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# *Human Rights and State Despotism in Kenya: Institutional Problems*

Makau wa Mutua\*

## **Autocracy: Basis for Human Rights Abuses**

Kenya's post-independence history has been marked by sharp contradiction between the state and civil society in spite of the image, created in the West during the Cold War, that the east African nation was the beacon of hope in Africa.<sup>1</sup> Not even the contested presidential and parliamentary elections in 1992, the first of their kind in decades, have brought relief from state-directed human rights violations, a problem that has become the trademark of the Nairobi government.<sup>2</sup> The seeds of an autocratic state were planted right at independence when in 1964 the minority Kenya African Democratic Union (KADU), under the leadership of Daniel arap Moi, Kenya's president since 1978, voluntarily dissolved itself and joined the Kenya African National Union (KANU), headed by the nation's first president, Jomo Kenyatta. The merger made Kenya a *de facto* one-party state and paved the way for a despotic executive.<sup>3</sup>

In the absence of an opposition, although the constitution allowed parliamentary democracy, Kenyatta quickly created a highly centralized, authoritarian republic, reminiscent of the colonial state. Although Oginga Odinga broke from KANU in 1966 to form the Kenya Peoples Union (KPU), Kenyatta crushed it in 1969 and detained all its principal leaders.<sup>4</sup> For all practical purposes, Kenya remained a one-party state. With the legalization of political monopoly, and following a failed coup attempt by the air force in 1982, Moi perfected the repressive state crafted by Kenyatta through party control of civic groups, trade unions, the press, the

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1. For an exhaustive catalog of human rights violations by the Kenya government, see Africa Watch, **Taking Liberties** (Washington, DC: Africa Watch, 1991). The report is the most comprehensive itemization of abuses by the government to date.

2. Multiparty presidential and parliamentary elections were held for the first time in 26 years in 1992.

3. KANU, the nationalist party, was formed in 1960. It enjoyed widespread support among the Kikuyu, Luo, Akamba, and Luhya, the country's main ethnic groups and won decisively the independence elections in 1963. KADU was orchestrated by the British settler and business interests. While its leaders presented it as the champion of the smaller ethnic groups it was in reality the vehicle for the protection of British settler property interests.

4. The KPU was banned in 1969, following an anti-government demonstration in Kisumu, Odinga's ancestral home. At least 10 people were killed by security forces. KPU leaders were detained under the 1966 Preservation of the Public Security Act (PPSA), the detention law passed by Kenyatta to silence critics.

parliament, and, critically, the judiciary. Political murder, detention without trial, and false, politically motivated charges became the business of the state.<sup>5</sup> The period between 1982 and 1990 was characterized by extreme government repression of its opponents. But the end of the Cold War exposed client states and emboldened reformers; in Kenya, veteran oppositionists, and a young professional reformist class of lawyers, the press, academics, and church leaders rode the global pro-democracy wave and prevailed on KANU in December 1991 to allow political competition.

Moi claimed throughout that Kenya was not ready for liberal democracy and repeatedly accused the West for using aid to force free elections. He warned that such changes would result in chaos and ethnic killings. KANU thereafter took every step to hobble the opposition and steal the election. First beginning in February 1992, it orchestrated and engineered the worst intercommunal violence in the nation's history. The killings of Kikuyus and Luos within the Rift Valley, Kenya's breadbasket, by members of the Kalenjin community, from which Moi comes, were ostensibly spurred by land disputes. In reality, the government used its agents and material to spark the killings to punish the opposition and drive it from the province. The killings, which continue to date, have left hundreds, perhaps thousands, dead and many more homeless. The government also refused to register millions of eligible voters in opposition strongholds, packed the electoral commission with its supporters, and denied the opposition access to the media and permits for rallies.<sup>6</sup> These problems, and an opposition divided along ethnic lines, resulted in Moi's victory. Since then, KANU has returned to one-party style politics, suppressing dissent, harassing opponents, and fanning the killings of innocents in opposition areas. Public institutions, such as the executive organs and the judiciary have continued as the instruments of repression despite the 1992 elections.<sup>7</sup>

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5. The most celebrated case of political murder during the Moi regime thus far has been that of Robert Ouko in February 1990—the urbane foreign minister who reportedly fell out with Nicholas Biwott, Moi's right hand man. A commission of inquiry was disbanded by Moi when it appeared close to implicating him and other senior aides in the murder. See Makau wa Mutua "A Break with the Past?" *Africa Report*, vol. 37, no. 1 (January-February 1992), pp. 21-24.

6. Brian Atwood, "Kenya's Rigged Election," *Christian Science Monitor* (2 September 1992). In that article, Atwood, then president of the National Democratic Institute for International Affairs and the current Administrator of the U.S. Agency for International Development, blasted the Moi government for taking steps to steal the election and charged that "human rights abuses have increased, opposition rallies have been hampered, opposition political leaders have been jailed, and violent episodes designed to incite ethnic conflict have been traced directly to Kenya's official security and police services."

7. The three main opposition political parties, Oginga Odinga's Forum for the Restoration of Democracy (FORD-Kenya), Kenneth Matiba's FORD-Asili, and Mwai Kibaki's Democratic Party (DP) took over 80 seats in the 188 member

## Suppression of Speech and Association Rights

Arguably, no other rights are more important than speech and association rights in a liberal democratic regime. The KANU government has managed until 1992 to hold the monopoly on power by denying these basic freedoms. Without a doubt the elections allowed an incremental jump in the level of public debate; previously forbidden subjects such as the transfer of power or the nature of the presidency were opened to public debate. Political parties, private media, and non-governmental organizations, including those addressing human rights, were launched under the assumption that it was their legal right to join public discourse on governance and the accountability of public officials. The newly inaugurated multiparty assembly was expected to assume its role not merely as the legislative arm but as the conscience of the nation and a check on executive authority as well. But Moi has since proven that despotism cannot be overcome without the thorough reform of public institutions.

As if to thump his nose at the notion of parliamentary supremacy, Moi has returned to the past with attacks on members of parliament (MPs). Opposition parliamentarians who speak publicly on matters of national importance—especially matters implicating government misconduct—have been arrested and jailed. A case in point is Njenga Mungai, a FORD-Asili MP who was picked up in August 1993 for meeting some of his constituents rendered homeless by the ethnic clashes in the Rift Valley. In 1993 alone, for example, up to 21 opposition MPs were arrested and jailed. The arrests have been motivated by the government's attempt either to prohibit a planned action, such as a demonstration, or to prevent MPs from highlighting an incident implicating the government. For instance, FORD-Asili MP for Nakuru North, Bishop Joseph Kamau Kimani, was arrested on 2 November 1993 for attempting to enter the Bahati Police Station in Nakuru to investigate the death of three men who had allegedly attempted to raid the station. He had publicly questioned the government's allegation, for which he was arrested and charged with "publishing a malicious rumor."<sup>8</sup> The latest of such arrests is that of Professor Anyang'

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parliament although they garnered 69.9 percent of the votes cast in the parliamentary poll. For a comprehensive analysis of the processes leading up to the election, see National Election Monitoring Unit, **The Multi-Party General Elections In Kenya** (Nairobi: NEMU, 1993). For a report on the period just prior to the election, see International Human Rights Law Group, **Facing the Pluralist Challenge: Human Rights and Democratization in Kenya's December 1992 Multi-Party Elections** (Washington, D.C.: IHRLG, 1992).

8. Robert F. Kennedy Memorial Center for Human Rights, **Failing the Democratic Challenge: Freedom of Expression in Multi-Party Kenya** (Washington, D.C.: RFKMCHR, 1993), p. 25. Other MPs arrested in 1993 included Raila Odinga, FORD-Kenya MP for Langata in Nairobi, Ferdinand Obure, FORD-Kenya MP, Kamau Icharia, FORD-Asili MP, and Abdullahi Sheik Ahmed, Mandere East MP, *ibid.*, pp. 30-31.

Nyong'o, the acclaimed political scientist and MP for Kisumu Rural, who was arrested in February 1995 for criticizing government allegations that a guerilla movement was out to overthrow it.<sup>9</sup> Also arrested in February was Rongo MP, Aluoch Polo, for "insulting" Moi; he has been charged with sedition.<sup>10</sup> The arrests appear to have had a chilling effect on the ability of MPs to speak openly.

Just as it had done during the electoral season, the government has not hesitated to use the Public Order Act to silence opposition political activity. According to this law, local administrators can deny permits for meetings and rallies. Leading opposition politicians such as Paul Muite, Kikuyu MP and former chair of the Law Society of Kenya (LSK), has been repeatedly barred from holding public rallies. Kaluki Mwenda, MP for Kitui Central has on several occasions had public meetings that she was scheduled to address dispersed by security forces. In by-elections to fill vacant parliamentary posts in 1994, police and security forces repeatedly disrupted opposition rallies and beat up supporters. In the event, a demoralized opposition has seen its numbers dwindle as KANU has financed a number of key defections and coerced others. A stunning defection was that of John Keen, the Democratic Party's (DP) secretary-general, who crossed over to KANU in February 1995.<sup>11</sup>

Two more recent events appear designed to further cripple free speech. The government, faced with an unrepentant opposition, has escalated the rhetoric of paranoia. With constant references to the "peace" and "stability" enjoyed by Kenyans in contrast to neighboring countries such as Rwanda or Somalia, Moi has played up the security of the state in recent months. He has named two allegedly clandestine organizations which he claims plan to violently overthrow his government. The first, the February Eighteen Popular Resistance Army (FERA) or the February Eighteen Movement (FEM), is allegedly based in Uganda, and plans to cause Rwanda-like chaos in Kenya.<sup>12</sup> The second, the Kenya Patriotic Front, is alleged to be working with FERA to accomplish that goal.<sup>13</sup> These charges give the government an excuse to tighten security measures and closely

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9. "MP arrested for criticizing claim that guerillas trying to overthrow government," BBC Summary of World Broadcasts (London) (17 February 1995).

10. "Opposition MP arrested, to be charged with sedition," BBC Summary of World Broadcasts (London) (18 February 1995).

11. *Indian Ocean Newsletter* (Paris) (11 February 1995).

12. *Ibid.*

13. "Moi says second clandestine group working to overthrow the government," BBC Summary of World Broadcasts (London) (16 February 1995).

monitor opposition activities. The government has already called for treason laws to be applied to those who ridicule the presidency and its occupant. This is meant to silence opposition critics who question government claims of plots against it as well as the direction that Moi is taking the country in. A government spokesman linked the alleged guerilla movements with the opposition. He alleged that the "opposition was in league with enemies of Kenya, who are jealous of our peace and stability, are busy with subversive activities."<sup>14</sup>

In addition, the government has taken steps to silence the buoyant non-governmental sector, revitalized by the opening created by the 1992 elections. A favorite tool of the government is the use of sedition laws to criminalize dissent and prohibit the circulation of certain publications. Since 1992, two outspoken publications, **Society** and **Finance**, have come under sharp attack for being critical of the KANU government. Copies of both have been confiscated by the state on several occasions. Another publication, the **Watchman**, was targeted by KANU for investigation because it was "inciting rebellion, civil disobedience and inter-tribal warring."<sup>15</sup> Virtually every medium, except the government-owned press, has incurred government displeasure for being outspoken. Reporters of the **Daily Nation**, the country's major daily, have been arrested on numerous occasions.

But the biggest threat, if the statements of government officials are any indication, is posed by the growing number of human rights organizations. The most prominent of these, the Kenya Human Rights Commission (KHRC), has established a reputation for factual, hard-hitting exposés of human rights violations by the government. In turn, the government has accused its officials of being under the control and pay of foreigners. The government accused the KHRC of "soliciting funds from abroad for destabilization of the country."<sup>16</sup> The attack was prompted by the effective campaign of KHRC to revive the debate on constitutional reform.<sup>17</sup> The KHRC is at the head of an increasingly vibrant civil society.

One of the most serious challenges to the KANU government was mounted in 1994 by Mwangaza Trust (MT), a charitable organization whose methods of work were highly innovative and grassroots-oriented. Though led by the upper crust of Kenya's political and intellectual elites,

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14. "Information Minister calls for laws on treason to be applied," BBC Summary of World Broadcasts (London) (17 February 1995).

15. "Probe Magazine, Says KANU," **Standard** (Nairobi) (13 February 1993), p. 6.

16. Minister Lashes Out at Human Rights Group," **Kenya Times** (Nairobi) (1 December 1994); "Makau Protests Against Kiraitu's Remark," **Daily Nation** (Nairobi) (1 December 1994).

17. LSK, International Commission of Jurists (Kenya chapter) and KHRC, **The Kenya We Want: Proposal for a Model Constitution** (Nairobi: LSK, ICJ-Kenya, and KHRC, 1994).

MT quickly turned into a populist grouping partly because of the charismatic leadership of Paul Muite, its chair. But it was also able to do what no other organization has done, including the government: it published its newsletter, **Nuru**, Kiswahili for light, in all of the country's eight major languages, reaching a population that had hitherto been ignored.<sup>18</sup> MT committed itself to involving Kenyans in seeking solutions to good government, "people-centered" development, equality of the sexes, and democracy.<sup>19</sup> On 19 January 1995, the government deregistered MT for "pursuing political activities as opposed to being a charitable organization."<sup>20</sup> In February, Moi attacked MT and Paul Muite as subversive and foreign-directed.<sup>21</sup> The government has repeatedly demonstrated its inability to tolerate independent political activity.

### **Conclusion: Necessity for Institutional Reform**

Although Kenya is now formally a multiparty state, the government still governs as if nothing has changed. It arrests, jails, and harasses its critics with impunity, and encourages ethnic killings even as its officials are involved in high level corruption. This conduct is possible because it was the form of the law—not its substance—that was changed to allow the contested election in 1992. Repressive laws and state institutions, many of them carryovers from the colonial state, remain intact. The constitution, the supreme law of the land, is an invitation to an autocratic presidency.<sup>22</sup>

In addition to reforming laws affecting political competition to level the playing field, laws limiting speech and political participation must be repealed or amended to reflect the guarantees in Kenya's bill of rights. These laws include: the detention law or the PPSA under which government opponents have been dispatched without a hearing in the past; the Public Order Act which allows despotic local administrators to deny assembly and associational rights to those critical of the government; the Chief's Authority Act, which gives local government agents the power to regulate all activity, including weddings and burials; the Societies Act, the law that regulates non-governmental organization and has often been used

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18. In its first edition **Nuru** carried the suggestive sub-headline: "light in the dark cave." See **Nuru** (Nairobi) (October 1994), p. 1.

19. Mwangaza Trust, **Mwangaza Trust: Mobilizing for Positive Change** (Nairobi: Mwangaza Trust, 1994).

20. "High Court allows charity deregistered for opposition activities to appeal," BBC Summary of World Broadcasts (London) (10 February 1995).

21. *Ibid.*

22. "President Moi says NGOs subversive," BBC Summary of World Broadcasts (London) (13 February 1995).

to deny registration to groups independent of the ruling party; and the sections of the penal code that provide for seditious offenses and the prohibition of certain publications.

Finally, a new configuration of powers among the executive, the judiciary, and the parliament must be instituted to limit the concentration of virtually all power in the hands of the president. The president's absolute powers in appointing members of the electoral commission, the official body mandated to organize, run, and monitor elections must be sharply reduced. Similarly, his powers to appoint senior judges without any parliamentary input needs reform. The same is true of other key public service appointments, including heads of parastatal organizations and diplomats. Some of these powers must be reduced and the remaining equally shared with parliament. The only sure method of effecting such changes is through a general review, in the setting of a constitutional conference, of all laws and institutions governing the country. Only through such a process can the arbitrary abuse of power by a few, and the commission of human rights abuses against the many by state officials, be punished and ultimately prevented.