa, some sections of the media seemed to make the same connection to freedom of expression. In Nigeria, the *Daily Sketch* described the murder as a rape of democracy and asked African governments to accept constructive criticism (*Africa Research Bulletin*, November 30, 1975).

security,⁸⁸ an allegation denied by both Britain and Kenya Governments (*Africa Research Bulletin*, November 30, 1975). Obviously, in the contest between liberty and authority, authority was speaking, using nonverbal communication, to trumpet its strength.

A parliamentary committee appointed to probe JM's death was credited with having saved the country from civil war (Kenya National Assembly 1975:5). The committee found evidence of a coverup and implicated Kenyatta's confidants so much so that Kenyatta refused to accept the report until the names of his confidants were removed. In the copy of the report in my possession, two names are blackened out, although they can still be read: that of Mbiyũ Koinange, Minister of State in the Office of the President and a long-time confidant of the President, and a Mr. Karanja, who was a bodyguard to Mr. Koinange (Kenya National Assembly 1975:38). Other than ordering the removal of these names from the report, Kenyatta acquiesced to the will of parliament, which adopted the report without the names. The President let the problem wear itself out with time; then, when he felt strong enough, the most outspoken of his critics such as Seroney and Shikuku were arrested. Once he had mastered the situation, Kenyatta gave his famous speech in which he said the hawk was in the sky ready to pounce upon the chicken (Arnold 1981:80).

The JM issue tested the government to the extreme limits. For a time, the government was lost for action as students demonstrated and workers planned strikes, and politicians spoke fearlessly. To counter the students, the government sent in the paramilitary GSU to beat up the students at the University of Nairobi and Kenyatta

⁸⁸ This was reminiscent of the 1964 mutiny by the army; the mutiny was put down with the help of British soldiers.

University College. Finally, the universities were closed down. To portray the image of a strong leader who was in charge, Kenyatta went on one of his working vacations in Mombasa where he summoned all the police chiefs for a meeting on April 29, 1975. No details of the meeting were reported. However, a photograph of the President with the security chief was published in the front pages of the newspapers, no doubt to give the impression that the security chiefs were able and ready to counter any threats from any quarter (*The Standard*, April 30, 1975).

But the government's reaction was not limited to issuing threats; it wielded both the carrot and the stick. To appease workers and deflect attention from the JM issue, Kenyatta announced an increase in the minimum wage for civil servants from Shs. 240 to Shs. 350 during the year's Labor Day celebrations on May 1 (*The Standard*, May 2, 1975). But workers, sensing government weakness, continued to agitate for higher wages.

On May 5, *The Standard* reported that the Minister of State in the office of the President Mr. Mbiyũ Koinange, had warned against rumor mongering and described those who indulged in rumor monger as "few and small spoilers" intent on causing division amongst the GEMA communities.⁸⁹ Koinange's warning was followed by Kenyatta's very own warning, reported by *The Standard* on May 12, 1975 as follows:

President Kenyatta, who yesterday continued to received messages from all corners of the republic reaffirming unflinching loyalty, has advised Wananchi to

⁸⁹ The murder of JM had resulted in a feeling that the Kikuyu Kiambu had monopolized political and economic power at the exclusion of other Kikuyu districts. Although he was from Nyandarua district, JM's roots were in Nyeri. He was therefore part of the Nyeri Diaspora. The murder of JM was pointed out as evidence of the Kiambu conspiracy to finish the Kikuyu from Nyeri and Murang'a districts. *The Standard* reports that in this meeting, Koinange was at pains to dispel the notion that the government was dominated by people from Kiambu: "The minister for finance, Mr. Kibaki, the governor of the Central Bank, Mr. Ndegwa, and Mr. Michuki [then Executive Chairman of the Kenya Commercial Bank] and even the boss of ICDC [Industrial and Commercial Development Corporation, an important government corporation] are all from Nyeri" (*The Standard* May 5, 1975)

exert their energies on nation building and lend a deaf ear to the “voices from the wilderness which were calculated to bring about despondency and sow the seeds of discord.” Addressing a delegation from Nairobi headed by the Provincial Commissioner, Mr. S. K. Boit, the President warned that evil-doing lived among the law-abiding citizens of Nairobi. The President told the delegation, which included the Mayor Miss Margaret Kenyatta and the deputy mayor, councilors, senior civic officers, members of parliament and provincial heads of department: “If you are determined to rid the city of rumor-mongers, thieves and evil-doers, it would be an easy task since you live among the lot, and thieves share their spoils among certain members of the population. You could, likewise, eradicate the writers and sources of subversive literature being circulated in the city and the country as a whole, if you were determined, mind and soul, to achieve this goal.”

Here, writers are mentioned in the same category as thieves, indicating just how Kenyatta felt about criticism of his regime at the time. However, the death of JM refused to exit the public domain. Leading Kikuyu musicians, such as Daniel Kamau (DK) and Joseph Kamarū (nicknamed *Kanya ko'horu* or “the gourd or container of information”), recorded songs bemoaning the fallen politician and criticizing the murderers. Sung in Kikuyu, the songs celebrated JM’s heroic politics and were extremely popular among the Kikuyu community.⁹⁰ Apart from the songs specifically praising JM, other songs seized the prevailing mood to lament the hardship experienced by the common people. One such song was *Maĩ nĩ marũrũ* or “the water is bitter,” recorded by Gathaiti Church Choir. The song lamented that water was bitter for both children and adults. It asked what people would drink now that water was bitter. Of course no training in rocket science was required to realize that the water in the song was a metaphor for the lives of ordinary people. Bitter water symbolized hard life.

These songs were of great concern to the authorities. The government reaction was once again high-handed. *The Standard* reported that the Provincial Commissioner for

⁹⁰ Kamaru’s song, *JM Kariuki*, is now available on youtube.
<http://www.youtube.com/watch?v=BOvPqLS4ZwYandfeature=related> (Accessed April 20, 2008)

Central Province, Simeon Nyachae, had told a public gathering that “in law, nobody was allowed to play any song – be it of JM or “bitter water” over loudspeakers in a public place without a permit. Such action was tantamount to holding a public meeting without a license. He warned such people that their trading licenses could be cancelled. Rather than singing about poverty among the people, the PC warned, “they should help the common man understand how he could acquire a farm or a loan to obtain a livelihood” (*The Standard* April 30, 1975).

In June, a Nairobi journalist, Kareithi Munuhe,⁹¹ independently published *JM Kariuki in Parliament*, a compendium of selected speeches by JM in Parliament. Munuhe writes that he published the book to celebrate JM’s contribution in parliament: “JM is dead, and his contribution to life has come to an end. He has no more to add and what he has done is all” (Munuhe 1975:5). It was arguably Kenya’s first instant book. In the introduction, Munuhe angrily expressed his anger at JM’s killers in a cryptic message:

In life men cry and men laugh. The difference between the two is time. Time levels out many things. Time levels out the mountains, cities, and histories. Worst still, time levels out the memory and with it the emotions. Time changes laughter into tears, and tears into laughter. It levels out heroic works of men and brings once upon a time worshipped leaders to contempt even to total elimination. People, in time, forget the pain. They forget those who helped them in time of need when their need is over. In the chase, the fastest dog is praised but when the kill is made strength replaces speed. Before long, names Kenya has adored will be remembered with contempt (Munuhe 1975:3).

It was a powerful message. Its main point appears to be that murder achieves nothing for the murderer because in the long run, we are all dead. The murderer achieves

⁹¹ Educated in Makerere University and in the United States, Munuhe himself was killed in a road accident on Thika Road in Sept 1977. Like other notable government critics such as Argwings Kodhek, Kitili Mwenda, and Bishop Alexander Muge, it was not clear if his death was due to any foul play. Besides his book on JM, he was also the author of *Kaburi Bila Msalaba* (Grave with no Epitaph), a romantic Swahili

nothing because he does not kill time, which is the force that is powerful enough to assign everyone's rightful place in history. Munuhe is also asking leaders to mind their legacy, because past achievements can be ruined by irresponsible acts of the present. It also stealthily attacks the wanton disregard of national heroes after independence; the heroes are equated to the fastest dog that is praised during the hunt but is shunted aside by the powerful humans after the kill.

The book was a hit. The authorities tried to restrict distribution by confiscating copies, but the book was in such a great demand that a second impression was released later in the year. The publication of this book shows that people can be very ingenious in a crisis, and are willing to use all media to communicate when mainstream media are out of reach or are unwilling to be accessed.

The authorities also used intimidation and detention as tools to silence their critics. For instance, on October 17, 1975, Kenyatta told parliament that dissidents would not be tolerated. Three days earlier, Deputy Speaker John Marie Seroney and Martin Shikuku, both fierce critics of the Kenyatta administration and non-Kikuyu friends of JM, were arrested within the precincts of Parliament. This arrest took place as fellow parliamentarians watched. The arrest was also contrary to immunity accorded parliamentarians within the precincts of parliament by both the parliamentary rules and the constitution. Shikuku had made the fatal mistake of claiming in parliament that the ruling party KANU was dead and Seroney had supported him. As the MPs were being driven away by the police, the MP for Kitutu East, Mr. George Anyona, asked if parliamentary immunity was still in place. The speaker Mr. Fred Mati, meekly said that

novel set at height of Mau Mau war. It must be noted that regardless of the fabled disregard of the highway code by Kenyan drivers, Kenyan roads have been rather unforgiving to government critics.

the privileges and immunity for parliament were enshrined in the constitution (*The Standard*, October 16, 1975). However, this was not enough to save the two MPs from detention.

Kenyatta said that other critics would meet with a similar fate. It was in this gathering that Kenyatta uttered the ominous words to the effect that the hawk was hovering in the sky ready to swoop down on the chickens (*The Standard* October 17, 1975). This message could not have been delivered in clearer terms. Throughout Kenya, the hawk is feared by all chicken farmers. It is a relentless hunter, spying on hapless chickens from on high and swooping down at lightening speed to snatch those chicks that are not careful enough to take cover. Kenyatta's statement was warning delivered in the idiom of the community. The imagery of the spying hawk is etched in the mind of every Kenyan who has ever raised chickens or witnessed the voracious hunt of the hawk.

Another form of response by the government was to inject its own views in the public arena through the establishment of a specialized unit within the Ministry of Information and Broadcasting that would produce in-depth news coverage and commentary. The Permanent Secretary in the ministry, Darius Mbela, announced on October that this new unit, to be called Information Research Bureau, would be set up to "eliminate the lack of information between the government and the press" and "with a view to highlighting government policies." This bureau would conduct research and write authoritative articles on various topics of public interest, but "would not indulge in any form of propaganda." The government was setting up the bureau "to promote a better understanding and to bring to an end the era of being misunderstood" The new bureau

would also seek to “cultivate patriotism, promote a national awareness, and accelerate development” (*The Standard*, October 4, 1975).

This government proposal should be seen as response to the growing popularity of the Hillary Ng’weno’s *Weekly Review*. The publications subsequent coverage of the saga became the new standard for local journalism. That the government wanted to start an in-depth news analysis division betrays its growing concern at the success of the new publication. The new bureau, however, was doomed from the start; the ministry lacked journalists capable of competing with the Harvard-educated Ng’weno. Many of the ministry’s journalists were also hampered by low morale and stifling government regulations.

The foreign press was not spared either. The Minister for Information and Broadcasting, Mr. Mathews Ogutu, while addressing a group of visiting American journalists, warned foreign journalists against misreporting Kenya. “Too often we have foreign journalists come here with preconceived ideas about this country, with the result that a complete stranger who spends a few days in a Nairobi hotel becomes an instant expert on Kenyan affairs.” He said foreign journalists were magnifying Kenya’s problems into “unbelievable proportions” instead of amplifying the country’s development efforts (*The Standard*, October 13, 1975). Similar remarks by government officials directed at the foreign press were common at the time.

The government then turned its attention to the offending theatre. Irked by the play *Ngaahika Ndeenda*, the government withdrew the license to perform the play. Such licenses were granted under the Film and Stage Plays Act, which prohibited any public

performance of plays without government approval.⁹² In November 16, 1977, the government stopped the play; then in December 1977, Wa Thiong'o was arrested and detained. His detention was not made public until January 13, 1978, when it was published in the official *Kenya Gazette*, even though the detention order was officially dated January 6, 1978 (*The Standard*, January 13, 1978). Wa Thiong'o had been taken into custody on the eve of the New Year when police burst into his house, arrested him and took reading materials from his library, an operation that was uncannily similar to Kenyatta's own arrest in October 1952 when the colonial authorities carted away his books.

The stoppage of the performance, his arrest and subsequent detention was clearly linked to freedom of expression for two reasons enumerated by Wa Thiong'o. First, these acts amounted to denial of the right to cultural expression. As Wa Thiong'o himself saw it, the proscription of the performance of the play and his own detention was a

severe blow to the efforts of some Kenyans to successfully challenge the foreign theatre and cultural establishment in Kenya, and the efforts of Kenyans to positively affirm themselves in theatre and culture. It also betrayed the blatantly accomplice role played by important sections of the Kenyan ruling elements and showed where perhaps the real opposition lay (Wa Thiong'o 1981: 47).

The act of detention was also an admission that the government's own propaganda was on the verge of losing out in the market place of ideas, and therefore an indictment of the governance approaches, moral compass, and hypocrisy of the comprador class:

⁹² In 1981, the Kamiriithu group attempted to stage another Kikuyu play, *Maitu Njugira* (Mother Sing for Me) at their village. Their application for performance was denied. However, the play was performed at Education Theatre II of the University of Nairobi as a "rehearsal" open to members of the public. The "rehearsals" went on for seven days before being stopped by the government. At least 10,000 people saw it (Wa Thiong'o 1983:44).

It is first an admission by the detaining authorities that their official lies labeled as a new philosophy, their pretensions often hidden in three-piece suits and golden chains, their propaganda packaged as religious truth, their plastic smiles ordered from abroad, their nationally televised charitable handouts and breast-beating before the high altar, their high-sounding phrases and ready-to-shed tears at the sight of naked children fighting it out with cats and dogs for the possession of a rubbish heap, that these and more godfatherly acts of benign benevolence have been seen by the people for what they truly are: a calculated sugar-coating of an immoral sale and mortgage of a whole country and its people to Euro-American and Japanese capital for a few million dollars in Swiss banks and a few token shares in foreign companies (Wa Thiong'o 1983:53)

While detention itself curbed an individual's freedom of expression in the public realm, this same freedom was curtailed inside detention facilities, particular by a schedule of minor and major offenses contained in The Preservation of Public Security Act. Koigi Wa Wamwere, one of the detainees in the 1970s, enumerated and annotated such minor offenses for which detainees could be punished as follows:

1. Making a groundless complaint.
2. Willfully making a false accusation against a detention officer – all accusations against detention officers were automatically considered false and willfully done.
3. Holding any communication in writing or by word of mouth or otherwise with any person in disobedience of regulations or orders in force in the place of detention – a lot of times this meant trying to communicate with fellow detainees.
4. Doing any act calculated to cause unnecessary alarm among detained persons in the place of detention or among detention officers.
5. Omitting or refusing to march as ordered when moving about the detention premises or when proceeding to or returning from work (although this work was a privilege that was never granted to us)
6. Refusing without a proper reason to eat the food provided (thus making refusing to eat in order to protest against the bad food a punishable act).
7. Willfully destroying food, or throwing it away without orders.
8. Omitting or refusing to wear clothing issued to him or exchanging any portion of it for the clothing of another person or losing, discarding, damaging, or altering any part of it. The clothing referred to here is the usual Kenyan prison uniform that convicts wear – *Kungurus*.
9. Removing, defacing, or altering any distinctive number, mark or badge attached to or worn on such clothing.

10. Omitting or refusing to keep his person clean or disobeying an order to cut hair or shaving the face (the assumption that detainees are no longer capable of taking care of themselves and must be taken care of).
11. Omitting or refusing to keep clothing, blankets or bedding clean or disobeying an order on the arrangement or disposition of any such articles.
12. Tampering in any way with any locks, lamps or lights or other public property without authority – this affords the authorities the power to roast you with a permanently lit 150 megawatt bulb which you cannot remove.
13. Stealing clothing or any part of the equipment of any other person – even *Kungurus* are a privilege and never adequate.
14. Committing a nuisance in any part of the place of detention – a nuisance here means anything that prison officers and warders may not be pleased with, including your own laughter.
15. Spitting on or otherwise soiling any floor, door, wall or other part of the building of, or any article in the place of, detention – common occurrences when normal innocent citizens start losing sanity in detention.
16. Willfully fouling any latrine or washing or bathing place.
17. Omitting or refusing to take due care of, or damaging, destroying or misappropriating any tools or any articles or clothing or other articles that are public property.
18. Willfully causing to himself any illness, injury or disability – as if detainees are mad people that have applied for detention to be able to inflict upon themselves illness, injuries or disabilities.
19. Causing or omitting to assist the suppressing of violence, or insubordination of any kind (making a detainee liable to punishment for whatever others do unless he betrayed them).
20. Treating with disrespect or insolence any detention officer, or any visitor to the place of detention, or any person employed in or in connection with the place of detention – anything that was not total genuflection to these officers and visitors was disrespect and insolence.
21. Being idle, careless, or negligent at work, or refusing to work when lawfully required to do so while leaving his cell, or other place in which he is required to be, or his place of work, without permission – this never applied to us since we were never out of confinement.
22. Showing or making unnecessary noise – singing, coughing and sometimes talking, when supposed to whisper while trying to communicate to prison warders, were all punishable.
23. Malingering – did not apply to us because we never worked.
24. Willfully making false accusation against any other detained person in the place of detention – applied when protecting collaborators.
25. Failing to report for or refusing to undergo medical treatment.
26. Insulting, threatening or using indecent language or immoral, disorderly or indecent behavior (which may mean anything).
27. Any minor assault or act of violence.
28. Any other act, conduct, disorder or neglect to the prejudice of good order or discipline.

29. Attempting to commit or aiding, abetting, counseling or procuring the commission of any of the minor offenses aforementioned (Wamwere 1988:xiv–xv)

The significance of the events surrounding *Ngaahika Ndeenda* to the evolution of freedom of expression lies in several areas. First, they indicate that whenever access to the mainstream media is unavailable, communities will resort to ingenious means of expression. Secondly, these events also changed the terms of reference for the contest between the desires for free expression and authority in Kenya. The contest was no longer going to be elite dominated, predominantly in English, with a small audience comprising a cabal of elite. From that moment, the possibility for, as Wa Thiong’o puts it, “communal participation” (1981:47), using an eccentric admixture of vernacular and modern forms, would be the norm. It is this change that Ndigirigi has recognized:

By performing at Kamiriithu village then, the Kamiriithu group demonstrated that Kenyan theatre could take place outside the confines of the National Theatre building. They converted the “empty space” at Kamiriithu into “a seeing place” therefore reconnecting Kamiriithu to performance traditional in African theatre where the theatre was not a physical building but a space in which there were performers/actors and an audience. By performing for a mostly rural audience with low levels of literacy, Kamiriithu also defined the audience for Kenya National theatre (1999:72).

The enlargement of the theatre audience from a small elite in the city to a participating audience in a rural setting, its delivery in a language they could easily understand, and, significantly, its focus on themes that were close to their hearts, combined to offer the greatest threat to the authorities at the time. In the worlds of one Wasambo Were, a Kenyan thespian, “drama was gradually seen as a tool to express the aspirations of the real and the living rather than the dead, removed or fictitious”(quoted in

Chesaina and Mwangi 2004). Thirdly, the detention of Wa Thiong'o thrust him to the forefront as a victim of conscience celebrated across the world, and with him the whole question of human rights in Kenya.

Conclusion

President Moi succeeded Kenyatta in August 1978 in a smooth transition that confounded many analysts who had expected chaos to erupt after Kenyatta's death. He began his rule on the right note, releasing twenty political dissidents from detention. Among those released were Wa Thiong'o, Shikuku, Seroney, and Koigi. For a time, it appeared as though the country had turned a corner, and that the authorities would from now on respect freedom of expression.⁹³ So convincing was this gesture by Moi that the US State Department's Human Rights report for 1978, published in the *New York Times* of February 10, 1978, described the human rights situation in Kenya in glowing terms. The report stated that "Kenya's political system and atmosphere are among the more open and lively in Africa" adding that the "Kenya Government takes pride in the fact that the fundamental rights and liberties of its citizens are enumerated in the constitution and in the existence of an independent judiciary to protect these freedoms."

This careful language balanced the US government's stated commitment to human rights against the imperative of supporting a key Cold War ally.⁹⁴ The only

⁹³ It should be noted, however, that Moi's good gesture overshadowed a terrible simultaneous arbitrariness. After releasing the detainees, Moi proceeded to bar ten other politicians from contesting parliamentary seats in the November 1979 General Election.

⁹⁴ The Cold War realism was such that in 1983/1984 issue of the US Army funded *Kenya: A Country Study* expressed great admiration of the Kenyan constitutionalism, at a time when President Moi had detained university professors without trial and used the aftermath of an attempted coup to ruthlessly purge the ruling party of elements who might offer competition. In hindsight, therefore, the following remarks are preposterous

indication that something was amiss was in the following language contained in the Human Rights report quoted above: “Nevertheless, the Government also has and sometimes uses detention provisions and other restrictive powers which it strongly defends as necessary in order to maintain law, order and public security. These powers have sometimes been used to silence critics of the senior leadership...The detention laws exert an inhibiting influence on public exchange of views on sensitive political topics.”

Moi’s release of his critics from detention, however, was but the lull before a storm. The Moi regime was later to be even more repressive than the Kenya regime (Wa Thiong’o Wa Thiongo 1983; Ayittey 1992; Opiyo 1993). Although Wa Thiong’o was released from detention, he was denied his job at the university, and the authorities refused to allow the performance of his play, *Mother Sing for Me*, at either the Kenya National Theatre or at Kamiriithu Village Cultural Center, which was totally destroyed by the government and a technical school built in its place (Bjorkman 1989). Within a few years, Wa Thiong’o was living in exile, where he was to languish until he finally returned to Kenya in 2003. Wa Thiong’o took his detention and exile philosophically, remarking at one time that the “reception of a given work of art is part of the work itself; or rather, the reception (or consumption!) of the work completes the whole creative process involving that particular artistic object” (Wa Thiong’o 1981:82).

Such is the power of artistic expression that Wa Thiong’o’s work served both to provoke authority, thus leading to suppression of dissent, and to advance the course of freedom of expression. Future generations of Kenyans were inspired by his writing. This

In comparison with most countries of Africa, Kenya has maintained high standards of adherence to constitutional and legal standards of the individual. Persons accused of infringement of the law are assured of fair public trials, and the rights of counsel and appeal are respected. Due process is

contribution was noted in a recent publication in the following terms: “Following the example set by Ngugi and his Kamiriithu theatre, but without the confrontation grammar in Ngugi’s theatre production, many groups exploited the popular theatre to depict problems affecting society” (Chesaina and Mwangi 2004 226). The writers are, of course, referring to the decade of the 1990s and early 2000s when expanded democratic space allowed plays banned in the 1980s and to be staged again.

As for JM, perhaps it is important to let Wa Thiong’o, whom I have argued was influenced by JM, eulogize him again by quoting a tribute to JM he published in the *Weekly Review* of March 24, 1975:

But I also know in a sense more deep than words can tell that on Sunday, 2 March 1975, he[JM] wrote one of the most important chapters in the Kenya people’s continuing struggle for a meaningful national liberation from external and internal exploitation and oppression and signed it with his blood...For it was we, we who have kept silent and propped up an unjust oppressive system, because we were eating a bit of the fruits. So we kept quiet when Gama Pinto was killed; when Mboya was murdered; when Kung’u Karumba⁹⁵ disappeared...Then suddenly above the silence of my grief I heard students, youthful voices, shouting defiance, denouncing lies, and singing poems to the struggle, voicing their determination to take up the fallen sword of J.M. and continue the struggle against inequalities in our land...I remembered that Mwangi is the name of a generation; and Kariuki means Born Again. A generation resurrected...This generation will never keep silent again. Not even if they have to pay with their blood. That to me is the meaning and significance of Kariuki’s death (Wa Thiong’o 1981:84).

To Wa Thiong’o, JM’s death can only be seen in freedom of expression terms. Even his death is a kind of writing. It is a perspective with which I agree; JM’s politics, culminating in his murder, represent a crucial episode in the evolution of freedom of

observed by the police, and other guarantees of English common law have with few exceptions been complied with (Nelson 1984:199).

⁹⁵ Karumba was one of the famous Kapenguria Six, the people detained together with Kenyatta in 1952. He disappeared without trace in the early 1970s.

expression. His murder was a strike against political dissent by politicians and he clearly paid the ultimate price for free expression. The subsequent detention of outspoken politicians had such a chilling effect on political debates in parliament that by November 1977, the Attorney-General, Mr. Charles Njonjo, the architect of the regime of intolerance, was complaining that the quality of debate in parliament had gone down (*The Standard* November, 1977). With the silencing of politicians, it was the turn of intellectuals to pick up the mantle. But even the intellectuals were to be silenced with the arrest and detention of Wa Thiong'o. From that moment, the country was poised for ruthless repression as the authority thought it had everything sewn up.

For purposes of the topic at hand, the evolution of freedom of expression, this case study is important for setting the stage for the violent confrontations between forces of liberty and authority in the 1980s that culminated in the political liberalization in the early 1990s. Following this democratization, the regime of Daniel arap Moi clung to power throughout the 1990s into to the early years of the twenty-first century. The significance of this historical episode lies in the fact that it is impossible to understand how the regime was able to survive for so long without considering the events of the mid 1970s, in addition to those of the late colonial Kenya discussed in Chapter Two. It is during these historical periods that authority in Kenya established modes of dealing with dissent which have been effectively used ever since. However, as we shall see in the next case study, tools and modes of dealing with dissent cannot work in circumstances of democracy, particularly when popular pressure combines with international pressure. In the next chapter, I will argue that the period between 1997 and 2003 represents the final

push and the triumph of liberty in Kenya – the forging of an equilibrium necessary for political stability.

CHAPTER FOUR

Freedom of Expression and the Constitutional Debate, 1997-2004

On March 15, 2004, the Constitutional Review Commission of Kenya presented the end results of its seven-year work – the Draft Constitution of Kenya, commonly known as the Bomas Draft.⁹⁶ At last, after a decade of passionately campaigning for a new constitution, Kenyans had a constitutional draft they could ratify or reject in a referendum. However, this draft was not presented for referendum as it met with considerable opposition from several segments of the Kenyan society. Its opponents included those who argued that the process that produced the draft constitution was not democratic and that the resultant document could not therefore represent the views of the people (EAHRR-Kenya 2003: 3). Opposition to the draft also came from some communities, notably the GEMA communities, who feared that its federalist, or *Majimbo*, orientation would ignite negative ethnic particularist sentiments and result in displacement of GEMA immigrants from some parts of Kenya.⁹⁷

⁹⁶ It was called “Bomas” because the main deliberations were held at Bomas of Kenya, a national cultural center in Nairobi.

⁹⁷ *Majimbo* means “regionalism” in Kiswahili, but it has come to be associated with ethnic cleansing. Mutunga and Kagwanja published critique of the *Majimbo* ideology titled: “Is *Majimbo* Federalism? Constitutional Debate in a Tribal Shark-Tank” in the *Daily Nation* of May 20, 2001.

The Bomas draft was subsequently changed in a series of initiatives spearheaded by one section of the NARC coalition government that had come to power after the 2002 general election, and vigorously opposed by the other. The section opposed to the Bomas draft constituted itself around the National Alliance Kenya (NAK), led by President Mwai Kibaki, while the group supporting the draft was the Labor Democratic Party (LDP) led by Rail Odinga, then a minister in the coalition government. What was eventually presented to Kenyans for ratification in the referendum was an adulterated version of the original Bomas draft, now informally called the Wako Draft, so named after Kenya's Attorney General Amos Wako, who spearheaded the changes. Officially, the Wako draft was known as the Proposed New Constitution of Kenya and was a consequence of changes on the Bomas draft made at meetings between competing groups in Naivasha (hence the Naivasha Accord) and at Kilifi (hence the Kilifi Accord). These changes were meant to address disputed sections of the proposed constitution. The referendum was finally held in November 2005, and the draft was soundly rejected. The reasons for the rejection of the draft are beyond the scope of this project. Our focus here is to analyze how the national struggle for democratization and a new constitution in the dying years of the last century and at the dawn of this century shaped the course of freedom of expression in Kenya.

I focus on this period of constitution writing because of the importance of a national constitution. Constitutions are essentially meant to moderate state power (Middleton and Lee 2007:2). They are also an "expression of the general will of a nation" and a reflection of "its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation" (Ebrahim, Fayemi and Loomis 1999:7). Constitutions are the "most symbolic manifestation of a

people's determination to establish an entirely new basis of its polity" (Preuss 1995:2). Unfortunately, as it has been noted, "constitutions in Africa have for long been seen merely as legislation that legitimizes executive action, and establishes the supremacy of the state over society" (Kibara 2003:5). While constitutions may exist for a long time, they are usually rewritten every so often to "solemnly confirm that through its revolutionary actions the people has regained its constituent power, that is, a power unrestricted by rules, institutions, or superior orders and directed only by its unrestrained willpower" (Preuss 1995:2). In the Kenya that is being analyzed in this chapter, the overriding issue was how to reaffirm the people's sovereignty by reclaiming ownership of the constitution. The need to rewrite the constitution emanated from a feeling that the incumbent constitution was not the product of popular will at the time of independence in 1963, and also from the fact that it had been severely adulterated for political expediency ever since (Okoth-Ogendo 1972; Ojwang 1990).

In pushing for a new constitution, Kenyans were hoping that it would achieve two main objectives: First, they wanted to imprint their own ideas about human rights in the constitution. Although there is a bill of rights in the incumbent constitution, it was inserted as an afterthought by the British and some extent by Thurgood Marshall, an American who had volunteered his legal services to the nationalists (Dudziak 2007). The Kenyan negotiators at the Lancaster House series of conferences wanted land and political freedom and while they may have had concepts about human rights, they lacked the language to articulate those rights, let alone express them in suitable constitutional phraseology. It has been noted that

The Kenyan Bill of Rights, therefore, like those of many former British colonies, cannot be said to be representative of a set of higher values emanating from, and

subscribed to, by the Kenyan people. Indeed, it was meant to be nothing more than a bulwark against political power in the hands of “natives,” primarily to protect the interests of European settlers (Munene 2002:142).

The clamor for a new constitution was meant to redress this by ensuring that the bill of rights in the new constitution emanated from the Kenyan people “who were ceding powers of governance to the rulers” (Munene 2002:158).

Secondly, the constitution was expected to increase their freedom of expression in particular and enlarge the democratic space in general. According to Cottrell and Ghai (2004), the movement took the form of constitutional reform because the country’s problems were seen to arise from a constitutional dictatorship that encouraged bad and oppressive governance. The existing constitution created excessive powers for the presidency that resulted in lack of respect for the separation of powers and the rule of law. However, the process of rewriting the constitution and concomitant changes did not eliminate the contest between authority and freedom, which continued to be waged in other spheres of national life. Hence this study also briefly examines the major developments in the evolution of freedom of expression that occurred outside of the constitution writing process.

I begin with an overview of the democratization process in the Kenya in the 1990s with special attention to freedom of expression issues. The struggle was initially about political liberalization, but it soon morphed into a clamor for a new constitution after it was realized that fundamental change was impossible without a new constitution. The constitution making process provided Kenyans with an unprecedented opportunity to vent their long-held grievances. What Kenyans hoped to achieve in terms of human rights and freedom of expression specifically is discussed, and the pressure that the articulation of these ideals exerted on the government indicated. I also discuss how the government

reacted to this pressure by examining the specific legislative and non-legislative reforms while frustrating and delaying constitutional reforms. These developments are discussed in the context of their impact on freedom of expression in Kenya.

Much of the political speech is carried out through the media. This study therefore tends to focus on the debates and reforms that expanded media freedom in particular. However, in so doing, it is acknowledged that the degree to which the media is free parallels the freedom of individuals to express themselves. Thus advances in media freedom should be seen as indicative of advances in individual liberties. Freedom of expression in the Bomas constitutional draft is examined in order to show how the aspirations for freedom of expression of a people shackled by authoritarianism since independence were captured in the constitutional draft.

Finally, I end with an assessment of the significance of the changes that have taken place between 1997 and 2004. This general period has been described as one in which “the culture of resistance in Kenya came of age” (Press 2004:191). In actuality, however, this chapter covers more than this period. As a result, the narrative is interspersed with details that provide the complex backdrop of the crucial era between the period covered in Chapter 3 and the onset of the constitutional debate in the 1990s. I believe this background is important for understanding the evolution of the political-legal and cultural regime of freedom of expression, and I have tried, whenever possible, to integrate some of this background into this chapter.

Political Reforms and Freedom of Expression in the 1990s

The year 1997 is a good starting point for the study of the evolution of free expression in Kenya in the contemporary period. In Kenyan history, it is a symbolic year. It marked a hundred years since the advent of English law on August 12, 1897 (Ghai and McAuslan 1970:19; Maina 1997).⁹⁸ The year 1997 therefore marked an important milestone since the arrival in Kenya of the Western notions of authority and freedom, including how to win liberty from the grip of modern authority. Indeed Wachira Maina, a prominent constitutional lawyer, looked at 1997 as a year for the country to take stock of its constitutional achievements:

A century later, should we celebrate or mourn? We suggest that Kenyans should reflect on the meaning of English law and of colonialism to Kenya as the 20th century comes to an end. Most of us do not know how colonial law spawned the current political crisis... The colonial state was an imposition, a conquest state... The law was used to create a racially segregated society [and] Force was necessary because the English believed Africans were recalcitrant, lazy and in need of some toilet training... independence changed little of the colonial legal legacy... That the Kenyan state should be in this parlous condition a generation after independence is a national scandal. This underlines what is really at issue in current reform efforts (*Daily Nation*, September 17, 1997).

⁹⁸ Although the territory that later came to be known as Kenya was declared a British protectorate on June 15, 1895, the protectorate status applied to foreigners, not natives of East Africa. It took the East Africa Order in Council of 1897 to bring the natives under British law as subjects. This is how Ghai and McAuslan put it:

By 1895, when a protectorate was declared over the rest of East Africa, the British Government's position was that, as against foreigners, as much power as was needed to ensure effective government could be assumed in a protectorate. It might be thought that this same approach would be adopted as against local inhabitants, particularly as full power had been acquired at the coast, but for no every clear reasons this was not the case. The Commissioner (of Imperial British East Africa Protectorate) appreciated that his administration lacked power to deal with local inhabitants, and that this created particular inconvenience in the exercise of judicial powers, and made recommendations to the Foreign Office accordingly. This resulted in the East Africa Order in Council 1897... The powers conferred were expressed to apply to natives of the protectorate in accordance with the Order but not otherwise, and the only matter of which specific mention was made in the Order was native courts (1970:19).

At the formal level, the required changes were in many forms. While some were constitutional, others would involve changes in statutory law. Informally, a new political culture of tolerance of opposing views was needed. However, political culture is often an overlay on written constitutions and laws.

The year 1997 has been called a “particularly active year” and a “milestone in the country’s constitutional history” (Kioko n.d.). There is evidence to support the view that this is the year when both the regime of President Daniel arap Moi and the opposition realized that hard line positions would have to give way to dialogue, horse-trading and compromise. Before this year, the Moi regime had behaved as though it was fully in charge of the course of history, changing the constitution as it pleased, on its terms. A case in point was the repeal of Section 2(a) of the constitution in 1992 that allowed for multiparty politics which had been barred since 1982.⁹⁹

This change was not the product of a negotiation between the government and the people, although there were calls for political changes even then. The government changed the constitution on its own, while treating the opposition with contempt, and “neither the President’s wide ranging powers nor the numerous repressive laws, which mainly originated from the colonial era, were touched” (Peters 2001:33). Although the multiparty elections were held in 1992 for the first time since 1969, the Moi regime continued to deny fundamental freedoms, including freedom of expression, to its opponents. Opposition politicians were routinely harrassed, licenses for meetings denied

⁹⁹ Kenya had been a *de facto* single-party state since 1969, but became a single party state by law following the constitutional change in 1982. It is important to note that the change to this controversial section of the constitution was done in a parliament controlled by KANU. Although the opposition was exerting a lot of pressure on the government, it would be untrue to say that this change was dictated by the opposition. There was little else short of a revolution that could have forced the government to do the bidding of the opposition.

and their political rallies broken up by the police.¹⁰⁰ The civil society faced the same fate, with many activists being violently attacked. President Moi also continued taking a hardline position on the issue of reforming the constitution. In effect, Moi's party, KANU, was the only national political force in the 1980s (Throup 2001).

But things clearly took a different turn in 1997. Nothing represents this change of heart better than the series of compromises called the Inter-Parties Parliamentary Group (IPPG) on legal reforms, whose achievements "marked a few steps in the long journey towards full democratization" (Asingo 2003:26). This was an informal grouping of government and opposition parliamentarians who took the initiative to find a middle-ground and a way forward after the noisy, acrimonious confrontations of the mid 1990s produced an impasse on the path to political reforms. We shall return to the specifics of this deal later. To understand what was happening in 1997, it is necessary to briefly review the changes preceding the events of 1997.

After Kenyatta's death in 1978, and the ascension to power by President Daniel arap Moi, things took a turn for the worse. As noted in Chapter 3, Moi started by releasing key dissidents from political detention, thereby giving the impression that he was going to be more tolerant than Kenyatta. But he soon revealed his true colors. He used the 1979 general election to end the political careers of his bitterest enemies. Those like Kihika Kimani, a parliamentarian from Nakuru, who had openly campaigned for the constitution to be changed in order to prevent Moi from ascending to power unexpectedly lost their parliamentary seats. To frustrate Kimani financially, Moi suspended land

¹⁰⁰ One of the most notable cases at this time was the trial of Koigi wa Wamwere, his brother Charles Kuria Wamwere and G.G. Njuguna Ngengi. The trio were sentenced to four years in prison and six strokes (lashes) of the cane for their political beliefs in 1996, following a trial that the US Congress described as

allocations (Widner 1992: 128).¹⁰¹ A cabinet reshuffle took care of other formidable adversaries such as Kenyatta's confidant, Mbiyũ Koinange, who was moved to a nondescript ministry. Others such as Njenga Karume, former Chairman of GEMA, were co-opted into the government where they continued to be watched closely (Widner 1992; Kariuki 2001).

After the attempted coup of 1982, a thoroughly shaken Moi became increasingly paranoid, and sought to consolidate his rule. Parliament passed a constitutional amendment that inserted the famous Section 2A, which barred the formation of political parties in the country. Many dissidents, mainly university Professors and students were detained, imprisoned or forced into exile. Moi also purged the government of all critics and frustrated the careers of anyone who appeared likely to represent a credible challenge (Tostensen and Scott 1987; Harden 1990; Widner 1992). To make rigging easier, Moi introduced the *Mlolongo* voting system, under which supporters queued behind political aspirants or their agents. The people standing in line behind the candidates or their agents were then counted and the politicians with the most people standing behind them were declared winners. This system was highly susceptible to abuse. Once people dispersed and returned home, numbers could always be changed as there was no paper trail, and it was virtually impossible to reconstitute the lines.¹⁰² The system also subjected voters to intense social pressure, particularly vulnerable groups like women, the poor, and business

“inconsistent with international legal standards” (*Africa Policy E-Journal* 1996).

<http://www.africaaction.org/docs96/ken9601.htm> (Accessed April 2, 2008).

¹⁰¹ Kimani had made his wealth through a series of land buying companies.

¹⁰² The *Weekly Review* of September 22-27, 1988, summed up the 1988 KANU nomination elections as follows:

On Monday, many people who made it to parliament unopposed were nominated by a much smaller number than that which brought the previous occupiers of those seats to Parliament in 1983. That is clearly not what the queue system was intended to achieve.

people who feared that their overt political choice might adversely impact their businesses.

Moi used this new system to rig out independent minded politicians like Kenneth Matiba and Charles Rubia. Even his own Vice-President, Mwai Kibaki, was dangerously threatened and he was eventually demoted to the ministry of health. To make matters worse, Moi engineered bills in parliament to remove the security of tenure for high court judges and the attorney general (Widner 1992). Moi could now remove independent minded judges at will, without having to resort to constitutional tribunals and other time-consuming due process requirements. At one point the Chief Justice declared the Constitutional bill of rights to be incapable of enforcement (EAHRR 2003:1).

Meantime, a campaign was afoot to pursue dissidents organized in small underground movements, the most prominent of which was Mwakenya. To clamp down on such mushrooming clandestine groups, “the government became even more repressive” (Odhiambo-Mbai 2003: 67). People would be arrested on being suspected of being members of Mwakenya and tortured as documented in a recent book (Citizens for Justice 2003).¹⁰³ On the other hand, people were forced to accept KANU through compulsory membership and civil servants could be barred from entering their offices when they failed to produce their KANU membership cards (Widner 1992: 1-3; Tostensen and Scott 1987: 97).

KANU membership became necessary as a protection against intimidation by unruly KANU youth wingers and the police...KANU was increasingly promoted

¹⁰³ This book is a compilation of personal experiences of torture victims at the basement of Nyayo House in downtown Nairobi.

as a mass movement and periodically restructured to increase party power” (HRW 1991: 13-14).

This scarcity of freedom of expression extended to the media sector as well. In the mainstream media, there existed “limits beyond which political commentators [could] not venture” without risking victimization and even detention (Tostensen and Scott 1987: 118). Editors and reporters were routinely harassed by the police, roughed up or detained (HRW 1991; Opiyo 1993). To survive, editors practiced self-censorship:

For the many who do not master the techniques of writing between the lines, self-censorship may represent the only logical response. Articles then tend to focus on themes which are unlikely to cause any offense or controversy. If not, the author may be branded, in the name of nation building and consensual politics, as an anti-*Nyayo* radical, or as a purveyor of foreign ideologies, or a disloyal rumour monger (Tostensen and Scott 1987: 118).

The flawed elections of 1988, coupled with widespread suppression of dissent,¹⁰⁴ lack of political choice, worsening economy, and tribalism combined with examples of political changes in the former Eastern Bloc countries to produce a groundswell of desire for change. There were regular street protests which were ruthlessly put down by the police. In 1991, Moi finally allowed multi party politics.¹⁰⁵ He did this not because he became converted to the idea of competitive politics, but because of his desire to contain or somehow control this change. To illustrate how powerful Moi was, in 1992, the newly appointed attorney general Amos Wako, in his inaugural speech, felt compelled to declare that Moi was above the law (EAHRR 2003: 5). A combination of the advantages

¹⁰⁴ Adar and Munyae have stated that “between 1989 and 1991, Kenya saw one of the worst human rights violations in its history” as Moi “accused advocates of multiparty politics of subversion, and thereby got a fresh excuse for detaining a new generation of his critics” (2001).

of incumbency, coupled with a splintered opposition, ensured Moi's return to power in 1992 after an election that observers nevertheless credited with having reflected the will of the people despite being flawed.

Things did not change after the elections. It has been noted that "although the country had reverted to a multi-party system in December 1991, Moi continued to govern Kenya as an autocratic state" (Odhiambo-Mbai 2003: 67). Between 1992 and 1997, it could be argued that Moi was under the illusion that he would somehow change the course of history by using a combination of political guile, brute force, stonewalling and feet dragging. His regime became extremely sophisticated in the methods it was using to frustrate change: outlawing and violently breaking up demonstrations, introducing contentious media bills meant to intimidate, controlling the state-owned media, monopolizing the electoral process, instigating tribal clashes and using state resources to campaign and buy political support (HRW 1993; Article 19 1995; Adar and Munyae 2001).

What is clear is that the advent of multiparty politics confirmed the worst fears that the government had about freedom of expression. Activists of all kinds were emboldened, despite the oppression, and the Nairobi of the early 1990s resembled a war zone as demonstrators battled the police.¹⁰⁶ An abrasive alternative press emerged that practiced a kind of crusading, adversarial journalism that had not been witnessed in Kenya since the period covered in Chapter 2 of this study. *Society* Magazine became the first publication in Kenya to draw a cartoon of President Moi and to place it on the cover!

¹⁰⁵ Article 2A of the constitution was repealed by Article 1A which states: "The Republic of Kenya shall be a multiparty democratic state."

¹⁰⁶ *Saba Saba* riots of July 7, 1991, are some of the most memorable demonstrations.

At first, the government resorted to the usual methods curbing free expression, including arrests and prosecution under all kinds of oppressive laws in the books. Upon arrest, journalists and publishers were often arraigned in court hundreds of kilometers from their residences. When this harassment drew too much criticism, the government fell back on more ingenious methods, including sending security operatives to disable printing presses and cart away vital parts of the printing equipment. In one such raid in 1993, the police totally immobilized Fotoform, a private printing press whose client list included such notable alternative publications as *Finance*, *Economic Review*, *Society*, and *Nairobi Law Monthly* (Nyamora 2007).

The government appears to have decided that the best way to tackle the challenge posed by too much freedom of the media was to sponsor legislation to regulate the way the media operated. A key component of these legislative reforms affected the mass media sector. There are two main reasons why the government opted to undertake reforms in the media sector. One, the government desired to showcase Kenya's new pluralist and democratic credentials, and reform in the media was a necessary weapon for backing this rhetoric of democracy, particularly if the reform was presented as liberalizing the media. It should be recalled that the government was not a willing participant in the democratization process.¹⁰⁷ Media reforms were, therefore, undertaken as an image-building initiative, a card which the government could play to reassure its critics (Gret 2001: 7).

¹⁰⁷ President Moi himself made it clear that the multiparty democracy was imposed on Kenya by International Financial institutions (Munene 2001). By embarking on media reforms which the government did not believe in, the government hoped that both the local opposition and the international donors would be appeased. This situation can account for the slow pace of these changes (Gret 2001:8).

Secondly, the government was really concerned with the conduct of the media. The alternative press that emerged after the democratization episode of the early 1990s was not willing to play by the rules of professional and ethical conduct, and tended to “champion mainly the political causes of the ethnic groups to which their proprietors belong” (Odhiambo 2003). Authoritarianism had acted as a safety valve for tribal sentiment, and the government was concerned that free expression would destroy what it regarded as the work of bringing the communities together that it had undertaken since independence.

In 1993, the government appointed the “Task Force on Press Laws” under the chairmanship of Hillary Ng’weno, perhaps the most prominent Kenyan journalist at that time, who was the publisher of the *Weekly Review*. The task force was charged with the responsibility of studying information access and dissemination, ethical and Professional standards for journalists and their reinforcement, and self-regulation of the media ideally through a media council or similar body. It was also to study the composition, functions, duties and procedures of such a body, media ownership, licensing, and development. Additionally, it was to also recommend “a comprehensive legal framework for the exercise of the freedom of the Press and the development of a dynamic and responsible print and electronic media” (*Kenya Gazette*, Legal Notice No. 6889, December 24, 1993:12).

In 1995, the task force presented its recommendations to the Attorney General, Amos Wako, who immediately drew up the Press Council of Kenya Bill and a Kenya Mass Media Commission Bill in January 1996. However, these bills were withdrawn hastily as their contents leaked out. Critics, mainly journalists, lawyers, scholars, and

donors said they were aimed at controlling the press (Dixon 1997: 171; Odhiambo 2003:304). Gitau Warigi, a prominent columnist, argued that the bills were a replica of the controversial Nigerian Press Council Decree No. 85 introduced by Nigerian dictator Sunny Abacha and that one of the bills even included a grammatical error in one section (*The EastAfrican*, January 22-28, 1996).

But the government was not to be deterred. In 1996, the Task Force on Press Laws was reconstituted, this time under Horace Awori, a former chair of the Foreign Correspondents Association. This time round, the task force collected views from a wide base: media organizations such as the Kenya Union of Journalists, the Kenya Community Media Network, Media Owners Association, Advertising Association of Kenya, university lecturers, and editors. Others included political parties, civil society and religious organizations. It even sought the views of regional media organizations such as the Media Institute of Southern Africa (MISA), and media organizations and practitioners in Uganda and Tanzania, as well as regulatory authorities in those countries. For almost two years, the task force studied and wrote its report, which it finally submitted to Attorney General Amos Wako. A key recommendation of the report was that a body to be called the Independent Broadcasting Authority (IBA) be established to regulate the allocation of frequencies in the broadcasting and telecommunication sectors (Gret 2001:7).

The government immediately bought the idea but not the name, and brought the Kenya Communication Commission Bill before parliament. This bill updated the Kenya Posts and Telecommunications Act (Cap 221) of the Laws of Kenya, with an offshoot called the Communication Commission of Kenya Act (Cap 2 of 1998). The Act

established the Communication Commission of Kenya (CCK) as a regulatory body, fashioned along the lines of the US Federal Communication Commission (FCC). It will be argued later that this change, while an important development for freedom of expression, brought in an era of confusion as government became increasingly reticent about giving licenses and frustrated entrepreneurs by delaying licenses for broadcasting.

Free Expression and the Push for Reforms in 1997

It is important to remember that although considerable progress for democracy had been made since 1990, freedom of expression was still very much limited in 1997. True, Kenyans could form political parties. Parliament, where there is absolute immunity, was lively, and as already stated, a number of laws had resulted in privatization and liberalization of channels of communication. Additionally, many reform bills and task forces had been established. Such changes, however, did not automatically translate into the long desired freedom of expression. Old ways of suppressing freedom developed in the colonial and early postcolonial period lingered, and new methods of suppressing expression were even invented as the Moi regime attempted to hang on to dear life.

Perhaps an incident that best illustrates the status of freedom of expression in 1997 is to be found in Nobel Laureate Prof. Wangari Maathai's memoir, *Unbowed*. She tells of her struggle against the excision and development of Nairobi's Karura forest, a 2500-acre island of biodiversity, which she describes as the "lung of the congested metropolis" (Maathai 2007:262). In late 1997, she was informed that private developers were putting up structures in the forest. She mobilized other members of her Greenbelt Movement and went to protest at Karura. The government initially tried to stop the

demonstration using the police, but by now, the government was keen to show its democratic credentials, so the police did not break up the demonstration violently. As Maathai tells it, those who had been allocated land were informed that it was up to them to protect their own property from intrusion by the environmentalists.

On her third visit to plant a tree at the entrance of the forest accompanied by six parliamentarians, journalists and German environmentalists, she was thoroughly beaten by hired thugs. The police, who were present, did not arrest the perpetrators. Maathai ended up in hospital (Maathai 2007: 266-269). The government had privatized violence (Kagwanja 2001:72) and it was a very dangerous time for demonstrators. HRW noted in one of its reports that some politicians had “recruited *ad hoc* ‘private armies’ of jobless youths as their personal bodyguards” and had used those groups “to rough up their opponents” (2002: 12). Freedom of expression was not just threatened by official government functionaries, but also by private armies.

Those challenging the government directly had even bigger problems. When the opposition and civil society organized an unlicensed rally in the historic Kamukunji grounds in Nairobi on May 3, 1997, the government sealed off the ground with a strong force of GSU troops and no one could reach the grounds. A similar rally was organized for June 1, or *Madaraka* Day, the anniversary of Kenya’s self-government. This rally also met the same fate (Peters 2001: 40). When plans emerged that civil society and members of the opposition were planning to disrupt the reading of the Budget in June, “strong security forces around parliament, and in town, ensured that no opposition demonstration took place” (Peters 2001: 41). However, unknown to the government, the opposition parliamentarians had an alternative plan for disrupting the reading of the budget:

James Orengo, a lawyer, vice-Chairman of FORD-Kenya and the most ingenious member of parliament, rose on a point of order and argued that the discussion of legal and constitutional change had precedence as a matter of national urgency over the budget speech. No sooner had parliament speaker Francis Kaparo (KANU) rejected the motion of adjournment, all hell broke loose. In the presence of Moi and transmitted live by Kenya Broadcasting Corporation (KBC), the opposition displayed placards and interrupted Mudavadi [Musalia, Finance Minister] constantly on points of order which were dismissed by Kaparo. Three parliamentarians, among them Paul Muite, then tried to grab the mace, the symbol of the constitutional authority of the House. They engaged in almost physical quarrels with Cabinet Minister Nicholas Biwott and others who defended the mace. Until KBC abruptly stopped the transmission, the public witnessed an unprecedented face off between the opposition parties and the government (Peters 2001:42).

This became an iconic moment for the struggle for free expression – parliamentarians extending the struggle into the chambers when other avenues for expression were blocked. The opposition organized another series of countrywide rallies a few days later, on July 7, the anniversary of the first multiparty rally in 1991 called *Saba Saba* (Seven Seven or July 7). This time round, the police were unrestrained. Chaos reigned in Nairobi the entire day and at least 14 people were killed and unknown number was injured, including several politicians and reform activists. At Nairobi's All Saints Cathedral, members of the GSU stormed the compound and the Cathedral and beat up people who had taken refuge, injuring Rev. Timothy Njoya, a prominent critic, who was only saved by foreign journalists (Peters 2001: 42; Press 2004). Many observers of Kenyan politics have always predicted that Kenya would disintegrate.¹⁰⁸ Assessing the 1997 riots in the *Sunday Nation* of January 13, 2002, columnist Mutahi Ngunyi wrote that

¹⁰⁸ It was first said that Kenya would not survive after Jomo Kenyatta, who was seen as holding the country together through his legitimacy as a nationalist and sheer father-figure charisma. The assassination of foreign minister Robert Ouko was another test for the country, as were the riots in 1991, and the tribal clashes in 1993. It was also expected that the transition after Moi's retirement would be a difficult one,

“these were serious” riots in which Kenyans “fraternized with the possibility of violent death, civil war and Rwanda-type genocide.”

Such was the status of freedom of expression in the Kenya of 1997. An increasingly erratic government was threatening its citizens with draconian violence, while at the same time apparently outsourcing aspects of intimidation to private armies. This situation was untenable in the long run. It energized the reform lobby, which now pointed at the violence to demonstrate the urgent need for reforms.

The IPPG Deal and Free Expression

With no end in sight, “activists began to focus on the goal of a new constitution as a way to reduce Presidential powers and pave the way for a fair election they hoped would result in a regime change” (Press 2004: 199). Civil society groups mainly based in Nairobi and led by elite Professionals such as lawyers, scholars, priests, journalists, and activists of various kind had already started agitating for constitutional reforms, but the events of 1997 underlined the need for a new constitution.¹⁰⁹ One such lawyer was Gibson Kamau Kuria, who had expressed the view that constitutional review was necessary because all the 33 constitutional amendments except one that had taken place since independence were “designed to weaken democracy or to banish it altogether” (2002).¹¹⁰

causing writers like Ndegwa to remark after the smooth transition that Kenya was “third time lucky” (2003).

¹⁰⁹ The campaign for a new constitution started on November 3, 1994 when three NGOs, the Law Society of Kenya, the International Commission of Jurists (Kenya Chapter) and the Kenya Human Rights Commission publicly presented the draft of a model constitution called the “The Kenya We Want” (*Kenya Tuitakayo* in Kiswahili). The draft proposed a new, more democratic framework for multiparty democracy (Peters 2001:32-33).

¹¹⁰ The lone constitutional amendment that had a positive impact according to Dr. Kuria was “the amendment, passed in 1977, which took away from a property owner whose land had been expropriated by

Many of these groups coalesced around the Citizen's Coalition for Constitutional Change – called 4Cs – which became the main civil society lobby group spearheading the campaign (Cottrell and Ghai 2004:3). In early 1997, these groups organized a National Convention Assembly (NCA) to consolidate action for constitutional reform by citizens. NCA's executive arm, the National Convention Executive Council (NCEC), was charged with the responsibility of broadening the process to include the participation of ordinary citizens.

Meanwhile, a kind of constructive engagement was taking place, forced in part by the incessant marches, street protests, rallies, and meetings as well as international pressure. Four days after the anniversary of the Saba Saba riots, President Moi agreed to meet the elected leaders of the reform movement and to a review process and even announced that he was ready to invite six or so experts from abroad to help draft the constitution. These promises, however, never materialized. Moi argued that the civil society was not representative of the Kenyan people (Peters 2001: 43), and civil society reverted back to mass action, leading to a dangerous impasse pitting a well-armed obstinate government against equally determined civil society groups and the opposition (Cottrell and Ghai 2004:3).

Finally, opposition political parties who were supported by religious leaders, abandoned the more confrontational civil society process which had by now been converted into a Citizens Constituent Assembly (Peters 2001:45), and negotiated a deal with the government that created a new forum called the Inter-Parties Parliamentary

the Government, the right to repatriate the proceeds of the compensation to any country of his/her choice. This right, which had been conferred after independence, was obviously detrimental to Kenya since it gave the power of veto of development to a few property owners and made it burdensome for the Government to acquire property for public purposes" (2002).

Group (IPPG). It was an informal process involving meetings and discussions between KANU's 70 MPs and 36 opposition MPs aimed at identifying areas of common ground where reform could be advanced. These included "the independence of the electoral commission, repeal of a number of laws restricting civil and political rights, freedoms of association and expression and the annulment of the offence of sedition which had been used extensively for a number of years to arrest and imprison people who agitated for reform" (Cottrell and Ghai 2004:3). It also agreed that the constitution would be reviewed after the passing of an act of parliament authorizing the review.

The common thread in all these targeted laws is their potential to either advance or curtail freedom of expression in general.¹¹¹ The resultant legislative reforms in general were in reality the pragmatic middle ground between a government that was reluctant to change the constitution, and a crusading opposition that wanted nothing short of fundamental change. Some of these changes affected the very statutory pillars of authoritarianism. A good example in this regard is the Preservation of Public Security Act.

This law, which had been inherited from the colonial authorities at independence, provided for the arrest and indefinite detention without trial or appeal to any court except a detention tribunal established under the same law at the discretion of the President. This law was amended by the Statute Law (Repeals and Miscellaneous Amendments) Act of 1997. Under the amendment, the detention of persons for political reasons was outlawed.

¹¹¹ Some of the IPPG agreements were consummated with a handshake, while others were earmarked for registration. An example of an IPPG proposal that was never legislated into law was one requiring political parties to recommend names of commissioners for appointment to the Electoral Commission of Kenya (ECK). In the 2007 general election, this oversight was to return to haunt the country when President Kibaki reneged on the IPPG guidelines when appointing new commissioners to replace those whose tenure had expired. President Kibaki had acted as per the existing law, but disregarded the non-legal agreement.

Thus, the amendment facilitated greater freedom of expression. For years, this law had been used to restrict the right of assembly by requiring public meetings to be licensed. The requirement that political parties get licenses from the provincial administration before holding public meetings was removed (Kibara 2003:3) and replaced with a notification requirement under which those intending to hold meetings were required to simply notify the police three days before the planned meeting took place (US Department of State 1999).

Another law that was repealed in 1997 was the law of sedition, which had been used to terrorize journalists, writers, and politicians and activists throughout post-colonial Kenya. Section 57 (1) of the Penal Code made it an offense for a person to print, publish, sell, offer for sale, distribute or reproduce any seditious publication. Seditious intention was deemed as:

- a) an intention to overthrow the government; to bring into hatred or contempt or to excite disaffection against the person of the President or the government of Kenya;
- b) an intention to excite the inhabitants of Kenya to attempt to procure the alteration of law by unlawful means; to bring the administration of justice into hatred or contempt; or to promote feelings of ill will or hostility between different sections of classes of the population.

The trawling nature of this law was a big obstacle to free expression and its removal a major advance for freedom. The amendment also created a Prohibited Publications Review Board that would review all the publications that had been banned previously, as well as any controversial future publications, and advise the minister if the ban should be lifted (US Department of State 1999). This new board would also advise the minister and its advice would be binding. The creation of this board introduced a new

layer of authority as opposed to the arbitrariness of ministerial edicts, but it was seen as a positive development because it somewhat devolved powers then vested with the minister.

Also repealed was the Societies Act (Cap 108, Laws of Kenya), and the Chief's Authority Act (Cap. 128, Laws of Kenya). As we saw in Chapter Three, these two laws negatively impacted freedom of expression. The Societies Act, which gave the Registrar of Societies wide discretion, governed the registration of organizations, including political parties, and it is the law that was for many years used by the government to restrict registration of parties by individuals opposed to the government. The 1997 amendments introduced a requirement for a timely response by the registrar to applications for registration. In the past, the registrar could sit on applications for long periods of time without explanation. Also introduced was a right of appeal to the High Court if the registrar of Societies denied an application.

The Chief's Act, on the other hand, gave power to the Provincial Administration bureaucrats to curtail freedom of association and of expression at the local level. Chiefs constitute the first tier of government in the locations. While their role could often be benign, Chiefs were often prone to illiberal interpretations of their role. At the height of their power in the 1980s, they often denied licenses even for evening gatherings to support families in days preceding funerals.

Other changes included barring administration officers from participating in partisan politics; barring the police force from discriminating against people on the basis of political beliefs; removal of the Presidential prerogative of nominating 12 members of parliament and its replacement with a system where parliamentary parties would share

the seats on a *pro rata* basis; an agreement that parliamentary parties would nominate 10 commissioners to the Electoral Commission of Kenya (ECK); and an agreement that an act of parliament would be set up to review the constitution after the 1997 general election (Peters 2001: 46; Kibara 2003:3).

The IPPG changes have been criticized for not resulting in far reaching changes that the public needed.

Post IPPG changes benefited mainly the political class seeking power, but did not materialize into substantive institutional reform. One of the reasons for the failure of the IPPG reforms, if not the primary one, is that they were designed, negotiated, and implemented “top-down.” They ignored the legacy of autocracy and absence of independence of the civil service, public broadcasting and the police (EAHRR 2003:4).

However, the IPPG agreements did result in considerable advance for freedom of expression. The US State Department noted in 1999 that the “reforms passed in late 1997 have improved the degree of freedom of speech and of the press which, while still limited, is substantially greater than 5 or 10 years ago, and the number of periodicals critical of the government continues to grow” (1999). Important reforms were indeed negotiated, such as the repeal of the Public Order Act and other oppressive legislation. What justifies the criticism of the IPPG package of reforms, according to the *Sunday Nation* of June 2, 2002, is that “once the coast was clear and the NCEC-driven demonstrators had cleared the streets, the government neglected to implement the changes in the same spirit it had promised when the IPPG was being negotiated.”

Constitutional Reforms and Freedom of Expression

With these contentious laws having been repealed, attention was focused even more intensely on constitutional review. On December 8, 1997, the Constitution of Kenya Review Commission Act became law (*Kenya Gazette Supplement* No. 73 of 1997). It established the basis for constitutional review and established organs to facilitate the collection of views from members of the public on the kind of constitution they wanted. This Act was heavily criticized by the civil society because it was seen as the product of executive decision which had been reached without the participation of progressive forces or the people. It was also criticized for what was seen as its inadequate mechanisms for ensure maximum participation by citizens in making their own constitution. When the Act was amended to allow popular participation, this was seen as victory of sorts. The Constitution of Kenya Review (Amendment) Act of 1998 allowed 54 stakeholder groups to be included in the process as agreed in the IPPG series of meetings.

Sensing that the opposition was gaining the upper hand in the process, President Moi, who was always anxious to control the constitutional review process and minimize popular participation, announced in June 1999 that the review was to be carried out solely by parliament and not by an independent body consisting of members from parliament and the civil society (ICJ 2000: 227). To him, the civil society leaders were unelected and could therefore not claim to represent any known constituency. This decision provoked controversy within Parliament and led to public demonstrations in Nairobi as mistrust of parliamentarians was widespread.

The initial exclusion of civil society groups from the constitutional reform process led to increased political protest and calls for a more democratic society. Police responded to these protests with mass arrests and physical violence, including the use of tear gas and sometimes, live ammunition. The genesis of these protests lay in the fact that although the ruling party KANU did not control all the MPs in parliament, it was clear to Kenyans that parliamentarians were susceptible to influence from the government through all manner of unscrupulous inducements. If the process of redrafting the constitution was entrusted to politicians in parliament, then the possibility was real that the new constitution would be compromised.

The government response to criticism was in the form of a Parliamentary Select Committee on Constitutional Review led by Raila Odinga.¹¹² It was formed in in December 1999, with Moi's blessings, to seek views from members of the public "on how the Constitution of Kenya Review Act can be improved" (*The Daily Nation*, December 29, 1999). This committee was designed to buy time and stem criticism of the idea of parliament's monopoly on the reform process. Aware of this political gimmick, religious leaders and other civil society leaders established a parallel "faiths-led" constitutional review process called the People's Commission of Kenya (PCK), or the *Ufungamano* (Swahili for reconciliation) Initiative, as an alternative process to reform the Constitution. It was comprised of Christians, Muslims, Hindu, and other religious organizations. By starting the PCK, the leaders of Ufungamano wanted to "force the

¹¹² Although Raila Odinga was one of the leading lights in the opposition, he had steered his National Development Party (NDP), into co-operation with Moi's KANU. His selection to chair this committee, while it might look like substantial achievement by the opposition, in effect represented government victory, albeit a temporary one.

government to agree to a single national process” of constitutional reform (Mutua 2008: 119).

The Raila Parliamentary committee released its report on April 6, 2000, and it was clear from the report that the committee had heard what it wanted to hear. According to the *Daily Nation* of April 7, 2000, the report said that “President Moi should have a key role in reviewing the Constitution” and that he should “personally appoint the 15 Commissioners the committee wants to oversee the reform from a list of 21 names given to him by Parliament.” The report was heavily criticized by some clergy and the NCEC for radically departing from the assumptions and structures contained in the CRCK Act (*Daily Nation* April 8, 2000). In July 2000, the Constitution of Kenya Amendment Bill was passed, providing for the appointment of 15 commissioners to review the Constitution.

There were also increased reports of state supported gangs assaulting members of the political opposition and dispersing protesters. For instance, on November 26, 2000, at the Tumsifu Center in Kisumu, a group of youths violently disrupted a public hearing on the constitution organized by *Ufungamano* Initiative, attacking the panelists and members of the audience alike and burning a vehicle belonging to *Ufungamano* (*Daily Nation*, November 27, 2000). Although the government could be censured for not doing enough to protect protesters, the genius of using thugs to disrupt demonstrations was that the violence could not be directly linked to the government in the same way the government could be blamed if the violence was meted out by uniformed police (CRCK 2002).

On November 11, 2000, Prof. Yash Pal Ghai was appointed Chairman of CRCK after recommendations from his former student, Attorney General Amos Wako. He floated and pushed the idea of a joint commission formed by the parliament-led commission and the Ufungamano Initiative. After lengthy negotiations, preparations for the merger of the two constitutional review teams began in January 2001. A final report of the drafting committee, proposing a united constitutional review process, was issued on March 15, 2001.

However, another contentious issue cropped up. The Ufungamano Initiative had proposed the inclusion of 12 experts to join the commission. One justification for the inclusion of experts was the infusion of external and comparative expertise in constitution making as the commission was made up mainly of politicians some of whom lacked the requisite education for grasping complex issues of constitution making. Another reason, Ufungamano hoped, was that the experts would support the views of the civil society more than they would support those of the ruling party. As it turned out, Moi questioned the credibility of the experts and they were not included (CRCK 2002; Cottrell and Ghai 2004).

But this was not the end of the challenges. On April 18, 2001, the Law Society of Kenya, which was linked to activists in the civil society, declared the Constitutional Review Commission of Kenya to be in office illegally, arguing that according to the CRCK Act, the commission should have completed its work by January 25, 2001. This move by the law society, besides following the law to the letter, was meant to serve another purpose. The law society felt, as did many in the civil society, that the constitutional review process was dominated and controlled by the government right

from the start. An end of the Commission's tenure, it was felt, represented an opportunity to re-start the process, this time round with proper representation of all stakeholders and viewpoints.

The Constitution of Kenya Review (Amendment) Bill or "Merger Bill," which accommodated the inclusion of the additional commissioners, was adopted by parliament on May 8, 2001, bringing the total number of commissioners to 29, excluding the Attorney General and the Secretary who were ex-official members. With the successful merger, the law society's opposition appeared to taper off when in June 2001, President Moi appointed the 12 members nominated by the Ufungamano initiative, with the result that civil society was now included in the constitutional review process (CKCK 2002).

Thus constituted, the CRCK in December 2001 embarked on its work of collecting Kenyan views about the constitution they wanted. As per Section 2B of the CRCK Act the Commission established District Documentation Centers, various groups were allowed to embark on civic education using a curriculum they developed in conjunction with the Commission in September 2001. After the public hearings, the Commission established a National Constitutional Conference, consisting of Members of Parliament, representatives of districts elected by the county councils, the Commissioners, representatives of political parties and about 125 representatives of civil society, to debate the recommendations for a reformed constitution as drafted by the Commission (CKCK 2002).

Despite the commencement of the collation of public views, the process that led to the creation of the Constitutional Review Commission of Kenya was seen as one that was skewed in favor of the KANU government. Prof. Peter Anyang' Nyong'o, a

prominent political scientist and an activist, remarked that the “whole thing is a charade,” arguing that although a constitution would eventually be written, Kenyans should not “delude themselves that you will have contributed to it” (Wajibu 2002). A consideration of developments outside of the constitutional review is therefore in order as some of these developments resulted in more tangible impacts, some negative and some positive, for freedom of expression than the stillborn constitution.

Regulatory Changes in Specific Media Sectors

While the struggle for a new constitution was taking place with a view to expanding freedom of expression and democratic space, other attempts were being made in parliament to reform statutes that hindered free expression. I will focus on the specific regulatory reforms in both broadcasting and print media as case studies to illustrate the slow deregulation of these vital sectors of free expression during Moi’s last term in office and at the height of the struggle for constitutional reform.

Broadcasting

One of the key sectors targeted for suppression was broadcasting, including vernacular radio. Radio had always been closely regulated in Kenya, perhaps because of its potential for exploitation in nefarious agitational schemes (Heath 1992). However, the number of radio stations had increased steadily since 1996, rising to 13 operational private radio stations in 2000 (CPJ 2000). The situation was worse in the Television sector. By 1999, only two television stations were operational – Kenya Television Network (KTN) and Stellavision (STV), in addition to the government broadcasters Kenya Broadcasting

Corporation (KBC) and its affiliates (Wanyeki 1999: 15). This low numbers of operational stations belied the huge demand for licenses that existed. However, it was impossible to know how many licenses for radio and television were pending as such data was considered “classified information” (Makali 1999: 13).

What is clear, however, is that these stations broke the monopoly enjoyed by the KBC, which had not faced competition since inception.¹¹³ Initially, the licenses for broadcasting stations were awarded to carefully vetted political supporters of the regime. The first private television license was given to KTN, associated with the business interests of the clique around President Moi, in April 1990. In July of the same year, another license was issued to Stellavision, a company belonging to *Weekly Review* Publisher Hillary Ng’weno, who had by now toned down his criticism of the government. However, this station did not start broadcasting until the mid 1990s (Makali 1999: 13).

Then, in 1999, things changed when a license was given to the independent Nation Media Group, which had the monetary and professional resources to really threaten the government monopoly. To ensure this did not happen, the new licensees were restricted to Nairobi and surrounding areas, which were, in any case, opposition strongholds, meaning they would be preaching to the already converted, leaving large swathes of the country at the mercy of KBC, which continued to operate in such a way that it severely limited “the ability of opposition leaders and other critics of the government to communicate with the electorate,” contrary to the IPPG agreement which

¹¹³ Even religious radio programs such those produced by the African Inland Church-run *Bibilia Husema Studios* (The Bible Says Studios), were aired through Voice of Kenya (VOK) and later KBC.

required the KBC to adopt a kind of “fairness doctrine” and to accord equal treatment to all political parties (KHRC 1997c; US Department of State 1999).¹¹⁴

The first privately owned vernacular radio station, *Kameme* FM, was started in February 2000, and it quickly gained popularity (US Department of State 2000). In spite of its limited area of coverage, it attracted both advertisers and audiences away from the state broadcaster, KBC. President Moi did not take this kindly. The broadcasting stations became threatening because of their reach, language of delivery, and potential for political agitation. In August 2000, Moi declared that vernacular radio stations promoted “tribal chauvinism and undermined national unity,” and asked the Minister for Information, Musalia Mudavadi, and the attorney General, Amos Wako, to enact a law to force private radio stations to broadcast only in English and Kiswahili (CPJ 2000).

In October 2000, Moi again threatened vernacular radio stations with closure if they did not become “transparent” and promote national unity (O’Doul 2000). To Moi, the stations could be used to arouse ethnic nationalism, a plausible position to take given the role of *Radio Milles Collines* in the Rwanda genocide of 1994 (Gourevitch 1998). However, a stream of opposition to these plans made the government drop the idea.

The main law governing the broadcasting sector was the Kenya Broadcasting Corporation (KBC) Act of 1989. It established the main state broadcaster, the KBC, and empowered the corporation to, amongst other things, produce and broadcast programs or parts of the programs by sound or television; provide for the management, powers, functions, and duties of the corporation; and, provide for the control of broadcast

¹¹⁴ The Statute Law (Miscellaneous Amendments) Act, 1997, amended the KBC Act to require the broadcaster to “keep a fair balance in all respects in the allocation of broadcasting hours as between different political viewpoints” and give free air time to registered political parties participating in the presidential, parliamentary or civic elections.

receiving sets and for the licensing of dealers, repair persons and importers of broadcasting receiving sets. The KBC was also empowered to oversee the broadcast activities of private broadcasters and also act as the “supreme government adviser on broadcast issues in Kenya” (Maina 2003:45). The corporation, therefore, enjoyed the dual mandate of provider and regulator.

This range of provisions under the KBC Act endowed the state-owned broadcaster with overwhelming advantages that the new entrants did not enjoy. Furthermore, the Act empowered the state broadcaster to support the government in its nation building efforts. The KBC interpreted this to mean uncritical support of the regime, and total blackout of opposing viewpoints. The Statute Law (Miscellaneous Amendment) Act of 1997 was one of the numerous concessions won by activists, journalists and freedom of expression advocates. This amendment to the KBC Act resembled the American Fairness Doctrine except that it was a law not an administrative policy.¹¹⁵ It amended the KBC Act to require the broadcaster to “keep a fair balance in all respects in the allocation of broadcasting hours as between different political viewpoints” and to allocate free air time to registered political parties participating in the Presidential, parliamentary, or civic elections to expound their policies. However, by 1999, a report noted that “KBC stations do not criticize the Government and give a large share of news time to government and KANU party functions and scant coverage to the opposition activities” (US Dept. of State 1999).

¹¹⁵ The Fairness Doctrine was a policy of the Federal Communication Commission (FCC) which required equal allocation of broadcast time to differing viewpoints. Under this policy, broadcasters had to file annual compliance returns to the FCC. The policy was constantly under attack for going against the spirit of the First Amendment of the US constitution. The US Supreme Court adjudged it as unconstitutional because it resulted in a chilling effect on broadcasters, who often avoided controversial topics. It was abandoned in 1987. Since then, there have been several unsuccessful attempts in the US Congress to enact it as law. (See Middleton and Lee 2007: 311)

Government control of this sector was buttressed by the Kenya Communications Act of 1998, which established the CCK as the regulatory authority for the Communications sector. It is the CCK that regulates and co-ordinates the telecommunication sector, radio frequencies, and apparatus. The power to grant a license to set up a broadcasting station was retained by the Ministry of Information and Communication. This means that before a license could be granted, an applicant had to be vetted first by the ministry. Upon satisfying the ministry, a license would then be given, which the applicant forwarded to the CCK for the allocation of frequencies. However, licensing remained cumbersome and the process of applying for such licenses remained shrouded in mystery and susceptible to corruption.

Theoretically, to obtain a license and a broadcasting frequency, an application is made to the ministry of information and broadcasting for a license and another to the Communications Commission (formerly Kenya Posts and Telecommunications Corporation) for a frequency. The frequencies available in Kenya (as determined by the ITU) are unknown (they are not gazetted); the exact departments or offices or individuals responsible for such departments or offices are unknown; the costs of such applications are unknown; the criteria for such applications are unknown. But, apparently, they are selectively applied and there is no obvious linkage between the two applications (meaning that to obtain a license does not necessarily imply obtaining a frequency) (Wanyeki 1999: 16).

As delays continued to attract critical comment, the government took to arguing that the delays were caused by its efforts to reorganize and regularize its licensing procedures. The ministry of Information Transport and Communication, claimed that it was waiting for recommendations on media liberalization from the Attorney general's Task Force on Press Law. This Task Force had released its report in 1998. However, its recommendations were not fully implemented because a number of issues remained

unresolved. These included how the selection of the 13 member Media Commission that the Task Force envisioned would be empowered to issue licenses would be constituted (US Dept. of State 2002).

In 2001, at a meeting convened by the government, yet another task force, called the “Broadcasting Task Force,” was set up to provide a clear policy in the sector. The task force was comprised of media stakeholders and Professionals and they considered broadcasting regulations, spectrum system and new technologies to enhance broadcasting coverage. Also considered were issues of public broadcasting funding and fair access to the market including cross-media ownership which was being pushed by major print media companies who had for a long time coveted the broadcast media. Although the task force recommended that an independent body regulate the sector, this did not happen. The government retained control over licensing through the ministry of information and frequency allocation through CCK. The specific freedom of expression challenge presented by this arrangement is that licensees held their licenses at the pleasure of the authorities. Apart from creating opportunity for corruption, any licenses issued could be revoked if any of these government agencies, at their discretion or at the instigation of the government, determines that either their law or policy has been infringed (US Dept. of State 2002).

As late as 2002, it was noted that “the regulatory framework for broadcast media allowed abuse and manipulation in the issuance, withholding, and revoking of broadcast permits and frequencies” (US Dept. of State 2002). Although the number of broadcasters had increased considerably by 2004, the laws regulating the sector had changed but little. Wanyeki’s observation in 1999 therefore continued to ring true:

Underlying pluralism in the media are the rights to freedom of expression and freedom of information. But to fully achieve these rights, citizens require access not just to information, but also the means to produce the information. At this point, with respect to the electronic media, Kenyans can be said to have access only to limited and politically slanted information. Access to the ownership and production of information electronically is similarly limited and apparently politically determined. Obviously, this has implications for the democracy that is being built. Combined with more traditional approaches to sourcing and formatting for the electronic media, this lack of access to both information and the means of producing information means that the majority of Kenya's population do not hear or see themselves reflected in the broadcasts that they receive. Their day to day experiences, their interpretations of those experiences, their proposals of change find no expression in the electronic media (1999:16).

However, both the KBC and CCK laws addressed issues of broadcasting and telecommunication, an area that definitely needed regulation, but left the issues of the print media untouched. Regulation of the broadcasting sector, unlike the print media, was perhaps attractive to politicians for its potential to offer corrupt reward in the adjudication of licenses and frequencies. The print media has no such licences.

Print Media

Although they failed to produce sweeping political changes, the political changes of the early 1990s were accompanied by considerable expansion in the print media sector both in terms of media organizations and freedom. By the late 1990s, there were numerous newspapers specializing in gossipy exposes and prurient stories about politicians and business people. Some of these newspapers were poorly edited and produced rags with no schedule integrity. The government saw these media outlets as a threat to the dominance of its own views. While it could live with the traditionally responsible and

restrained journalism of the mainstream press, the government could not stomach this new gutter press.

A wide range of archaic laws was still on the books and available for suppressing such journalism. Section 181 of the Penal Code, for instance, prohibited the production, distribution, and exhibition of obscene materials, which were vaguely defined to include indecency. The editor and two reporters of *Emotions* magazine, which had featured “suggestive pictures of scantily-clad women,” were cited for publishing and distributing pornographic material (CPJ 2000).

In May 2000, the government published a proposal to an amendment to the Books and Newspapers Act that would have required new publications to post a bond of one million shillings (US \$ 13,459) as security against fines that might be imposed in future legal cases. This represented a hundred-fold increase over the previous bond of 10,000 shillings (US \$ 135). Another contentious clause in the proposal was that requiring distributors and vendors of publications to be held responsible for violations of the Act. Consequently, any person who distributed a publication that had not paid the mandatory bond would be liable for fines of up to 20,000 shillings (US \$269), and risked imprisonment of up to six months, or both, regardless of whether or not they knew the bond had not been executed (CPJ 2000).

The objective of these increased fees was to weed out the threatening gutter press, which was owned by cash-strapped individuals, and also to deter new entrants into the media by increasing the initial capital required to start a publication. The higher bond was supposed to make it easier for libel plaintiffs to collect actual and punitive damages in the event of a successful libel suits. The proposal to criminalize distribution of publication

was meant to instill a chilling effect on potential vendors. Fortunately, after a much-heated debate, the proposals were shelved.

However, the amendments were republished as the Media Law 2002 bill, which parliament passed in May 2002. The passage of the bill by parliament showed the willingness of politicians from both sides to curb freedom of expression. This convergence of interests of opposition and government parliamentarians was occasioned by a proliferating and irresponsible “gutter” press that offended all prominent persons regardless of political leanings.

However, while the government may have been justified in its attempts to control the gutter press, the resultant regulations were overbroad, a position that was expressed eloquently by one writer:

“Moi son's maid pregnant” is one of the titles I once read in a gutter newspaper. Of course, there was nothing in the story and whoever wrote it should have had his head examined. Another was: “The President's girlfriend” and there was a picture of President Moi on the cover page. But the story was on Zambia's President of the time, Mr. Frederick Chiluba. It had been lifted, word for word, from a Zambian paper. Now this is the kind of stuff our Government says it wants to tame – a tissue of lies in our own body politic. But, as the Swahili saying goes, *mtego wa panya huingia waliokuwepo na wasiokuwepo* (a mouse trap catches all), which is the whole irony of the new anti-press law. A snare ostensibly put for the gutter [press] has trapped both the mainstream and the gutter (*Daily Nation*, June 5, 2002).

Other commentators saw the proposed law as unnecessary because there were already laws in place to deal with the kind of transgression that they posed.

Yes, they [gutter press] are often deliberately provocative. Yes, too, they are often libelous and plain wrong. And yes, several of them have been implicated in extortion efforts. But the fact is that there are already laws dealing with extortion and libel. Besides which, common sense tells us that extortion only works if the person being extorted from does indeed have something to hide. But the President's position on this matter comes as no surprise. It is entirely consistent with his position on most media-related matters. From his various pronouncements, the media is apparently one of those inescapable evils of modernity, forced down his throat by neo-colonialist imperialists in the name of keeping up democratic appearances. Fine, he will swallow it if he has to. But he will cook it up in a manner calculated carefully so as to cause him minimal indigestion (Wanyeki 2002).

The government also viewed the Internet and other new technologies with suspicion. In 2000, President Moi called for tighter state oversight of Internet content, and in the same year, the Communications Commission of Kenya raided the offices of *Reuters News Agency* and confiscated equipment allegedly because Reuters had not sought a license for operating the equipment (CPJ 2000).

Other Restriction on Freedom of Expression

For a person who was used to restricting the freedom of expression of others, it was apparently very difficult for President Moi to learn to play by the new rules instituted by the advent of the multiparty era, such as the IPPG package of reforms. He therefore kept relapsing back to his authoritarian form. In a move reminiscent of the disbanding of the Kamiriithu Theatre in the 1970s, the police, on March 31, 2000, arrested eleven human rights activists while they were performing a play before a group of children as part of a civic education program in the Ogiek community (Amnesty International 2000). Police also disrupted another play in Keiyo district during an opposition rally (*Daily Nation*, January 25, 2002). In all these cases, police defended their actions with claims that

permits for the rallies and performances had not been obtained. However, the organizers of these public functions claimed that they gave advance notice in accordance with the 1997 amendment to the Public Order Act. It is likely that these activities were stopped because they were viewed by the regime as an attempt to politicize communities deemed to be supportive of President Moi.

However, by 2002, the government appeared to be more tolerant of dissent in areas that had overwhelmingly turned opposition. It viewed these areas as beyond salvage. A number of plays were written and performed for several weeks in the opposition strongholds of Nairobi and Central provinces, including *Ngoma Cia Aka* by comedian Wahome Mutahi and *Katiba*, by his younger brother Richard Mutahi. *Katiba* was described as “a tongue-in-cheek look at the intrigues of governance and constitution-making” taking place in a fictitious country “whose maximum leader has no respect for the constitution” (*Daily Nation*, March 22, 2002). *Ngoma Cia Aka* was said to be both immoral and a security threat. Both plays were eventually banned in 2002 (US Department 2002). Therefore, even in Moi’s last year in office, freedom of expression was still very much under threat.

In April 2002, Moi ordered the police to monitor and record all public speeches by politicians at political rallies. The order was regarded as an attempt to restrict political speech (US Dept. of State 2002). Then, in October, while campaigning for Uhuru Kenyatta, his chosen heir, Moi said: “Everybody must toe the line or otherwise quit, we have no room for dissenting fellows and I shall use all mechanisms at my disposal to silence them” (Kamau, 2002). This order was meant to silence murmurs of disquiet in KANU as politicians positioned themselves for his succession.

But even the police were hardly immune to attacks for exercising their freedom of expression. In October, three police officers were fired for discussing politics and suggesting that the KANU Presidential candidate, Uhuru Kenyatta, would lose the December election to the opposition. The comments were said to have been taped and presented as evidence in a police disciplinary tribunal that found the officers guilty of violating a provision of the Police Act that prohibits affiliation with a political party or group, and of compromising their political neutrality. This incident played right into the campaign season and was widely criticized as an infringement on freedom of expression, causing the Police Commissioner to announce that the officers could appeal their dismissal (US Dept. of State 2002).

Moi's criminalization of dissent appears to have played a huge part in the loss of Uhuru Kenyatta in the 2002 Presidential election, therefore scuttling Moi's own succession project as Uhuru was his preferred candidate. Moi became so intolerant of dissent that he fired people who would have lent their support to Uhuru and helped actualize Moi's dream of influencing who became Kenya's next President.¹¹⁶ By sacking Vice President Prof. George Saitoti who was seen as too independent and the leader of a rebel faction within the ruling party, KANU, Moi caused a rebellion in the party and instigated the very dissent he was trying to prevent. To bolster Uhuru's campaign, Moi seconded a section of his powerful Presidential Press Service (PPS) to cover Uhuru and also instructed the state-funded KBC to give Uhuru "adequate" publicity (Kamau 2002). However, the credibility of KBC was such that few Kenyans took its broadcasts

¹¹⁶ He fired his long-serving Vice-President, Prof George Saitoti, and Minister for Environment, Joseph Kamotho, and two assistant ministers Fred Gumo and Peter Odoyo (Kamau 2002).

seriously. Kenyans had become sophisticated enough to disregard one-sided broadcasts favorable to Uhuru, who went on to lose the general election in December of that year.

Legislative Reforms and Freedom of Expression

The new liberalized dispensation, and in particular the IPPG agreement of 1997, changed the way the government responded to criticism as well as how it dealt with its critics.

While old ways of dealing with critics such as arrests, violence and general intimidation and even barring the media from reporting parliament¹¹⁷ were still available to the government, it was now illegal, following the repeal of sedition laws in 1997, to detain critics. This amounted to a drastic diminution of the government's coercive powers. It meant that detention without trial, the most effective repression tool which successive governments had used since colonialism, was now unavailable. New ingenious ways of combating dissent had to be invented.

At first, efforts towards this end took the course of admonishing the media to adopt self-regulation. On April 11, 2001, a Code of Conduct for Journalists and the Mass Media was released (Gret 2001: 5). It was the product of the Media Industry Steering Committee, which comprised the Kenya Union of Journalists, Media Owners Association (MOA), Editors Guild, Alternative Press, Media Training Institutions, Correspondents Association, Media NGOs and the State Media. However, the government rejected media self-regulation if such self-regulation was not statutory.

¹¹⁷ Standing Order No. 170 of the Kenya National Assembly states that "any newspaper whose representative infringes these Standing Orders or any rules made by the Speaker for the regulation of admittance of strangers, or persistently misreports the proceedings of the House or refuses on request from the Clerk to correct any wrong report thereof to the satisfaction of the Speaker, may be excluded from representation in the press gallery for such term as the House shall direct." In 1989, after Moi had accused the *Daily Nation* of arrogating on itself the role of an "unofficial opposition party," parliament accused the

The issue of freedom of expression was high on the agenda of political parties, with KANU preferring strict control of the media and the opposition trying to prevent such control. In 2001, the KANU government introduced a bill aimed at controlling the media. The Statute Law (Miscellaneous Amendments) Bill of 2001 contained proposals to change the Books and Newspapers Act by increasing the publishing bond from Sh10,000 to Sh1 million and criminalizing the distribution and selling of newspapers if the bond was not executed. The proposed amendment also sought to hold distributors and vendors of publications responsible for violations of the act. "As a result, any person who distributed a publication that had not paid the bond would be liable for fines up to Kshs. 20,000, imprisonment for up to six months, or both, even if they were unaware that the bond had not been paid"(CPJ 2000). Media owners, practitioners, activists, and international organizations opposed the proposed law on the grounds that it would lead to the folding up of a number of small publications due to the prohibitively high regulatory fees.

To many observers, the reasons for the introduction of the bill, as well as its intended purpose, were clear. A report by the Committee for the Protection of Journalists expressed the reasons succinctly:

The bill was apparently drafted in response to the perceived threat of an emerging tabloid press that specializes in gossipy exposes about politicians and prominent business people. The higher bond might have made it easier for a plaintiff to collect on a libel judgment, but local journalists also viewed it as an attempt to stifle anti-government journalism by deterring new publications from entering the market and making vendors wary of new magazines and newspapers (CPJ 2002).

newspaper of being disrespectful when it criticized the lack of debate in parliament. The paper and its sister publication, *Taifa Leo*, were banned from covering parliament (HRW 1991: 192).

The bill attracted considerable critical discussion in the Kenyan press that resulted in parliament delaying its discussion until the end of the parliamentary session. The end of a session of parliament normally means that parliament would re-order its business afresh during the new session. In the process of this reordering, some of the business from the previous session is pushed back to accommodate new business that has more urgency. This meant there would be temporary reprieve, but the bill had the effect of hanging on the media like the sword of Damocles.

Some members of the political opposition sympathized with the media. Fearing government intervention or a government-instigated media law, the Democratic Party of Kenya, then the Official Opposition, advised the Kenya Union of Journalists to prepare “a draft self-regulatory press Bill that can be enforced in law” (*Daily Nation*, January 31, 2002).

The bill was revived again in April 2002. Once again, it met a critical reception. The *Daily Nation*, in an editorial on April 17, 2002, stated that “Punitive publishers’ bonds and hefty penalties for lack of compliance can only be proposed with a mind to putting most newspapers out of business.” The Chairman of the MOA, Mr. Wilfred Kiboro, speaking on behalf of its members, said that the “government appears determined to control the media” (*Daily Nation* April 19, 2002).

Despite this criticism, the bill passed nevertheless, because it was bundled with other attractive reforms, such as better emoluments for judges and other holders of constitutional office. It also provided for continuous voter registration, a big change since voters used to be registered in the year of the general election, disenfranchising many people who had attained voting age in the process (*Sunday Nation*, June 9, 2002).

Politicians also discovered a new, more potent weapon to control freedom of expression. Defamation lawsuits, which had not had a noteworthy impact in Kenyan media, suddenly became common. The HRW states that starting from 1997, “the number of libel cases against newspapers, magazines, and bookstores” (2002:17) soared. Many of those cases were brought by members of the ruling party, KANU, against independent media. However, KANU-leaning newspapers like the *Kenya Times* and *East African Standard* also lost major defamation cases resulting in a chilling effect for all media.

Some of the more famous cases included one filed by a former aide to President Moi, Mr. Joshua Kulei, who was awarded Ksh.10 million (\$ 133,333) against *The People Daily*, an opposition-leaning newspaper. Another Moi confidant, cabinet minister Nicholas Biwott, was awarded Ksh. 67.5 million (\$ 900,000) for defamation by two book publishers and two Nairobi bookstores that had stocked the books in question, *The Rogue Ambassador*, a memoir by former U.S. Ambassador to Kenya, Mr. Smith Hempstone, and *Dr. Ian West's Casebook*, by Dr. Ian West and Chester Stern, which alleged that Biwott was involved in the murder of the beloved Foreign Minister Dr. Robert Ouko in 1990. Biwott also got an injunction barring the *Daily Nation* newspaper from serializing one of the books. Even President Moi himself sued Ambassador Hempstone in June 2001 (US Department of State 2002).

In September 2000, Justice Evans Gicheru of the Court of Appeal was awarded Ksh. 2 million as general damages, and Ksh. 25,000 as punitive damages, against British Author Andrew Morton whose biography of President Moi titled *Moi – The Making of an African Statesman*, was adjudged to have betrayed the judge negatively during the

conduct of the official inquiry into the murder of Foreign Affairs Minister Dr. Robert Ouko in 1990 (Maina 2003:39).

Biwott also had another defamation case decided by the courts in his favor. He had sued *The People Daily* after the newspaper printed a story alleging that Biwott had corruptly influenced the award of contract for the Turkwell Gorge hydroelectric dam to a consortium of French companies. In March 2002, the court awarded Biwott Ksh. 20 million (\$ 266, 667) (Makali 2003). This case was particularly significant because it appeared to target investigative journalism and to show the potential consequences of engaging in it. In a country that was consistently listed as one of the most corrupt by Transparency International in its annual Corruption Perception Index, it was a big blow to the fight against corruption.

The *Daily Nation*, the largest newspaper in the country, was also a frequent target of defamation suits. According to Human Rights Watch, the newspaper had, since 1997, been sued by a son of President Moi, a government minister, the Statehouse controller, and a lawyer (2002: 17). In September 7, 2001, High Court Judge Kasanga Mulwa found the *Nation* guilty of defaming Mr. Patrick Machira in a picture caption it published in 1995 and ordered it to pay Sh10.2 million as damages. Mr. Machira, a lawyer, had sued the newspaper in 1996 when it published a picture caption suggesting that a woman client had assaulted him in a disagreement over money. Machira argued the woman was not his client, that newspaper had misled its readers to conclude that woman was an unhappy client of Mr. Machira, and that this amounted to libel *per se* (*Daily Nation* May 25, 2002).

Journalists and publishers complained that the avalanche of defamation suits was meant to silence them. Through the awards, the Court declared “its intention to give more protection to public figures, rather than the media for fair comment under the right to free press” (Maina 2003:39). The totality of these excessive damages awarded to public officials appeared to disregard the precedent set in the famous US libel suit, *New York Times v. Sullivan* where the US Supreme Court held that “all public officials who sought to win a libel suit based on defamatory allegations about how they did their jobs or whether they were fit to hold those jobs henceforth would have to prove actual malice” (Pember and Calvert 2008: 164). High Court Judge Richard Kuloba said that the “law protects the character more than the press” (*Daily Nation*, December 1, 2001).

The devastating defamation law suits drew their force from a 1992 amendment to the Defamation Act Cap 26 of the laws of Kenya. The link between these damages and the suppression of political dissent lies in the fact that the amendment was introduced in 1992, immediately after Kenya reverted to multiparty politics. In July of that year, attorney general Amos Wako introduced the Statute Law (Miscellaneous Amendments) Bill (1992), section 16 (A) of which sought to have newspapers and magazines found guilty of defamation or libel to pay an amount not less than Ksh.1 million in damages to the plaintiff where the libel was in respect to an offence punishable by death, and, in respect to offences punishable by imprisonment for a term not exceeding three years, the new law authorized courts to award damages not less than Ksh. 400,000. In an op-ed published in the *Daily Nation* of July 22, 1992, Senior Counsel Lee Muthoga saw through the ruse:

One gets a distinct feeling that this legislation is being amended now so that when suits by the Government or those highly placed individuals arise, damages awarded will be such as to drive the publication out of circulation. It also appears that the amendment is brought now so that during the forthcoming election campaign, people in high places will be spared the wrath of the pen and their past misdeeds will be kept away from public glare. The provision is singularly destructive of Press freedom and comes at a time when we need that freedom most.

The resultant hefty libel awards against publishers produced a chilling effect on the part of writers and publishers and distributors as they were all liable for libelous content. Kenyan journalism became replete with straight news and opinion pieces at the expense of investigative articles which were risky to publish and expensive to produce (Maina 2003:39).

Additionally, criminal libel, an archaic law (Middleton and Lee 2007: 95) that was still in the Penal Code, was also discovered by the government and used against its critics, particularly those in the media. Jonah Mwangi Wandeto, a journalist with *The People*, was arrested on March 8, 1999, for publishing a story that stated that bandits had held up the Presidential escort. Another journalist from *The People*, Mohammed Sheikh, was arrested from publishing an alarming article, and the Editor of *The Dispatch*, Maneno Mwikwabe, was also similarly charged for articles he had written in 1998.

The MP for Kwanza, Mr. George Kapten, was charged with criminal libel for defaming a government official when he alleged in an interview published in the *Finance Magazine* that President Moi was implicated in the Goldenberg scandal. Although he was released on bail, he died suddenly at his home on Christmas Day in 1999 (US Dept. of State 1999). Criminal libel was still being used in 2002 by the government to intimidate pro-opposition press (US Dept. of State 2002). However, there were judges who

appeared to favor more freedom for the media. A high court judge, Mr. J.M. Khamoni, ruled in a case in which a government minister had sued Star Publishers for defamation that “the right to freedom of expression, especially the right of the press to make fair comment on matters of public interest, should not be unduly interfered with through the granting of interlocutory injunctions”¹¹⁸

Not all bills served the purpose of suppressing expression. Some of the new legislation actually helped expression, albeit marginally. In 2000, for instance, a motion for the enactment of a Freedom of Information law was introduced and passed in parliament. However, the motion was limited to calling for the enactment of the law, and did not establish such law. Nevertheless, the spirit of the motion is noteworthy. This was another way of seeking to expand freedom by providing access to information in the custody of the government. In effect, what was being attempted was a sunshine law to prevent a secretive government that still used the Official Secrets Act from barring the release of information. The passing of this motion was seen as a “laudable” development that “ought to be followed to its logical conclusion” (Kioko n.d.).

In the same year, a motion was introduced in parliament for the establishment of a Truth and Reconciliation Commission (TRC). Obviously borrowed from South Africa, which had established what is perhaps the most famous truth and reconciliation commission after the demise of Apartheid, the motion resulted in the formation of a committee to study the possibility of establishing the TRC. The committee was chaired by Prof. Makau Mutua. It went around the country listening to public views on the matter, and even recommended the creation of the TRC, but the commission has never

¹¹⁸ See Kenya Media Report by Vicky Richardson, *African Media Debates*, Rhodes University, <http://journ.ru.ac.za/amd/kenya.htm> (Accessed January 24, 2007).

been established. However, the importance of this move to freedom of expression is clear. A TRC would allow victims of state violence and other abuses to express themselves openly and to seek redress for their suffering in addition to forgiveness. That a TRC was not established points to the fear with which memory is regarded in Kenya. The official policy of forgetting the past that started under Kenyatta was still very much alive in Kenya nearly 40 years later.

In October 2000, the Attorney General published a Bill establishing the Kenya Human Rights Commission to create a commission to promote and protect human rights in the country. It established the Kenya National Human rights Commission (KNHRC), which monitors the Government's compliance with its obligations under international treaties and conventions on human rights. The Act was passed by parliament, but the KANU government refused to gazette it or make it operational. Only after the new government was sworn in 2002 was the commission appointed (Kibara 2003:10). In a country with a history of extrajudicial killings, targeted assassinations and politically instigated ethnic clashes, the establishment of this body was a major milestone for freedom.

Yet another motion that was introduced in 2002 was one that sought to allow parliament to control its own calendar. This motion carried considerable implication for free expression and the independence of parliament. Hon Peter Oloo Aringo, who had developed a reputation as a crusader for the independence of parliament, gave notice that he would introduce a motion which, besides seeking to control the parliamentary calendar, would attempt to amend Section 14 of the Constitution, which immunizes the President against criminal and civil proceedings, and therefore places the Kenyan

President above the law. In effect, therefore, Aringo intended to introduce an impeachment clause that would make it possible to prosecute a President who abused the constitution in any way. If passed and acceded to by the President, the law would allow parliament to condemn the President, remove him or her from office, or cause them to be tried in a court of law (*Daily Nation*, March 22, 2002). The implication of such an amendment to free expression would be immense. It meant, for instance, that the President could be impeached for flouting the constitutional clause on free expression.

Contributing to the motion, Mbita MP Otieno Kajwang (Kanu) said: "It is ridiculous that even primary schools know when they are supposed to open and close, and not Parliament" (*Daily Nation* July 26, 2002). The control of the parliamentary calendar by the President meant that Parliamentary business could be interrupted by the President at any time. Perhaps this explains why parliament had only managed to pass 50 bills in five years (*Daily Nation* July 26, 2002). It also meant that parliament could always be sent home whenever the government wanted to forge ahead with controversial projects without the glare and the scrutiny of parliament. This is what happened when the government wanted to build an ordinance factory in Eldoret, and again when the government wanted to buy a Presidential jet for the President (*Daily Nation* July 26, 2002).

Aringo's motion sought to strengthen the Parliamentary Service Commission (PSC), which had been established in 1999 after another motion of his led to the amendment of the constitution. The new PSC, established under section 45B of the constitution, took over from the Attorney General the powers of drafting new laws and prosecuting people named and criticized in parliamentary watchdog committees. It was

also invested with powers to prepare all financial estimates for approval by parliament and to establish a fund into which committees of parliament would be paid. In other words, parliament would approve and pay its own salaries for its own operations. Finally, the bill sought to establish a tender board to deal with government contracts.

To understand the importance of this motion, it is important to recall that it was Kenya's powerful presidency that controlled the legislature. This arrangement has been criticized for violating the principle of separation of powers and that of checks and balances (Kioko n.d.). It compromises the independence of parliament, and undermines the freedom of expression of parliamentarians as the President can send parliament home in order to stop a controversial debate. We saw in chapter Three how Kenyatta prorogued parliament in 1975 when it emerged that Jean Seroney would be elected deputy speaker contrary to the wishes of the executive. In enacting the PSC and seeking to control its own calendar, parliament was therefore exerting its own independence, and thereby showing its desire to allow more freedom for members to express themselves. The motion to control its calendar, however, failed and by 2004, the President still retained the power to control parliamentary calendar.

Non-legislative Measures for Controlling Freedom of Expression

There were also a number of non-legislative measures taken to curtail freedom of expression. These included putting pressure on advertisers not to patronize publications critical of the government (US Dept. of State 1999). Because this is a measure that can be stealthily applied behind the scenes, it was a favorite of the government. This method of controlling the media was still in evidence in 2003.

Although privately owned, analysts point out that the print media is not necessarily independent of officialdom. The government and state owned corporations are a huge source of advertising revenue for the *Daily Nation* and the East African Standard. Both dailies are hugely influenced by advertising revenue, which in turn informs their editorial policy so that the major government private businesses can exert considerable pressure and even drive a media house out of business (EAHRR 2003:14)

Intimidation was also a weapon of choice. In 1999, President Moi criticized *The Nation* and *The People* Newspapers, stating that they were the worst enemies of democracy and practiced “terrorism and distortion” and advised KANU supporters not to buy the newspapers. The Minister for Energy Mr. Francis Lotodo warned journalists not to set foot in West Pokot district, an area that produces news as it is a haven for cattle rustling. By denying the media access to news, perhaps the government hoped that it was striking a blow at the media which relies on catchy headlines to increase circulation.

Journalists were also often beaten. An Assistant Minister in the Office of the President, Mr. Fred Gumo, threatened to have journalists who wrote critical articles about his Luhya ethnic group beaten. A few days later, David Makali, editor of *expression today*, was abducted, beaten, and released after an article appeared in his periodical alleging government officials were involved in narcotics trafficking.¹¹⁹ In May, the Kenya Union of Journalist (KUJ) and the Media Institute (MI) issued a statement which claimed that there had been a “steady rise in cases of open violence against journalists by state agents and lately, by gangs of the payroll of powerful individuals” (US Dept. of State 1999).

¹¹⁹ At the time, I was an editor-at-large at *expression today*. Makali informed me of his travails via email and he appeared convinced at the time that the minister was somehow involved.

Another tactic available to the government was harassment. An example occurred in July 1999, when the police raided the offices of the Nairobi printing firm Junior Graphics, and confiscated films and printing plates for *The Concord Weekly*, *The Weekly Express*, *The Metropolitan*, *The Dispatch* and *The Citizen*. Paul Kimani, the publisher of *The Concord*, was subsequently arraigned in court on charges of publishing without a license (US Dept. of State 1999).

The government also used denial of registration as a tool against critical media. The *Post on Sunday* and *Finance* were denied registration in 1998, but continued to publish without licenses. However, *Post on Sunday* was forced to close down after its editor Tony Gachoka was convicted of contempt of court for alleging that the Chief Justice, Zaccheus Chesoni, and other members of judiciary took large bribes to rule in favor of businessmen implicated in the Goldenberg scandal. Among the panel of seven judges he faced were three whom he accused by name in his reports. The prosecution was initiated by Attorney General Amos Wako, whom Gachoka had accused of covering up the scandal. With the Court of Appeal, the highest court in the land, being the court of original jurisdiction, it meant that Gachoka had nowhere to appeal (US Dept. of State 1999). After serving 74 days in jail, President Moi unexpectedly pardoned Gachoka. This act of magnanimity was probably meant to impress Gachoka and make him indebted to the President so that he would in future “behave” himself.

Other restrictive measures took the form of covert admonition to journalists. One report noted that:

While there was no overt official government pressure on journalists (in 2002), individual journalist reported that they were pressured by government officials

and other influential persons to avoid reporting on issues that could harm the interests of these persons or expose their alleged wrong doing. Some editors and journalists reportedly practiced self-censorship because of government pressure or bribes; there also were credible reports of journalists accepting payments to report or withhold certain stories, some of which were fabricated (US Dept. of State 2002).

But violence continued being used as a tool for suppressing expression. On March 15, 2002, supporters of the now defunct National Development Party (NDP), which was then co-operating with KANU in a coalition government, attacked *Nation* journalist Odhiambo Orlale at the party's headquarters during a party executive committee meeting. An Assistant Minister, a member of the party, warned Orlale against writing negative articles about the party (US Dept. of State 2002).

Another example of government clamp down on the expression was the arrest of three *East African Standard* journalists in 2003 when the paper published what it claimed was a "confession" by the killers of the late Dr. Crispin Odhiambo-Mbai. One journalist, David Makali, was later charged with stealing a government video cassette worth Ksh.500 (Kibara 2003:13). However, in this case, the government action might have been justified on the grounds that evidence obtained illegally and publicized could have been prejudicial to the rights of the accused, including fair trial.

Freedom of Expression and Constitutional Review Process

Section 2A of the CRCK Act established the object and purpose of the constitutional review. While there was no specific mention of expanding freedom of expression as an object of the constitutional review in the Act, it is clear that free expression as an issue was at the back of the mind of parliamentarians when they passed the law. Section 17A

of the Act mandated CRCK to “conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues.” This statement assumed widespread gullibility, timidity and torpidity on the part of Kenyans. Years of oppression and suppression of dissent had clearly failed to produce a citizen who could be relied upon to produce the desired constitution. The citizenry needed to be educated on how to participate in the production of their own sovereign document.

It was also clear that parliament had free expression mind because Subsection (b) of Section 2A specifically spoke to “establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, and gender equity.” This was both a wish and a polemic against the past when dissent was disallowed. The Commission was to ensure this by adhering to guiding principles set out in Section 5 of the Act, subsection (c) (i), which required the commission to “provide the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution.”

Collecting and collating views was founded on the theory of sovereign power of the people to make a constitution that would govern them. Tremendous effort and money were expended on ensuring diverse participation of Kenyans from all walks of life in the constitution making process as “it was necessary that the legitimate power of constitution review emanates from the people through their effective participation in the process [that] would influence content” of the constitution (Muli 2004). Kenyans did not disappoint; they came out in large numbers to present their views to the commissioners. The *Daily Nation* of March 22, 2002 reported that the Commission had revealed that it had received 5,000 memorandums from the public, which the Commission secretary Patrick Lumumba

said was the highest number of documents received for all of the 20 African countries that were reviewing their constitutions at the time. It is these views that were analyzed and used in drafting the Bomas constitution.

Again, Kenyans, except for journalists, did not specifically ask for freedom of expression. This is hardly surprising. As Mutua has observed, “the people may not have known the precise norms and structures the new constitution should include” but they had a “grasp of the general principles and values that should direct the constitution-making effort” (2008:173). The totality of their presentations to the commissioners hint at widespread desire for more free expression, which Kenyans saw as being enabled by a re-designed government that had more checks and balances and devolved power. The view prevailing in the country was expressed by Prof. Anyang’ Nyong’o when he said that “any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution” (Wajibu 2002).

According to the CRCK report, Kenyans who presented their views to the commission constantly criticized the imperial nature of the presidency, with its huge and untrammelled powers in one person’s hands, which they saw as the source of corruption, cronyism, and the suppression of human rights. They wanted to limit the power of the President as well as Presidential tenure and the number of times one person can hold that office. Kenyans preferred an arrangement whereby executive power was shared between two constitutional offices – that of the President and Prime Minister. They wanted greater accountability from the government, particularly through a stronger parliament.¹²⁰ They

¹²⁰ Hon Oloo Aringo told the Commission that “excessive presidential powers have crippled the functions of Parliament” and described the country's current leadership as one based on "presidential authoritarianism" and "imperial presidency." He said Kenyans had not been given a chance to experience parliamentary democracy as the Kenyatta regime had quickly changed the constitution and parliamentary

also wanted to check power by dividing it between national, provincial and district governments. Many expressed a preference for “coalition” government, consisting of members of different communities and regions, so that the government did not become the preserve of a single community, but assumed a national character that reflected the diversity of the Kenyan people. Of those who expressed their views in terms of formal systems, many urged curbs on Presidential power and the introduction of greater accountability. But the majority asked for a parliamentary system, a cabinet government headed by a Prime Minister responsible to, and removable by, the legislature (CRCK 2002; *Yawezekana*,¹²¹ various issues).

Views on the kind of country Kenyans wanted were not restricted to presentations at the constitutional review process; they were widely available. The *Daily Nation* of April 30, 2000, for instance, carried a conveniently timed special report on detention without trial, which reminded Kenyans of the horrors meted out to detainees:

Many of Kenya’s post-independence political detainees left prison so seriously ill that instead of going home they were taken straight to hospital. The prison conditions were harsh and in one camp the detainees shared the tiny cells with snakes and scorpions. In some cases, the prisoners were served rotten food. The prison warders would laugh off any complaints by the victims, and one warder responded by telling his charge that he deserved nothing better than death. The prisoners were put in solitary confinement in

system was nipped in the bud. He said “free and open debate in the House became punishable as it was equated to dissent and lack of patriotism.” See “President crippled Parliament”, *Daily Nation* March 26, 2002, <http://www.nationaudio.com/News/DailyNation/26032002/News/News62.html.gz> (Accessed March 8, 2007).

¹²¹ *Yawezekana: Bomas Agenda* (literally meaning “It is possible” in Kiswahili), was a popular newsletter published by a coalition of civil society organizations including FIDA Kenya, Institute of Education in Democracy (IED), KHRC and the League of Kenyan Women Voters (LKWV). It was created as an alternative to the mainstream media, which were often criticized for their inadequate coverage of the

dingy cells and denied exercise and sunshine. Their health went down especially due to poor diet and lack of medical facilities.

By reminding the entire country of the horrors of detention, the newspaper was making a statement to the effect that the country needed to move forward with constitutional changes that would guarantee that such inhuman acts would never be re-introduced in Kenya again. As matters stood in 2000, the presidency was still very powerful and parliament was still weak enough to be manipulated in order to amend the constitution, perhaps reintroducing detention. The view expressed in the editorial was shared by other Kenyans. In a letter to the editor, one Joseph Mutua wrote that since the “the constitution is the mother law,” it should therefore be respected, and that politicians should be allowed unfettered freedom of assembly and movement (*Daily Nation*, May 24, 2002). In parliament, some members supported the idea of introducing live coverage of parliamentary proceedings. Such a move was seen as capable of causing an improvement in the quality of debate (*Daily Nation*, May 29, 2002). Inherent in the idea of “quality” was a longing for parliamentarians who expressed themselves not just eloquently and argumentatively, but also freely and without fear or favor.

A key finding of the entire process was not just an indictment of bad governance, but it was a veritable byproduct of denying people the freedom to express themselves:

The whole nation feels alienated from the government and structures of authority. People feel neglected, and victimized. They consider they have no control over their life or destiny. Outside elections, participation is almost non-existent. There are no authorities to whom they can, or feel they want to, make complaints – least of all the police. Even the privileged class of business people complain about the vagaries of the organs of the state, and the denial to them of justice by judges

constitutional review and were said to have been “caught up in the intrigues and sensational sideshows that characterized” Bomas (Muli 2004).

through incompetence, corruption or lack of impartiality that arises from dependence on the executive. There is a strong sense of the decay of institutions. The system has become the means of aggrandizement and enrichment for the few, and the impoverishment of the many. Discrepancies of wealth are among the most extreme in the world, and Kenyans feel no surprise that high crime rates, and public servants unmotivated to perform with fairness or efficiency, have resulted (CRCK 2002: 11).

At the end, the commission acknowledged the people's participation: "The Commission is very happy with the way the people responded to the chance to participate in the review" (CRCK 2002: 7). However, perhaps because of the wide-ranging nature of freedom of expression, there were view specific presentations on what kind of freedom of expression Kenyans wanted.¹²² It is clear from the Commission report that many Kenyans, although not specifically calling for enlarged freedom of expression, were categorical in demanding changes in the constitution that would ensure increased freedom of expression:

But there were many suggestions made and on some of them there was unanimity; for not concentrating power in the hands of one person, for a system of

¹²² The CRCK presented thirteen main points from the people detailing what the people wanted and freedom of expression was not mentioned. The points are:
 Give us the chance to live a decent life: with the fundamental needs of food, water, clothing, shelter, security and basic education met by our own efforts and the assistance of government
 We want a fair system of access to land for the future and justice for the wrongs of the past
 Let us have more control over the decisions which affect our lives, bring government closer to us – and let us understand better the decisions we can't make ourselves but affect us deeply
 We don't want power concentrated in the hands of one person
 We want our MPs to work hard, respect us and our views – and the power to kick them out if they don't
 We want to be able to choose leaders who have the qualities of intelligence, integrity and sensitivity which make them worth of leading
 We want an end to corruption
 We want police who respect the citizens – and who can be respected by them
 We want women to have equal rights and gender equity
 We want children to have a future worth looking forward to – including orphans and street children
 We want respect and decent treatment for the disabled
 We want all communities to be respected and free to observe their cultures and beliefs
 We assert our rights to hold all sections of our government accountable – and we want honest and accessible institutions to ensure this accountability (CRCK 2002: 8).

complaints mechanisms – many specially mentioned an ombudsman – for more accountability mechanisms generally, for stronger human rights provisions, for appointments to important public offices to be independently made, and for better and equitable distribution and use of resources. People wanted the Constitution to recognize the people in a way which it has not done in the past (CRCK 2002: 13).

It is easy to understand why there were calls for the executive powers of the presidency to be trimmed. In Kenya, everything was done at the pleasure of the President. All civil servants held their jobs at the pleasure of the presidency. Ministers and MPs for a long time swore loyalty to the President. The President appointed judges, ambassadors, ministers, generals, police commanders, university vice chancellors, and other important government functionaries. No other body vetted the Presidential appointees. The President was also the commander in chief of the armed forces. It was simply the most powerful office in the land. These appointees have in the past performed their duties with more consideration about pleasing the President than pleasing the Kenyan. The officials have suppressed criticism of the President, and have tended to interpret such criticism as uncalled for, and an affront to the nation, whose symbol of unity is the President.

By the very nature of their Profession, journalists find themselves as the vanguards of free expression. As such, they were expected to take advantage of the commission to express their views on free expression. However, they appear not to have seized this opportunity to unequivocally demand for freedom of expression. Journalists complained that their views were not adequately represented in the constitutional review, but it remained unclear why. Veteran journalist Dennis Kodhe was quoted as saying that the media missed a golden opportunity because when the bill of rights was discussed, the position of the media was not articulated because according to him, journalists were not adequately represented. The secretary general of the Kenya Union of Journalists, Ezekiel

Mutua, who had made presentations to the CRCK, was later quoted as having been disappointed with the section on the media in the bill of rights. He said that although he understood “that the constitution cannot capture every triumph and disappointment...the media needed specific guarantees” (*Yawezekana*, Bumper Issue, June 5, 2003).

There are several reasons why the journalists believed that their views were not adequately presented at the commission. The first has to do with the disorganized nature of the Kenyan media. Although the KIJ purports to speak on behalf of the media, the reality is that its membership covered a tiny fraction of the media Professionals. For instance, it does not represent filmmakers or playwrights, being, as it is, a trade union for journalists working for the mainstream, mainly news organizations. Secondly, it is possible that the media might have felt that given numerous task forces that had preceded the commission and the preponderance of reports they had produced, as well as their own code of ethics bill they had drafted, their views were widely available for consideration by the commissioners. On this score, they were probably right; we shall see that the resultant constitutional draft contained very strong freedom of expression provisions.

Coupled with this was the fact that the relationship between the Commission and the media was strained at best, a state of affairs that may also have contributed to the feeling that journalists' views were not being taken into account. The Commissioners felt that the media did not understand the issue of constitution making and therefore tended to focus on the differences between Commissioners more than the actual views presented at the Commission. At one time the Chairman, Prof. Ghai, felt compelled to write to the media decrying this situation:

Of late, some media have carried statements by members of the Constitution of Kenya Review Commission and other stories portraying discord in the commission. Differences are inevitable in a commission of 29 members. However, despite this, it is important that we remain faithful to the commission's mandate. I appeal to the media to focus on issues that can benefit the nation and allow the commission concentrate on its important work. It is widely recognised that Kenya needs a new constitution which addresses the many problems facing us. Let the media focus on critical constitutional issues that must be reviewed as part of the process of making a new constitution (*Daily Nation* April 16, 2002).

In the end, the journalists need have worried. The draft constitution drawn up at Bomas had a very strong section on the freedom of expression and it is to it that we now turn.

Freedom of Expression in the Constitutional Draft

The CRCK Chairman, Prof. Yash P. Ghai, presented the Bomas constitutional draft to Attorney General, Mr. Amos Wako, on March 15, 2004. A long, almost Byzantine document, it covered wide-ranging areas of governance in 21 chapters. Unlike the incumbent constitution, the draft had a preamble which recognized the “aspirations of all Kenyans for a government based on the essential values of freedom, democracy, social justice and the rule of law.” The inscription of these values in the preamble supports the claim that constitutions “are polemics against the past” (Duchacek’s 1968: 93). The constitutional draft was a response to the misrule of the past, examples of which are mentioned in this dissertation.

Chapter Six of the draft contained a lengthy bill of rights, which contained almost every imaginable right. It is to this chapter that will now turn to analyze those aspects of it that could be said to be a response to the long quest by Kenyans for freedom of expression. The Bomas draft contains all the 10 freedoms and rights guaranteed under the

current constitution. Amongst these 10 rights is freedom of expression and religious rights. To these, the Bomas draft grants an additional 32 rights absent in the incumbent constitution. These new rights include innovations such as the right not to obey unlawful orders, freedom of trade and occupation, the rights of refugees and displaced persons and the right to human dignity.

Other rights missing from the current constitution but granted under Bomas include rights to official information, environment, food, water, sanitation, health, education, privacy, fair administration, and rights of consumers, prisoners and linguistic communities. Unlike the current constitution, the drafters of Bomas constitution added a number of political and civil rights, including a very liberal right to assemble as well as the right to strike and to demonstrate (under Article 53). This bill of rights resembles the South African one, which is often cited as the most liberal in the world. There is also evidence in the draft constitution of liberal appropriation of ideas from international human rights documents such as the UDHR, ICCPR, and the International Covenant on Economic, Social, and Cultural Rights (ICESR).

It is noteworthy that although the Bomas draft had many sections that subsequently turned out to be contentious, Chapter Six was not one of them, and was left largely intact, except for a few changes, in the so-called Wako draft that was presented for ratification and rejected in November 2005. This means that if Kenya ever enacts a new constitution, the bill of rights in the Bomas draft will probably be retained as is or with minimal changes.

The prominence of human rights provisions in the general organization of the draft is one of the most noticeable things about the draft. The organizational structure of

the draft, which remained intact in the subsequent Wako draft, was as follows. First, unlike the independence (incumbent) constitution, the draft had a preamble meant to “establish a few of the most fundamental principles of the state, and to affirm the fact that the Constitution is rooted in the people and owes its very existence to the legal force to the people” (CRCK 2002: 24). This was an important reiteration of the sovereignty of the people and how the constitution derived its power from that sovereignty.

After a preamble, the first chapter dealt with the sovereignty of the people and the supremacy of the constitution. Chapter Two defined the republic for which it was being established, and Chapter Three enumerated national values, principles and goals. It even had a broad cultural policy and established a cultural commission in Chapter Five. However, it is Chapter Six that concerns us here, as it contains a lengthy bill of rights. In other words, there is a natural progression from sovereignty, the decision to establish a republic governed through a constitution, to the rights granted under that arrangement. Compared to the 1963 Constitution, the draft Constitution gave the bill of rights more prominence and justified its own organizational structure as follows:

But order is significant: the way in which the human rights provisions were ‘demoted’ from Chapter II in the 1963 Constitution to Chapter V as now, says something about the priority given to citizen’s rights. The draft Constitution begins with a statement of principles and values; what is the purpose of government. The purpose is the benefit of the people of the nation – all the people. The values are those of tolerance, democracy and the sovereignty and participation of the people. Then human rights are set out in detail, preceded by the provisions on citizens: who are the people of Kenya? (CRCK 2002: 21).

The Commission recognized the vital importance of freedom of expression. It saw “the freedom of expression and of the media” and “access to information” as necessary

for the “establishment and protection of democracy, including the accountability of public authorities” (CRCK 2002:28). This was a significant departure from the incumbent constitution, which never established a connection between the rule of law and democracy with free expression. Section 49 of Chapter Six guarantees freedom of expression as follows:

- (1) Every person has the right to freedom of expression, which includes: -
 - (a) freedom to receive or impart information or ideas;
 - (b) freedom of artistic creativity, including dress; and
 - (c) academic freedom and freedom of scientific research

Freedom of expression as stated here is much broader than in the incumbent constitution which talks of freedom of expression in a blanket fashion without bothering to delineate the various strands of that freedom. The draft constitution takes this approach for the avoidance of the kind of doubts that pervade the entire bill of rights in the current constitution, attracting critics such as Gathu (1995b) and Odhiambo (2002). The Bomas draft provisions on free expression are so clear and elaborate that it is evident that the framers were trying to eliminate any speculation about their real intentions. The right to impart information is also an important addition. No longer will Kenyans be arrested for speaking their minds or trying to influence others. The detention of writers, for instance, would be impossible under the Bomas bill of rights.

However it was also recognized that freedom of expression was not absolute because it “must respect the reputation of others” although the “essential nature of the right must be protected” (CRCK 2002: 33). This constitutes an admission of the limits of free expression, although a critique could be made that injury to reputation is not the only

potential misuse of freedom of expression. It is safe to say that the Bomas draft gave much freedom of expression as is practically possible without embracing absolutism.

The draft also addressed a major anomaly in the incumbent independence constitution when it guaranteed freedom of the media in a separate section. It has always been argued that the current constitution does not specifically guarantee media freedom and that this freedom in Kenya is merely derived from individual freedoms. Unmentioned in the bill of rights, the press has “no specific institutional protection” (Odhiambo 2002: 297). To redress this oversight, Section 50 of the draft, on the freedom of the media, stated expressly as follows:

- (1) Freedom and independence of electronic, print and other media of all types are guaranteed
- (2) The state shall not –
 - (a) exercise control over, or interfere with, any person concerned in broadcasting, production or circulation of any publication, or in the dissemination of information by any medium; or
 - (b) harass or penalize any person for any opinion or view, or the content of any broadcasting, publication or dissemination
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
 - (a) are designed to ensure the necessary regulation of the airways and other forms of signal distribution; and
 - (b) are independent of control by government, political interests or commercial interests
- (4) All State-owned media shall be independent and impartial and shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that –
 - (a) makes reasonable provision for equitable allocation of airtime by State-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns;
 - (b) regulates freedom to broadcast in order to ensure fair election campaign; and

- (c) provides for the establishment of a body which shall be independent of government or political control and reflective of the interests of all, sections of the community, and which shall set media standards, and regulate and monitor compliance with those standards.

What is noteworthy from this lengthy excerpt is the desire by the framers of the draft to expressly inscribe free expression. In the past, there has been criticism of the ambiguity of press freedom in the 1993 constitution, which mentions neither the press nor broadcasting. The state is expressly forbidden from any form of media control. Even state-owned media is freed and that freedom expressly stated in the constitution. Perhaps the largest beneficiary is the broadcasting sector. Unlike in the US where print media enjoys the highest form of constitutionally protected freedom, the draft constitution gives freedom to broadcasters in Kenya that is equal to that of the press in every respect. The broadcasting sector is only subject to a kind of "Fairness Doctrine" regulation that is left to be enacted by parliament. The envisioned regulation is geared towards guaranteeing equal access to political contestants. However, the draft is silent on other concerns that often are specific to the broadcasting sector such as indecency and obscenity.

From the perspective of freedom of expression, what is noteworthy is that media freedom is treated as a special right on its own in the draft. This goes to show that in spite of the complaints from the journalists, media freedom received very good treatment in the Bomas draft and, taken together with the wider provisions on freedom of expression, the amount of freedom available for expression under the Bomas draft is simply unprecedented.

This prominent treatment of human rights differs from the Independence Constitution in another remarkable sense.

Human rights provisions are wider than in the old (Constitution), taking account of modern developments in the understanding of human rights, of international treaties on human rights, and of the issues which people have raised, and on the basis of thinking about how the provisions of the existing constitutions worked, or failed to work (CRCK 2002: 22)

The Bomas draft envisioned complete enjoyment of these rights except during a state of emergency which could only be declared under very unusual circumstances clearly defined in the draft. Such circumstances were defined in Section 76 of Chapter Six and included war, invasion, general insurrection, disorder, natural disaster or other public emergency. According to Section 76 (6) a state of emergency, once declared, could suspend the bill of rights, including freedom of expression, if it was necessary to do so under the emergency. But even these unusual circumstances, including states of emergency, were subject to review by the courts under Section 76 (5). This was an important device to check on arbitrary invocations of such unusual circumstances.

Another important innovation was the provision of two primary enforcement mechanisms. Under Article 31, an aggrieved citizen is empowered to complain to a constitutional human rights agency called Commission on Human Rights and Administrative Justice (CHRAJ). This commission has the power to conduct investigations and prosecute human rights abuses. At the same time, the Bomas draft gives citizens the option of filing cases in the High Court for enforcement of any of the rights it has granted. The Court, on its part, is granted wide-ranging powers to enforce the bill of rights, including making compensatory awards. Additionally, in adjudicating issues of human rights abuses, the courts are under the Bomas draft instructed not to be unduly restricted by technical rules. The creation of what may appear to be competing

enforcement mechanisms must be seen not as a redundancy in design, but as a check and balance innovation meant protect human rights, including freedom of expression.

Conclusion

The fate of constitutional reform in Kenya that would finally overhaul Kenyan pre-independence laws and usher in constitutional guarantees for freedom of expression was tied to the capacity of the Kenyan politicians to compromise and rationalize their personal and constituency interests with those of the larger state. It was clear from the beginning, however, that sections of the new government, particularly the NAK group led by President Kibaki, were not keen to legitimize the constitution making process.

President Kibaki did not even mention the issue of the constitution in his inaugural speech. However, he did promise to implement fundamental changes.

We want to bring back the culture of due process, accountability and transparency in public office. The era of “anything goes” is gone forever. Government will no longer be run on whims of individuals. The era of roadside policy declarations is gone. My government 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 we have undertaken to bring (*Daily Nation*, December 31 2002).

Clearly, the incoming government was keen to give Kenyans what they wanted most – freedom. The new President was promising more freedom for individuals and more freedom for parliament after the elimination of personal rule. But it remained unclear how this freedom would come about in the wake of the government’s lukewarm support for a new constitution. During the campaign, Kibaki had promised that the country would have a new constitution within six months. This was received well by

Kenyans, but the issue fell off the ladder in the run up to the general election, and constitution making was left to civil society groups as politicians focused their attention to the campaigns (EAHRR 2003: 2). After dethroning KANU, the new rulers started bickering among themselves, particularly over the unfinished business of the constitution.

Although there were disagreements over the substance of the draft, there were also disagreements on the process of reviewing the constitution. Key NAK members questioned the legitimacy of the constitutional conference that produced the draft, arguing that the composition of the delegates was not representative of the national demographics.

They argue that the delegates are unrepresentative of the Kenyan population given that three delegates, regardless of population, represent each district. This has resulted in a situation where a district of 15,000 is represented by the same number of people as that with over 100,000 people. The extremes of Nairobi with three million people being represented by three delegates just like Ijara with 15,000 is often quoted. It is argued that with this lopsided representation, views from some parts of the country would be given undue weight in the conference, thereby, disadvantaging some regions (communities). NAK supporters maintain that basing representation on districts, many of which had been created by Moi for political advantage with no recourse to a boundary commission, is unfair. They argue that the composition of the delegate was meant to give the KANU areas undue advantage and that given the fact that the delegates had not been changed after elections, NAK was bound to be disadvantaged (Kibara 2003:16).

The result was the continuation by NARC of what has been called “spoiling tactics” (Cottrell and Ghai 2004:20), meaning the ingenious use of constitutional and unconstitutional means of delaying the conclusion of constitution writing by both the Moi and the Kibaki regimes.

Accordingly, in January 2003, the target date for a new constitution was pushed back by six months. Ten months down the road, the constitutional review process was adjourned to January 2004! In January 2004, President Kibaki promised that all efforts would be made to have a new constitution by June 30, 2004. This date also passed with the promise unmet and with Kibaki and his colleagues now evasive about setting a deadline (Murunga and Nasong'o 2006: 17).

The NARC government began by announcing major changes in the judiciary to rid the bench of corrupt judges (ICJ 2005). The coalition also established the national human rights commission and an anti-corruption commission, therefore demonstrating that it could implement the provisions of the draft constitution in non-contentious areas, and those in which donors were demanding immediate action. The main obstacle to constitutional reform lay in the controversial issues that needed more consultation, negotiation, consensus-building and agreement. They included executive powers, devolution of power from Nairobi to the districts, the creation of a bicameral legislature, and the perennially explosive land question (Njonge n.d.). By 2004, there was no consensus in Kenya's political class on how to tackle these issues.

What is clear however is that the political changes that had taken place in Kenya between 1997 and 2004 were the result of increased demand for freedom by Kenyans themselves, and pressure for reform from the donor community. This struggle had produced considerable freedom of expression. For the first time in Kenya's history, Kenyans were enjoying freedom of expression in a way that they had never been witnessed in the history of modern Kenya. Individual Kenyans could call the radio stations in existence and express themselves on virtually any topic. They could write op-ed columns and letters to the editor on virtually any subject. They could even author

blogs and participate in the numerous discussion lists and message boards on the internet, contributing on any topic of their choice.

However, the threat of regressing back to authoritarianism still remained for as long as there was no new constitution. We end this chapter with the cautionary words of *Nation* columnist Kwamachetsi Makokha, who captured the situation of hubris, exuberance and risk that was Kenya of the early 2000s in relation to freedom of expression:

It has been many years since talking politics was considered an offence, and many people have forgotten how they spoke in hushed tones whenever any criticism of the authorities was voiced. This, many of us believe, is a free country. But the hour of darkness seems to be upon the nation again (*Daily Nation* April 7, 2000).

This case study has shown, *inter alia*, how the period between 1997 and 2004 represented the final push and the triumph of liberty in Kenya. However, the seeming triumph of freedom over authority did not result in political stability as earlier generations of libertarians had envisioned. The failure to enact a new constitution combined with a general disregard of established limits to expression to present new challenges for the nation.

CHAPTER FIVE

Conclusion

In this dissertation, I set out to document the evolution of freedom of expression in Kenya by analyzing the contest between popular desire for free expression and authority's penchant to withhold that freedom. This contest is rooted in the universal desire by people to express themselves freely without interference from governments and a countervailing desire that exists in all governments to restrict free expression while claiming their right to protect people from themselves. This government position is often expressed in terms of public safety and order. The two principles, freedom and authority, are forever matched in mortal combat. How this contest is resolved becomes fodder for political and cultural history.

What is clear is that democracy requires that individuals in society be able to hear, form and freely express their opinions on a wide range of issues. Freedom to think and to speak as one wishes is an indispensable means to the discovery of political truth, as much as it is for entertainment and other social benefits. This freedom is extremely relevant to African countries, which are in the process of consolidating their democracies. This democratic consolidation, which is expected to result in political stability that has eluded most African countries since independence, can only be attained through greater respect and facilitation of free expression. What African countries have realized during their short period of experimentation with democracy is that the tension that existed between liberty and authority during the era of authoritarianism has not disappeared. Instead, the tension has simply been redefined. If the African individual is able to enjoy freedom of

expression to a greater degree and if governmental authority is restrained enough to allow for the exercise of this freedom without resorting to repression, then a key requirement for sustainable democracy will have been reached. The key to understanding freedom of expression in democracies lies in an examination of the uneasy equilibrium of these two forces (Lahav 1985).

This dissertation has examined how the contest has played out in Kenya since the advent of colonialism, but more specifically in the 1940s, 1970s, and the late 1990s and early 2000s, all very different historical periods in which the contest was colored by circumstances peculiar to the times.

In Kenya, as in many countries, the history of struggle against domination is often cast in nationalist and anti-totalitarian terms. This is made possible by a felt imperative for conformity with established theoretical paradigms and fashionable disciplinary categorizations. Seen without disciplinary blinkers and from a long-term perspective, however, it becomes possible to think of the motive force of the struggle as located in the enduring human desire for free expression. Freedom of expression, as a right that enables the seeking, receiving, and sharing of information or ideas through all available media, is crucial to human survival and progress. I subscribe to the view that a “society in which ideas cannot be continuously generated and disseminated risks economic, social, and cultural stagnation” (Munene 2002: 151). Other rights are penumbra rights in relation to the right of freedom of expression. Of what use is food if you can’t ask for it or say you have had enough? To be able to express oneself is to live. This explains why the fight for the freedom of expression is at the heart of both the nationalism and democratization discourses.

In this conclusion, I present the apparent lessons of the evolution of freedom of expression in Kenya, followed by a critical analysis of some of the problems that persist despite all the changes, as well as a number of salient remarks.

Lessons learned

We can draw several conclusions from this study. The first lesson is an obvious one: that in Kenya, the tension between liberty and authority is not a recent phenomenon, but is as old as the Kenyan state itself. There is a tendency to see contemporary struggles as rooted in the immediacy of their own context. Every generation tends to be blinded by the glare of its own achievements and to glorify in its own struggles. What this study has shown is that the gains registered by one generation are built on the gains attained by an earlier generation.

No sooner had the East African Protectorate been established in 1895 than individuals started clamoring for more freedom. By the 1920s, this clamor had congealed into modern political groupings such as the East African Association, Kikuyu Central Association, and the Young Kavirondo Association. Matters came to a head after the Second World War when returning veterans with a different view of the world and ideas about freedom met with solidifying settler nationalism in a volatile colonial political scene in which rudimentary ideas about human rights reigned supreme. Free expression was ultimately denied to the majority of Africans. The tension culminated in the violent episode called Mau Mau. In a bid to put down Mau Mau, the colonial government came up with a wide range of counter-insurgency measures, some martial and others legal in

nature. The collective impact of these measures was the curtailment of free expression at that time, which provided precedent for postcolonial repression.

Nevertheless, the spirited struggle for free expression by the anti-colonial nationalists provided innovative methods of resistance that inspired later generations of libertarians during the postcolonial era. These methods included pamphlets, the so-called alternative and underground press, use of non-mass communication channels of communication, and critiques of notions of national virtue and morality expressed in literary works, drama, and song.

It is clear that there are significant differences between the first case study and the other two case studies. The struggle for freedom of expression in the 1940s and 1950s took place when, as it has been observed, “the enemy was foreign, not domestic, and when there was little in the way of international forms of human rights” (Press 2004:58). This is what gives the struggle a nationalist outlook, an “us” vs. “them” distinction. In effect, as can be gleaned from the first case study, it was a struggle for free expression as much as it was a struggle for land and property. Indeed, nationalism, in so far as it aims at self-determination, is at some level a struggle for free expression. At the center of the idea of the nation is another idea – that of the people’s sovereignty, their freedom to express their collective will. Nationalism is, after all, a “distinctive form of politics” and “a way of thinking about our identity” (Day and Thompson 2004: 82). In a condition of domination, nationalism is the vehicle through which free expression escapes. Nationalism is a movement that seeks to advance the interests of the dominated. The airing of grievances and the modes of that airing, are forms of free expression.

The struggle in the 1940 and 1950s was unique in that it entailed much more violence on a large scale. This does not negate or diminish my argument – that this was a fight for free expression -- in any way. It is a statement about how a hard-line stance by the authorities after demands for free expression shepherded the conflict into militarization. This hard-line stance, resulting in the use of force to quell the clamor for freedom and in delaying tactics aimed at frustrating transformational change, was to be replicated in the post-independence contests for freedom with terrible consequences that the country could have avoided if the lessons of the colonial interregnum had been learned. I will return to this issue later.

The push for more freedom of expression in post-independence Kenya has been largely free of large-scale violence. Instead, it has been characterized by censorship; time, place, and manner regulations; banned publications; prior restraint and post-publication punishment; detention without trial; and numerous isolated deaths, disappearances and targeted assassinations. The trajectory taken by the evolution of the freedom of expression in post independence Kenya confirms Mueller’s thesis that “African nationalists were bequeathed a legacy designed to provide the government with a monopoly of coercive sanctions and resources that could be used to maintain law and order, to repress opponents, and ultimately to discourage dissent or politics itself” (1984: 401). State authority and actors have deployed these resources and tactics selectively in postcolonial Kenya. This has in turn denied the struggle a critical mass of popular frustration that that can lead to prolonged full-scale war.

By the time the constitutional draft was launched in 2004, the environment for freedom of expression in Kenya had expanded so much that even without a new

constitution, it was clear that things would never be the same.¹²³ The government “appeared like a political madhouse with no one in charge” (Mutua 2008: 149). Political speech was largely unrestrained. The President could be insulted; he could be cartooned and otherwise caricatured. His personal affairs, including the domestic quarrels of his wives, were all fair game. Corruption cases, such as Anglo-Leasing contracts in which the government was set to lose money, were revealed by the media. One report noted that the “media remained candid and independent” and that there were “numerous tabloid periodicals, which appeared irregularly and were highly critical of the Government” and that their reports “ranged from revealing insider reports to unsubstantiated rumor mongering” (US Department of State 2004).

The media in Kenya had also achieved a level of diversity that was unimaginable barely a decade earlier, and the range of views was equally astounding. This is not to say that the media and individual Kenyan citizens were free to express themselves on key political issues without consequences. The International Press Institute (IPI) reported that on January 10, 2003, police raided major towns and confiscated the so-called “alternative press,” including *The Independent* owned by Mburu Mucoki, an editor who perhaps fits the description of Kenya’s own version of Larry Flynt.¹²⁴ The Minister for Information, Mr. Raphael Tuju, was quoted as saying that the publications had failed to promptly

¹²³ Perhaps an anecdote that best exemplifies the strides freedom of expression had made in Kenya concerns the successful lawsuit filed by Wallace Gichere, a photojournalist who had been crippled by state agents in 1991. While working as a photographer for the Nation, Gichere had also been writing articles on human rights abuses by the government for the international media. In 1991, state agents visited his apartment in Nairobi and tossed him out of his fourth floor window, causing him appalling injuries. In 2000, the Standing Committee on Human Rights, one of the institutions Moi had grudgingly acceded to, recommended that Gichere receive state compensation for his injuries and financial loss, and in 2002, the attorney General admitted liability for Gichere’s injuries (IPI 2004). Although Gichere’s compensation was long coming, that he could force an admission of liability from a government was in itself a major achievement and a significant statement on how things had changed.

¹²⁴ He has recently spent time in jail for alleging that a government minister had been caught in a compromising situation in a car with a prominent Catholic cleric.

comply with the law, which required them to register, to execute a bond, and make returns to the registrar of newspapers. The raid followed a warning by Tuju that the newspapers had failed to respect the principles of fairness and balance (IPI 2004). Taking advantage of the newfound freedom, and edited largely by untrained journalists, and beholden to ethnic politics, the publications in question clearly left a lot to be desired in terms of professionalism. However, in cracking down on them, the government neatly illustrated the point I am trying to make, namely, that formal fundamental political change had failed to take place despite the enactment of many progressive pieces of legislation and the entry of new people in government. Change had occurred largely at the level of individuals without affecting structures and institutions.

The many false starts at fundamental reform have resulted in what can be described as change without transformation. The history of freedom of expression in Kenya is therefore one of a sedimentation of change moments that allow for new political actors to replace discredited and outgoing actors without fundamental change taking place. In the 1950s, after much struggle, the resultant change meant, ultimately, the replacement of colonial administrators by their African counterparts. But the structures of governance that restricted the freedom of expression remained intact. As one commentator has put it:

The new rulers were good students of colonial authoritarianism. For them the constitution was a vehicle for the establishment of political hegemony and control. It had to be “practical or workable” in the hands of the rulers. It was a powerful weapon to control citizens and crush those who threatened the rulers' grip on power (Ngugi 2002).

In the 1970s, after much struggle for freedom of expression, in the name of what I characterized as the Kenyatta succession, Kenyatta finally died. His demise resulted in the removal of his key confidants from power. However, the new regime of President Moi, after starting off well by releasing political detainees, soon resorted to the very same repressive tactics that Kenyatta and the colonial authorities before him had used. Why? Because the structures of oppression were retained. As Moi said, he would follow Kenyatta's footsteps or "*Nyayo*" (Widner 1992). It was another episode of change without transformation.

While progress has been discernable in the freedom of expression since the dawn of multiparty democracy in the early 1990s, the legal and the structural situation for that freedom, in the absence of a constitution, remains precarious (Maina 2003:3; Odhiambo 2003: 303). As late as 2003, journalists were still being arrested for doing their work, and the rights of assembly and protest were still limited. The annual reports of organizations such as CPJ, Reporters without Borders, US Department of State, Human Rights Watch, and local organization such as the Kenya National Human Rights Commission and the Kenya Human Rights Commission, describe instances of harassment whenever people have expressed themselves.

This state of affairs can be explained by the failure to enact a new constitution. As Mutua has argued, the "redemption of the postcolonial African state must start with the writing of a broadly legitimate national charter that creates a new compact between the state and its citizens" (2008: 2). As the mother law, the constitution offers philosophical underpinning and protection to all other statutes. The situation obtaining in Kenya in the period under review is such that the progressive statutes in existence are not fully

protected by the incumbent constitution whose bill of rights is limited in nature and is characterized by ambiguity, particularly on free expression issues (Odhiambo 2002). According to one report, “journalists are often unable to obtain government documents that could strengthen their cases in court” (HRW 2002:3). The proposals in the draft constitution guarantee wide freedoms for expression, and the freedom and independence of the media. Another important proposal is a strengthening of the guarantees of access to information. If these proposals ever come into force, the government will be obliged to publish and publicize any information of public interest. The draft constitution also contains guarantees to the right of freedom of association and peaceable assembly and to demonstrate without any prior permission.

It is clear from all the three case studies that the situation of freedom of expression has improved. It is safe to say that the use of extra-legal, extra-judicial, and arbitrary actions against political dissenters and the media has abated. But it is by no means extinct. Restrictive legislation was still in place in 2004 and the government continued to sometimes restrict the exercise of freedom of expression despite the considerable changes. The media regulatory framework allowed for the abuse and manipulation of the process of licensing with permits and broadcasting frequencies being withheld or revoked as a means of targeting alternative media. The Kenya Penal Code retained the provision precluding the publishing of any false statement, rumor, or report which is likely to cause fear and alarm to the public or disturb the peace. The Books and Newspapers Act (Cap. 111, Laws of Kenya) amended in 2002, inserted new clauses that are highly restrictive of expression. The Act imposes exorbitant publishing fees and strict penalties for those who violate the new rules. The law requires publishers to purchase a

bond of Kshs. 1 million before printing any publication and to deposit copies of their papers with the registrar within two weeks of publication. These measures were apparently aimed at emasculating the cash-strapped alternative press, but they had a consequential chilling effect on the established media.

Everyone looked forward to the new constitution as the document that would liberate the people from the clenched-fisted government (Mutua 2008: 167). Life was envisaged as being ultimately better under a liberal constitution, which was seen as the only one capable of guaranteeing the enjoyment of human rights, including free expression. The new draft constitution contained a well-rounded bill of rights, the future ratification of which is in no doubt. What this lengthy bill of rights in the Bomas draft of the constitution suggested is that, as a result of abuse of governmental authority in the past, the scales had tipped in favor of the individual rather than the state. Under this new constitution, if and whenever it is ratified, even with some changes on the disputed sections, the Kenyan (or Wanjiku, as she is often called in Kenya) would henceforth be trusted with free expression.

Another important lesson is that the outcome of the fight for freedom is dependent on unity in the ranks of those who struggle. It is, therefore, the popular movement that succeeds over an elite-led process. What the first case study shows is that although the violent Kikuyu nationalism of the pre-independence days enjoyed support amongst the Kikuyu *hoi polloi*, it was adequately supported by neither the elite nor by the rest of the Kenyan ethnicities. A struggle that is localized, even when it is clearly for the benefit of the larger public good, risks being misinterpreted as parochial.

The struggle for freedom of expression in the 1970s was elite-led, with university professors and some parliamentarians spearheading it. It was not popular in all parts of Kenya, being, as it was, concentrated around Kikuyu areas, the other areas having been deterred from participating by the suppression of their elite by the state and the gullibility of the rest of the people. What I have cast as the struggle for Kenyatta's succession was in essence a revolt of one section of the Kikuyu elite – the writers and politicians -- against another section of the Kikuyu elite who controlled government and wealth. In its narrow regional orientation and location, the struggle in the 1970s is similar to the anti-colonial struggle of the 1940s and 1950s. Therein lies the probable cause of its failure. Few outside of the Kikuyu areas supported the struggle. Some did not even understand what it was all about. Others probably viewed the state as irrelevant in their lives. These groups adopted a wait-and-see attitude. It appeared to be another internal Kikuyu affair that other Kenyans had no business getting involved in. This had the effect of emboldening authority, which saw the struggle as lacking popular national support. The overriding lesson in this period is that the urge for reform does not always start simultaneously from all corners of the state. There are geographical, geopolitical, ethnic, elite, religious, and gender variables that color the origin, shape, and outcome of a struggle.

The struggle witnessed in the late 1990s and early 2000s showed that a groundswell of popular desire for greater freedom across all Kenya's ethnic matrix is unstoppable even by the most determined form of authority. It showed that a united, determined citizenry committed to reform is able to force authority, however reluctant it is, to accede to at least some of the desired reforms, without resorting to large-scale

violence. Press's contention that mass public support is a key element in the emergence of a culture of resistance crucial to change is therefore vindicated (2004:250).

It also showed that a determined government can drag its feet and delay reforms that would guarantee free expression and general liberty for years. The KANU government "continued to play the game of musical chairs with the much-needed constitutional reforms necessary for advancing democracy" (Nasong'o 2007: 98). The new NARC government continued with the same tactics of stonewalling that eventually torpedoed the entire constitutional making process (Nasong'o 2007: 100). This slow-punctured reformation of governance, while incomparable with a total breakdown of law and order, has its own inherent risks. Incrementalism, while preferred over abrupt and disruptive change, is fraught with dangers. Perhaps a good illustration comes from the IPPG reforms, which achieved a great deal, but also resulted in palpable failure at some level. As has been noted,

After 1997, harsh media laws were passed, police brutality continued, and the courts continued to grant *de facto* immunity for corruption and human rights abuses, even declaring the anti-corruption authority to be unconstitutional (EAHRR 2003: 4).

Clearly, incremental change achieved through peaceful means cannot be expected to produce the same results as armed revolutionary change. As has been noted in relation to African constitutionalism, "the apparent constitutional failures and serious setbacks of constitutionalism in various African countries are to be expected as integral to the necessary or unavoidable processes of adaptation and indigenization" (An-Na'im 2006: 1). These failures and setbacks constitute the baby steps of constitutionalism. But while

baby steps are important, a baby can sometimes get frustrated. This is the tragedy of the Kenyan situation.

While this project is not about the period after 2004, because of the magnitude of the events following the December 2007 general election, and because of the apparent links between constitutional reforms and these events, I feel compelled to say that those who will look for answers to the violence that occurred after the general election would be best advised to point at the role of authority in delaying and frustrating a popular reform agenda. The push for reforms in the 1970s was effectively dashed, and authority triumphed.

In the 1990s and 2000s, the struggle resulted in some piecemeal changes that gave the impression that fundamental change or transformation had occurred. Yet nothing could be further from the truth. The move to review and rewrite the constitution, while it made considerable gain, was never consummated. Even after the much-touted smooth transition of power from KANU to the opposition in 2002, the government continued to use a number of legal and non-legal “spoiling tactics” to frustrate the enactment of a new constitution (Cottrell and Ghai 2004:20).

The new regime that came into power after the 2002 general election retained in large measure the institutions and policies of the previous regime and even resorted to authoritarian tactics to muzzle opposition and critical viewpoints (Nasong’o 2007:101). These new statutes and gentlemen’s agreements, such as aspects of IPPG changes, although advancing the course of freedom in a significant way, did not enjoy the protection of the fundamental law of the land. The prevalent freedom was located more in the changed times and evolving informal political culture. The gains registered in Kenya

were largely manifest in legislative reforms. While this is a positive development, one media scholar has noted that “legislation alone, though an important first step in media growth, cannot ensure the smooth operation of the media sector” (Odhiambo 2002: 296).

What is noteworthy is that the freedom obtaining in Kenya in the early and mid 2000s was not anchored in the constitution. As we saw in Chapter 4, the general will of the people, although captured and expressed in a draft constitutional document, had not been made operational. This is how Kenya came to depend on the demeanor of a political leader for freedom -- the magnanimity of President Mwai Kibaki, who appeared to have a higher tolerance for biting criticism than his predecessor.¹²⁵ But this reliance on the tolerance of their leader meant one thing: the worship of whimsy and arbitrariness – the same things that had caused so much restriction to freedom of expression in the first place.

Perhaps the best evidence that this freedom, without being founded on a constitution, rested on shaky ground is the continued existence of the following statutes that curtailed free expression:

- The Official Secrets Act of 1970 (Cap 187): This anachronistic law allows the government to operate secretly.
- Films and Stage Plays Act of 1972 (Cap 222): This law creates a censorship board with broad powers, including the right to censor all material offered for public

¹²⁵ Kibaki withered biting criticism of his uninteresting, slowpoke governance style, and was the butt of jokes about his ever-fighting official and unofficial wives and allegedly tribalistic, corrupt and conniving confidants. In comparison, President Moi ruled Kenya for over ten years without any Kenyan daring to mention his estranged wife, alleged girlfriends, or corrupt henchmen.

entertainment. It also bars the making of film in Kenya without license from the ministry of information and broadcasting.

- The Kenya Communication Act of 1998 (Cap 2) and the Kenya Broadcasting Corporation Act (Cap 221): These two laws need to be harmonized to establish a one-stop center for applicants of broadcasting licenses.
- Books and Newspapers Act of 1962 (Cap 111), updated as The Statute (Miscellaneous Amendment Act, 2002): This law, which established hefty bond fees for publishers, needs to be changed to allow the establishment of more media outlets.
- The Defamation Act of 1972 (Cap 36) as amended by Statute Law (Miscellaneous Amendment) Act No. 12 of 1992: This law introduced hefty damages for libel that have resulted in a chilling effect on free expression.
- The Preservation of Public Security Act of 1960 (Cap 57) and all subsequent amendments which gives the President powers to censor, control, or prohibit the communication of any ideas or information and their dissemination.
- The Penal Code of 1960 (Cap 63) whose Section 66 prohibits publication of any statement, rumor, or report that may cause fear and alarm to the public or disturb the peace.
- The Police Act of 1968 (Cap 84), which empowers Police Commanders to control and direct the extent to which music or human speech or any other sound may be amplified, broadcast, relayed, or reproduced by artificial means.
- The Armed Forces Act of 1953 (Cap 205 – Protected Areas), which prohibits access to military installations and operational zones. Inaccessible areas of

military operation means that no one can scrutinize what goes on, a very serious anomaly given that some of the operational zones are in inhabited areas.

- Special Districts Administration of 1960 (Cap 105), through which provincial administrators are empowered to restrict the movement of an individual conducting himself “so as to be dangerous to peace and good order.”

These laws have their roots in colonialism and are, therefore, retrogressive and anachronistic. Their existence at a time of greatly expanded freedom meant that the letter of the law was behind the spirit of the nation.

This failure to enact a new constitution was the result of deliberate frustration by successive KANU-led governments, not just the NARC regime. This contributed to a pervasive feeling of helplessness. Kenyans felt as if they could not attain fundamental change through democratic means. Despite the enactment of a number of laws that resulted in significant expansion of free expression and freedom in general, without constitutional change, real transformation remained an illusion. Fundamental transformation is vital for the full enjoyment of rights, including free expression. Without this new freedom being enshrined in a new, ratified, operational constitution, it appeared as if the hard-won liberty was a fleeting gain. Without a new constitution, the abundant freedom of expression amounted to little since there was no enforcement mechanism to support the freedom. Freedom of expression was thus a fragile possession.

On the other hand, freedom of expression was being exercised without the expectation of its limits. Kenyans were expressing themselves with all the passion and carelessness characteristic of an era of suspended morality. The country was in a unique

situation where traditional morality that glued both the tribe and the nation together in the early post-independence period was so eroded as to be unrecognizable and unrecoverable, while the practice of responsible expression had not been fully internalized. The absence of the coordinates of free expression limits, therefore, constituted a kind of license. It was the age of uninhibited, even illicit expression.

Through the unprecedented exercise of free expression, the carefully crafted narrative of unity and stability was undermined. The constitutional review process provided a chance for individuals, speaking in the name of the tribe, to repudiate the integrationist project on which the country was founded. Demands for ethnic recognition and entitlement outweighed those of national integration. Commentary was replaced with open incitement and agitation against state authority, which we saw in Chapter One was established by man to aid in his own governance. This means that whenever the authorities took action on irresponsible expression, it always appeared as an unjustified attack on free expression since there was no expressed limit on what constituted acceptable free expression. The country progressed along a narrow strip -- a no-man's land between the delineated boundaries of freedom and authority. There was too much free expression. However, because the constitution had not been reviewed and enacted, there was too much authority as well. The contest between liberty and authority had resulted in a dangerous draw in which each side lay prostrate yet potent, welling with emotion and strength, ready to strike the other with a death blow.

As is often said in Africa, Kenya had the beer, but not the container with which to drink it. It had the freedom, but this freedom was undergirded neither by a popular consciational political culture, nor by a formal agreement by the sovereign on how to

govern itself. The country operated on a lame duck constitution that had been mutilated many times for short-term expediency rather than long term efficacy. In this scenario, in this game with neither an acceptable umpire nor acceptable rules, it was just a matter of time before the country met its rendezvous with the Hobbesian scenario, in which both authority and freedom eat their young.

Kenya's nightmare came after the disputed elections of 2007. For a brief period in January 2008, Kenyans fought one another in brutal skirmishes that were broadcast around the world on TV and on the Internet. About 1500 people were killed, and a further 600 displaced. The international community was forced to intervene, sending the former Secretary-General of the United Nations to mediate between the warring factions, tribes, and authority. In the end, a coalition government that resembled the design of government in both the Bomas and the Wako drafts of the constitution, both of which were delayed and rejected, was installed. The reforms demanded by Kenyans since colonial days, which the authority had refused to implement peacefully, were forced on the same authority in a violent crisis. It was reminiscent of the colonial era when colonial settlers denied Africans freedom only to be forced to accede to changes after the violent Mau Mau struggle.

Fundamental transformation in a democratizing situation makes it possible for the *vox populi* to not only be heard, but to appear to be heard. Without it, there is much talking at cross purposes, with no satisfactory responses to questions since no one is listening to the questions or the answers, as some pursue transformation for its own sake, while others frustrate change for no apparent reason other than the fact that they detest change and see their obstruction of it as a form of expression that equally deserves to be

protected. The post 2007 election violence could, therefore, be said to have been inevitable. As one writer of a letter to the editor remarked in 2002, “Those who make peaceful revolution impossible will make violent revolution inevitable” (*Daily Nation*, June 4, 2002).

The delay in adopting a new constitution must be located, not only in government recalcitrance, but in the contradictions inherent in democracy itself. The freedom of expression used to demand changes is the same freedom that those who obstruct democratic changes in a democratizing setting usually invoke. Even authority itself, in invoking highfalutin ideas of law and order, justifies its fiat on the basis of democracy. It is ironic that part of the reason why Kenyans did not have a new constitution had something to do with the freedom of a section of the citizenry to express their opposition to the constitution. However, believing in freedom of expression means believing in views that one does not necessarily like (Chomsky 1992). It is in this sense that freedom of expression is a double-edged sword.

In the run-up to the December 2007 election, in a transitional and developmental setting, freedom of expression practiced with few legal, moral, or political restraints fostered a culture of immediate gratification in a people of doubtful rationality -- or of a rationality that had not evolved to a level that could appreciate these inherent contradictions of freedom. Kenyans wanted everything now, nay, yesterday – and used their new-found freedom to express their impatience and skepticism as well as to assert their ethnic identities and to demand their share of the national cake, now seen as divisible in ethnic terms. Abundant freedom of expression failed to take the place of equality of opportunity and equitable distribution of resources, which those who agitated

for greater freedoms throughout Kenyan history had envisioned would be a natural consequence of freedom – a kind of free expression dividend. As we have seen, particularly in the earlier case studies, those who fought for freedom of expression often saw their struggle as resulting in better life for future generations. The events after the 2007 general election point to the fact that a disequilibrium might occur between expectations at the time of struggle for greater freedom and the capacity for resultant change to fulfill such expectations. I agree with the admonition that, while democracy is the best form of government, democratization can often exacerbate ethnic particularism, fortify social and economic inequalities, penalize minorities, rekindle old animosities, become the tool of powerful economic interests, fail in practice to broaden popular participation in government, and favor communities with an existing commercial ethic (Chua 2003).

Regression, Progress, and Free Expression

The contest between authority and free expression in Kenya is bound to continue in the future, even if a new constitution is ratified. Even in the most developed democracies, this contest is not fully settled. It goes on organically and incrementally. Free expression is the highest aspiration of mankind. But freedom without responsibility is the prerogative of the harlot. While authority has presented the greatest threat to political stability in Kenya in the past through denial of free expression, current and future threats to both stability and free expression itself will emanate from how Kenyans exercise the new-found freedom.

What must be emphasized is that the setbacks witnessed in Kenya after the disputed 2007 elections as well as in each of the case studies reviewed here are an inevitable part of the process of building national consensus around the principle of free expression. As these case studies have shown, the clamor for free expression has in the past been led by the elite of the day. These elite provided ideals, aspirations that appeared good without the benefit of being tested in Kenya's peculiar, unequal, multiethnic society in which traditionalism and modernity coexist uneasily. All stable democracies were convulsed by similarly drastic events and remain vulnerable to setbacks and serious strife. What we must accept is that constitutionalism is not an event; it is a process. These apparent regressions in Kenya must be seen, as An-Na'im has argued, as part of progression (2006).

Undeniably, free expression often has a role to play in these occasional regressions. While it may appear attractive and logical to trade free expression for momentary stability, those seeking answers to long-term stability must accept that the answer lies in more, not less, expression. Tocqueville once remarked that he did "not feel toward freedom of the press that complete and instantaneous love one accords to things by their nature supremely good. I love it more from considering the evils it prevents than on account of the good it does" (quoted in Cook 1990: 15-16). The only way to ensure popular negotiation of issues of power relations and economic, historical, and social justice, while securing the rule of law and fundamental rights in any society, is free expression. It is the cement for building a political culture of tolerance. Free expression is necessary for presenting and mediating competing claims, and achieving necessary compromise.

Seen in this light, the tragic events witnessed in Kenya in 2008 support my analysis that free expression aids the rule of law. There is need, therefore, to secure and promote free expression in order to avoid such tragedies. The fact that some individuals abuse free expression to incite hatred and violence is an unavoidable risk, and the response should be to hold those responsible accountable and not to violate the rights of the peaceful and responsible majority.

The evolution of freedom of expression in Kenya has taken many twists and turns. Throughout this evolution, the two consistent forces have been the desire for free expression and the contingent role of authority. Authority has dominated free expression for the better part of Kenya's existence as a state. In recent times, however, there is evidence that free expression has gained the upper hand – but barely. It remains to be seen how the contest will end in Kenya, or if it ever will.

ABBREVIATIONS AND ACRONYMS

BBC:	British Broadcasting Corporation
CCK:	Communication Commission of Kenya
CPJ:	Committee to Protect Journalists
CRCK:	Constitutional Review Commission of Kenya
EAA:	East African Association
EAC:	East African Community
EAHRR:	East African Human Rights Report
EAMI:	East African Media Institute
EAPG:	East African Protectorate Government
ECK:	Electoral Commission of Kenya
FCC:	Federal Communication Commission
FESTAC:	Festival of Arts and Cultures
GEMA:	Gĩkũyũ Embu and Meru
GSU:	General Service Unit
HRW:	Human Rights Watch
IBEAC:	Imperial British East Africa Company
ICCPR:	International Covenant on Civil and Political Rights
ICESR:	International Covenant on Economic, Social, and Cultural Rights
ICFTU:	International Confederation of Free Trade Unions
ICJ:	International Commission of Jurists
IPPG:	Inter-Parties Parliamentary Group
ITU:	International Telecommunications Union

KADU:	Kenya African Democratic Union
KANU:	Kenya African National Union
KASU:	Kenya African Study Union
KBC:	Kenya Broadcasting Corporation
KCA:	Kikuyu Central Association
KFL:	Kenya Federal of Labor
KHRC:	Kenya Human Rights Commission
KNHRC:	Kenya National Human Rights Commission
KPU:	Kenya People's Union
KPU:	Kenya Peoples Union
KTN:	Kenya Television Network
KTN:	Kenya Television Network
KUJ:	Kenya Union of Journalists
LDP:	Labor Democratic Party
LKWV:	League of Kenyan Women Voters
MI:	Media Institute
MISA:	Media Institute of Southern Africa
MOA:	Media Owners Association
NAK:	National Alliance Kenya (party)
NARC:	National Rainbow Coalition
NCA:	National Convention Assembly
NCEC:	National Convention Executive Council
PCK:	People's Commission of Kenya

STV: Stellavision
TRC: Truth and Reconciliation Commission
UDHR: Universal Declaration of Human Rights
UNDP: United Nations Development Program
VOK: Voice of Kenya
YKA: Young Kavirondo Association

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