

THE EVOLUTION OF KENYA'S ELECTORAL SYSTEM WITH
SPECIAL EMPHASIS ON PRESIDENTIAL ELECTIONS, 1963-1979

By

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Dedicated to

A dissertation submitted in part

fulfillment of the requirements

for the award of a

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NAIROBI, 1980

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Dedicated to
My Mother and Sister
Njeri and Mumbi Murage.

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..... it was a small minority that inherited power at Independence. Essentially this "bourgeoisie of the civil service" was financially and politically weak. It therefore set about using the state machinery to make itself rich by inserting itself as a sort of commission agent in the foreign dominated commercial system There are never quite enough spoils to go around, and this weakens the would be bourgeoisie. Consequently this "national bourgeoisie" discovers the need for a domineering, powerful and "popular" leader to whom will fall the dual role of stabilising the regime and perpetuating the domination of the bourgeoisie. His strength in this role is necessarily in inverse proportion to that of representative or popularly elected government The institutions of government are progressively reduced to those of President and his circle. The party becomes a mere shell and usually an implement of coercion.The leading posts in the bureaucracy are entrusted to men from the leaders tribe, and sometimes directly from his own family or clan. Parliament becomes little more than an adjunct of the Presidency, where a legislative veneer is fitted over the wishes of the autocracy, in return for high salaries and a limited licence to ventilate popular sentiments which of course, must however not be critical of the President. Presidential elections mean nothing more than accepting the leader in power. Parliamentary elections are reduced merely to a choice of personalities, all of whom are pledged to support the President and his government: elections circulate the elite, contribute to the mystification of the voters, and thus help preserve the elites freedom to go on enriching itself without interference from below. With the passing of elections, this function is performed by a series of military coups.

Frantz Fanon's commentary on government in Emergent third world neo-colonial states.

- The Wretched of the Earth,
(penguin London 1967)

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I am extremely grateful to all those persons who in one way or another assisted me in this dissertation from its initiation.

For special mention I wish to single out Mr. Professor M. J. ... Registrar who kindly agreed to supervise the final stages of this work after Mr. ... my first supervisor left the University to take the possession of his ... I greatly benefited from his helpful comments, criticism and suggestions not to mention that I very much enjoyed the ...

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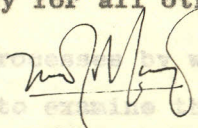
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The views and ideas expressed herein are my own, and do not in any way reflect the position of the University or the Faculty of Law. Except for the typing errors, full responsibility for all other errors and mistakes is acknowledged.



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INTRODUCTION

Early Legal political philosophers have postulated a period in which men lived without any institutions of law and government, which characterise our present day societies. Some of them John Locke for example, saw man's life in this condition as relatively tranquil and benign, while others like the great English philosopher Thomas Hobbes thought his existence in the "state of nature would be solitary poor nasty brutish and short".

Advocates of both persuasions however share a common conclusion; that men created civil government to make their lives and other forms of interests more secure. In today's world, it is possible to discern five distinct systems of government: the liberal democracy (Britain, India etc), the Socialist and Communist systems (USSR, China, Mozambique), Autocracies (Zaire, Spain under Franco etc), Monarchies (Morocco, Saudi Arabia, Swaziland) and Military Dictatorships (Pakistan, Gabon and Amin's Uganda).

Whatever the system of government, there are many government institutions which are set up to play the variety of fundamental and necessary roles involved in the administration of a state. Two such institutions are the Parliament and the Presidency, if the country has opted for a presidential type of government. ^{Like Kenya, are you sure?} These two institutions provide the political leadership that controls the central government. This leadership provides a central exercise of authority which formulates national policies, makes decisions and manages the affairs of the state.

This dissertation is interested in the processes by which political leadership is recruited in Kenya. It seeks to examine the laws governing the election of President or Member of Parliament in Kenya, how these laws have been developed, and in the light of Kenya's past general elections, see how the electoral system has operated to determine the political leadership of this country since independence. In other words the modest aim of this research is to examine the legal and political framework by which the Kenyan political leadership has come to power, continues to remain in power, and may be replaced within the existing constitutional framework.

Its brevity notwithstanding, it is hoped that it will excite interest in the subject and perhaps serve as a basis for further discussion and a more thorough research.

The paper is divided into four chapters. The first chapter examines the framework of government inherited at Independence. This involves examining the relevant provisions of the Independence Constitution. The analysis gives us the governmental framework against which background to discuss the electoral system.

The second chapter analyses the development of our electoral system from 1963 to 1969. It investigates the legal rules which constitute our electoral laws, and examines the political forces and events which have been both the cause and occasion for the development of those legal rules.

Chapter three examines the institutionalisation of the one-party state in a multi-party electoral system. It discusses the electoral politics of the period 1969-1979 and shows how the one-party system of government has exploited the multi-party electoral system to secure its position and maintain itself in power. And Kenya's only political party during this period - KANU, has been discussed because of the role it plays in our electoral system.

The final chapter highlights some of the shortcomings of Kenya's defacto one-party system operating within a framework of election laws designed for a multi-party system, emphasising on how the functions of such a multi-party electoral system have been frustrated. The author then proceeds to make a case for the revision of the electoral system to have it conform to the existing political realities.

The methodology of research adopted is the examination of the primary sources of our election laws - the republican constitution, the National Assembly and Presidential Elections Act and the KANU constitution - and a re-examination of the published material on Kenya's contemporary political science. These are blended with materials from newspapers, magazines, thesis and discussions with my lecturers and fellow students. Discussions with my colleagues have proved especially useful, not surprisingly because of the greater interest that Kenyan politics has excited among its peoples since the death of President Kenyatta in August, 1978.

Certain details had to be foregone and the analysis cannot boast of being exhaustive. Its brevity notwithstanding, it is hoped that it will excite interest in the subject and perhaps serve as a basis for further discussion and a more thorough research.

The colonial government was carried on through a bureaucratic machinery that was rigidly authoritative and predominantly military in character. Colonial rule being the anti-thesis of democracy and

CHAPTER ONE
THE CONSTITUTIONAL FRAMEWORK
OF GOVERNMENT AT INDEPENDENCE

Kenya became independent on 12th December, 1963. The two most important instruments in the transfer of power were the Kenya Independence Act 1963,¹ passed by the British Parliament, renouncing British rights of government and legislation in Kenya, and the Independence Order-in-Council,² whose second schedule contained the Independence Constitution.

The two outstanding features of this constitution were a form of Westminster system of government, and an extensive system of regionalism - a quasi-federal arrangement of government with semi-autonomous regions divided roughly along tribal lines. This constitution was a product of vigorous bargaining by the various groupings that dominated the political scene in the early sixties. The major groups were KANU which was dominated by the larger and more politicised Kikuyu and Luo tribes, KADU which represented the smaller Luhya, Kalenjin Masai and Coastal peoples, and the small but powerful white community. The whites were interested in safeguarding their economic interests, while the Nationalists were interested in the speedy transfer of power to the Africans. But while KANU wanted that power to be transferred to a strong and centralised African government, KADU wanted limitations be put on the exercise of that power, to ensure that the smaller tribes are not dominated by the larger ones.³

The period of colonial transition and the transfer of political power to an African majority continued until the time of Independence on 12th December, 1963. This transition to an African government sounded the death-knell to the colonialism of the pre-1950's and the multi racialism of the late fifties.

The colonial system which the constitution intended to get rid of, was one in which the small European community enjoyed political supremacy through their control of the state machinery: a system in which they enjoyed economic superiority over the Asians at the middle and the Africans at the bottom, and a system characterised by rigid racial discrimination and other forms of domination at the social level. ⁴

The colonial government was autocratic⁵ for it was carried on through an imposed administrative machinery that was rigidly authoritative and hierachical in form and predominantly military in character. Colonial rule being the anti-thesis of democracy and popular participation in government, the legislature and the judiciary did not exist as distinct and separte branches of government. The legislature was controlled by the executive for its function was to advise the Governor on government sponsored legislation. The Governor had the power to veto or suspend enactments, and in any case he could promuglate legislation on his own initiative by decree. As a matter of fact, legislation consisted essentially of administrative instructions passed on by the Governor to his subordinates in a chain of command.⁶ In the final analysis, whatever little power the legislature had were of scant improtance given the composition of the legislative council. For the legislature was unrepresentative of the society it purpperted to serve, in that the majority of its members were "officials", that is, senior civil servants who held their seats ex-officio. These officials were the administrative heads of various government departments - the colonial secretary,⁷ Financial Secretary, Attorney-General, Chief Native Commissioner and so on. And in addition, the Governor had the power to nominate a certain number of "unofficial" members, one or more of who might be charged with the duty of representing "native" interests. In other words the colonial legislature lacked three key attributes of a legislature in a liberal democracy: first the executive was not in any way responsible to the legislature but to the colonial office in London. Secondly the legislature was not popularly elected, not representative of the people for whom it was making laws, and thirdly the legislative council was neither a supreme nor a sovereign body as it was subjected to the control and overriding powers of the Governor.

The judiciary existed only as an appendage of the colonial executive. It was not independent to the extent that it interpreted laws in such a way as to facilitate colonial exploitation. For instance the racialism and cultural arrogance that permeated the whole colonial system was well reflected in the decision of Rv AmKEYO⁸ (Prime Minister and his Cabinet) belonged to it.¹³

in which, ^{case,} Hamilton CJ, ruled that a union between an African male and an African female is no marriage at all, and at best it could only be referred to as wife-purchase.

Therefore, given the oppressive and exploitative nature of the colonial system towards the majority, and the relentless and increasingly strong onslaught against the system by the Africans, it is true to say that by the mid-fifties at the latest, Kenya as a "white man's country" was already doomed. And that the accedency of the half-hearted multi-racial politics of the late-fifties was an unsuccessful attempt by the Europeans, both to adapt themselves to their vanishing political supremacy, and to maintain that supremacy with the aid of the local Asian community and the small westernised elite of educated Africans.⁹

However, when Independence came, it did not radically restructure the colonial system as most Africans would have wished;¹⁰ indeed Independence was granted on the basis of the continuation of the system with the colonial patterns emerging relatively unchanged. It may be described as a bargain struck between the various colonial interests and the African Nationalist Parties whereby the colonialists agreed to the transfer of formal political authority to the African Nationalists, in exchange of the latter's agreement to safeguard the economic interests of the former.¹¹ It is therefore not surprising that the Independence constitution being a product of delicate compromises reached through long and protracted negotiations, was so detailed, complex and to some extent incomprehensible.

It was based on two principles - the principle of a Westminster Parliamentary system of government and secondly the principle of minority protection, by which it incorporated an extensive system of regionalism for the protection of minorities.¹² The state had three distinct organs of government - the legislature, the executive and the judiciary.

The Parliament was bicameral. It comprised of the Senate (Upper House) and the House of Representatives (Lower House). The Lower House was the superior of the two, because not only was its membership more impressive than that of the Senate, but also the Executive (Prime Minister and his Cabinet) belonged to it.¹³

The Senate in the bicameral legislature represented tribal interests, because the senatorial seats were divided on district wide basis.

It was intended to supplement regionalism in the protection of minority interests at the centre, while regionalism protected those interests in the regions. A constitutional amendment could be effected only by a 90% majority vote in the senate, whereas only a 75% majority was required in the Lower House.¹⁴ The Parliament was charged with the roles of making laws, controlling and criticising the performance of the government, and generally involving the citizens in popular participation of the government through representation.¹⁵ The

Parliament was expected to control the government through censure, refusal to pass a government bill or by a formal vote of no-confidence in the government in which case the government would have to resign and elections be called. However, this was only an expectation and not a reality as it later transpired. Because as it is going to be shown shortly, in practice it is the executive that controls the parliament and not the reverse.

The Executive was charged with the duties of implementing the laws passed by the legislature, and with the actual administration of the state. Reflecting a time-honoured convention of the Westminster parliamentary system, there was diffusion of executive power in that there was a separation between the Head of state and the Head of Government. The Head of state was the Governor-General¹⁶ representing the Queen, since Kenya was a dominion with the Queen as the monarch. The Governor-General appointed as Prime-Minister a member of the House of Representatives who in his opinion was likely to command to the support of a majority of its members. This of course meant that the Prime-Minister would be the head of the party that commands the majority of seats in Parliament. The first Prime-Minister of Independent Kenya was Mr. Jomo Kenyatta after the landslide majority that his KANU party captured in the pre-Independence elections. The Governor-General appointed the rest of the cabinet on the advice of the Prime-Minister. True to the principles of a Westminster system, executive authority was vested in the Queen and delegated to the Governor-General, but he was to exercise that power on the advice of the cabinet.¹⁷

systematically.

There was also a partial fusion of the legislature and executive organs of government, because the executive was a constituent part of the legislature. This is a characteristic feature of a Westminster model. After parliamentary elections, the leader of the winning party forms the government, and he himself becomes the Prime-Minister. He chooses the members of his cabinet from amongst the elected members of Parliament who belong to his party, or from amongst the coalition parties if it is a coalition government. By belonging to the legislature, the executive is able to control the legislature because the executive members are also leaders of the majority party.

In Kenya, the executive was part of the legislature and the Prime-Minister was the head of the KANU party that had a majority in Parliament. And although the executive came ^{only} from the House of Representatives, executive control over legislation was realised through the general subordination of the Senate to the House of Representatives.

This Westminster structure of government is open to criticism. First the partial fusion of the executive and the legislature resulting in the control of the legislature by the executive was in conflict with the principle of collective responsibility of the government to the parliament, a cardinal principle of a Westminster model. The latter principle means that the cabinet is accountable to the legislature and can even be forced to resign through a vote of no-confidence. It is difficult to see how this principle can work in a system where the executive is part of and controls the legislature, unless of course the government is a minority one. Executive control of the legislature in Kenya is so strong as to render the concept of collective responsibility meaningless. Because for instance Kenya's fourth parliament has among its members twenty-seven Ministers and fifty Assistant Ministers.¹⁹ And considering that the twelve nominated M.P.s would be expected to support the government, it means that the composition of parliament alone (27+50+12=89 out of the 170 voting M.P.s is enough to ensure successful passage of every government measure.²⁰ In this way the supremacy and independence of the parliament, and its ability to control and criticise the executive has been muzzled systematically.

as seen in the eyes of the people. 23

The third organ of the government was the judiciary. While the legislature was charged with the duty of making laws, the executive with the duty of implementing those laws, the judiciary was to have the responsibility of seeing that the laws are not only implemented, but are in fact implemented in accordance with the procedures laid down by the law. The judiciary was also to review administrative action to ensure that such actions are within the powers laid down by the law, and finally to adjudicate in conflicts involving the government and the citizens or conflicts between private citizens themselves.

Although the essentials of the Westminster Parliamentary system were maintained in relation to the central government, the system was modified by provisions which created a quasi-federal arrangement of government in semi-autonomous regions divided roughly along tribal lines.

The constitution created seven regions.²⁴ Each region had both a Regional Assembly and a Regional Government.²⁵ The Regional Assembly was the parliament of the region. The members of the Regional Assembly were elected directly by the people of that region. The head of the Regional Assembly was the Regional President and he was elected by the members of the Regional Assembly. Each region had its own administrative establishment whose size varied from region to region. The chief to Executive officer of the Region was the Civil Secretary, and he was appointed by the Public Service Commission in consultation with the Regional President.²⁶

The establishment of regionalism was aimed at distributing power to enable people to participate in the process of government in the regions. The allocation of powers between the central and regional governments was provided for in great detail, so much so that there was a provision as

"..... to which legislature could provide for public lavatories and refuse and which executive was responsible for implementing the law on these subjects."²⁷ The first schedule of the constitution spelt out the legislative and executive competence of the central government at the centre, and the regional governments in the regions. Part I spelt out the matters which fell within the exclusive legislative competence of the regional assemblies. Part II listed those matters within the

The move from "majimboism" to a unitary republic may therefore be said to have been prompted by an honest desire to formulate a more workable machinery of government.

Dismemberment of regionalism was realized through legal and extra legal means. KADU members were constantly wooed to cross the floor in parliament and join KANU, and where persuasion failed, methods of bullying and coercion were employed. It was intended that the absorption of KADU into KANU, would leave Majimboism with nobody to defend it.

Regionalism was also killed through calculated strangulation by the central government. The KANU government refused to release any funds to the regional governments. It therefore frustrated majimboism into abortion by making impossible the implementation of the majimbo provisions, especially those relating to the decentralisation of the civil service and the administration.³¹

The legal measure that struck a death blow on regionalism was the first constitutional amendment,³² which was to change Kenya from a dominion to a republic. This Bill also provided for the election of an executive President and among other things stripped the regional assemblies most of their powers, conversely increasing the powers of the central government in the regions. It was not easy for the bill to be enacted, because 75% votes were required in the Lower House, while 90% votes were necessary in the Senate. Fortunately for the KANU government, KADU "voluntarily" dissolved itself on 10th November, 1964³³ and all its members joined KANU. The bill therefore enjoyed easy passage in both Houses of parliament.

The third constitutional amendment³⁴ struck a further blow at regionalism and removed the little powers that had remained. It also changed the title of the regional government - "region" became "province", while "assembly" became "council" so that it now read "provincial councils."

With the dissolution of KADU and the abolition of majimboism, the senate now became an anachronism. Having outlived its usefulness, it was abolished and absorbed into the House of Representatives in December, 1966.³⁵

FOOTNOTES

16. Section 31 CHAPTER ONE Constitution.
17. Ibid, Section 72 (4)
1. II and 12 Eliz. 2.C. 54
2. Statutory Instrument No. 1968 of 1963
3. For a lucid analysis of this bargaining, see Garry Wasserman, The Independence Bargain- Kenya Europeans and the Land Issue
4. Colin Leys, Underdevelopment in Kenya- The Political Economy of Neo-Colonialism, 1964-1971
5. A useful and detailed discussion of the machinery of the colonial state can be found in Robert Martin, Legislatures and Socio-Economic Development in Commonwealth Africa, Ghai and McAuslan, Public Law and Political Change in Kenya, Nairobi 1970, P 5-174
21. Section 72 (1) of the Independence Constitution
22. Nwabueze B, Constitutionalism in Emergent States P 55-78
23. Brett, Colonialism and Underdevelopment in East Africa, London 1973, P 299-305.
- Roberts-Wray, Commonwealth and Colonial Law, London 1966.
24. Although Roberts-Wray is the leading source of information on all legal aspects of the colonial state, he was for many years a Legal Advisor to the Colonial office and his analysis must therefore be treated with great caution.
25. Ibid, Chapters V and VI
26. Ibid, Section 110
27. Ghai and McAuslan, op cit, p 197
6. Robert Martin, op cit, P 2 et seq
7. The colonial secretary co-ordinated the central administration of the colony and should not be confused with the secretary of state for the colonial office.
28. Section 72, 1963 Constitution
29. Ochieng-Otieno, The Politics of Constitutional Change in Kenya since Independence, 1963-1969
30. See footnote 23 above
8. 1917 7EALR 14
31. Ghai and McAuslan, op cit, p 210 et seq
9. Garry Wasserman, op cit.
32. Act No 28 of 1964
10. Colin Leys, op cit, P 28-62 and 170-206
33. Daily Nation, 11th November, 1964.
11. Garry Wasserman, op cit.
34. Act No 14 of 1963
12. Ghai and McAuslan, op cit.
35. By Act No 40 of 1966
13. The Kenya Independence Constitution, 1963, Section 75
14. Ibid, sec 71 (6)
15. For a discussion on the role and functions of parliament see Wheare, Legislatures (London OUP 1963).
- C. Gertzel, The Role of Parliament in Kenya (unpublished).

CHAPTER TWO

TOWARDS A ONE-PARTY STATE; THE DEVELOPMENT OF KENYA'S
ELECTORAL SYSTEM 1963 - 1969

This chapter is going to examine the development of Kenya's electoral and analyse the political (and socio-economic) forces which brought about this development and examine what effect these legal provisions had on the electoral politics of Kenya.

As a preliminary point, it is possible to discern two distinct phases of political development during this period. From 1963 to 1966, politics and constitutional development was concerned with political unification and promotion of a one-party system (which was realised in 1964) and the abolition of regionalism. On the other hand, the period 1966-1969 was one of political turbulence which began with the formation of KPU by the KANU radicals led by Oginga Odinga. This period saw the reaction of the government against the KPU threat through legal and extra-legal means and presents an interesting exercise of political survival. The phase ended with the banning of KPU in 1969, a return to the one-party system and the holding of the first general elections after Independence later in the same year.

The preceding chapter has shown how the Independence constitution provided for a parliamentary system of government but modified in such a way as to incorporate a system of regionalism. The constitution was so detailed and complicated that it proved unworkable. The central government made no secret of its intention to make some far-reaching amendments to the constitution.¹

This was effected by a constitutional amendment which was mentioned earlier aimed at turning Kenya into a republic, deregionalise the structure of government and provide for the election of an executive President.² Naturally KADU was opposed to the abolition of regionalism. However the passage of the bill was aided by two factors: first the specially entrenched provisions clause in the Independence Constitution was amended to require only 75% majority vote in both houses,³ and secondly the KADU opposition party was dissolved on 10th November, 1964. Before considering the amendment itself, it would be useful to examine the factors that led to the momentous dissolution of KADU.

In the early sixties, political activity was basically polarised around KANU and KADU, the two major political parties. Both were formed in 1960, when National Political parties were legalised for the first time since the declaration of Emergency in 1952. Prior to 1960, only district political organisations had been allowed to exist since 1957. These organisations were tribal and were built upon the traditional clan lineage and family structures of the respective tribes. After the legalisation of nationwide political organisation in 1960, the district political groupings were not dissolved. They were converted into district branches of the national parties, a fact which enabled the district party leaders to retain most of their former autonomy within the now larger political organisations. Thus KANU and KADU were loose amalgams of district organisations that reached independence as mere federated ethnic loyalties grouped around individual personalities.⁴

KANU was a coalition of the largest and most politicised groups which included the Luo and the Kikuyu (and their Meru and Embu neighbours). KADU was on the other hand a grouping of the smaller tribes notable among which were the Kalenjin, the Luhya, Masai and various coastal peoples. The two parties had remarkably similar structures, and perhaps the only major difference was the regions and ethnic groups from which they drew their support. KANU which was the dominant mainstream of political expression in the early sixties, was originally intended to be a single nation wide party. It was however devoid of any ideology or a coherent set of political principles that would have been able to hold the nationalist movement together. So that besides European encouragement in the formation of KADU, it was largely the absence of strong fundamental values, and a clearly spelt out political philosophy within KANU, that made it easy for KADU.

" to elevate ethnic fears and animosities into a political principle when independence appeared imminent".⁵

Thus, save for the fact that KANU preferred a strong and centralised form of government, while KADU struggled for a weak central government that would enable the regions to govern themselves, there were no other

political or ideological differences between the two parties as those which were to characterise the intra-party struggle between the KANU "conservatives" and the KANU "radicals" in 1965 and 1966. This explains why the KADU opposition was so suddenly and painlessly dissolved and absorbed into KANU within a year of Independence.

Consequent upon the dissolution of KADU and the realisation of a one-party state, the first constitutional Amendment Bill⁶ enjoyed easy passage and became law on 23rd November within two weeks of KADU's dissolution. As mentioned earlier, the amendment aimed at making Kenya a republic, abolish regionalism and provide for the election of an executive President. It is those provisions relating to the election of the President that are of primary concern to us.

The Amendment spelled out two methods by which a President could be elected. The first method was to be used only during general elections upon the dissolution of parliament. To stand as a candidate for presidential elections, a person had to meet the following requirements:

- (a) be a citizen of Kenya,
- (b) be aged thirty five years or more
- (c) be registered in some constituency as a voter in the National Assembly elections.⁷

A Presidential candidate also had to be a parliamentary candidate standing for elections in some constituency because a presidential candidate would not be declared elected president unless he was also successfully elected as a member of Parliament.⁸ The nomination of the presidential candidate also had to be supported by at least 1,000 persons registered as voters in the National Assembly elections.

Before the polling day, each parliamentary candidate standing for the elections had to declare support for one or other of the Presidential candidates. In the absence of such declaration, the nomination papers of the parliamentary candidate would be invalid.⁹ During parliamentary elections in the constituencies, the ballot papers were to be in such a form as to disclose the name of the parliamentary candidates, as well as indicating the name of the presidential candidate which each of the parliamentary candidates supported. The late

be supported by at least twenty members of the lower House, the failure Tom Mboya said that the reason for this arrangement was to enable the people of Kenya in every constituency, to have a chance to decide (though indirectly) which of the national leaders they would vote for. After the parliamentary elections, that presidential candidate who is elected as a member of the National Assembly, and who receives the declared support of more than half of the members successfully elected to the National Assembly, was declared elected President.¹⁰ In the event of no candidate receiving more than half the support of the successful members of parliament, no one was declared elected president and therefore the second method of electing a president was resorted to.

This second method of presidential election was also used in any of the following instances:¹¹

- (a) where the president dies while in office,
- (b) where it is determined that the election of the President was invalid,
- (c) where the president resigned without having first dissolved parliament,
- (d) where the President ceases to be a member of Parliament otherwise than by reason of dissolution of Parliament or
- (e) where the president ceases to hold office due to his inability to perform and discharge the functions of his office as a result of mental or physical infirmity for a period of three months.

Where for any of these reasons, occasion arises for the election of a president, the Speaker of the House of Representatives summons a meeting of the members of that House, where upon the members sit as an electoral college to elect the President,¹² If the need to elect the President arises from the failure of the general elections to elect a president, the elected members of the lower House sit as an electoral college to elect the President before the election of the specially elected members. Any of the elected members is eligible to stand for the presidential elections. His nomination papers must however

There was nothing to prevent a parliamentary candidate from supporting

be supported by at least twenty members of the lower House, the failure of which voids his nomination.¹³ At the election meeting, the election is by secret ballot, and any member entitled to vote on any question or motion before the House is entitled to vote. This provision therefore excludes persons like the Speaker and the Attorney-General from voting. The provision may be justified on the grounds that the speaker and the Attorney-General are not elected members and they would not be representing the people if they were to vote for the President.

If no clear majority is obtained at the first ballot, another two may be taken at different sittings. If there is still no success, another two (and not more) ballots may be taken, if the speaker thought that they may result in the election of the President. Otherwise if the House of Representatives is unable to elect a President, the Parliament stands automatically dissolved and another general election takes place.

Looking at the first amendment Act, it is clear that the two paramount aims of the electoral system of presidential elections were the assurance of majority support for the government in Parliament, and the democratic principle of popular choice and participation in government. This was made possible by having the electorate indirectly electing the President, by electing those parliamentary candidates who supported the presidential candidates of their own choice.

The system did however have a number of weaknesses. For instance, assurance of majority support for the government which was of paramount importance, was not, on closer examination so well guaranteed. First the rules did not require political parties participating in the elections to nominate a Presidential candidate.¹⁴ Consequently the parliamentary candidates from a party without a presidential candidate, would have to support the presidential candidate of another party. And if such a presidential candidate was elected with substantial support from such members, his government majority in parliament would constantly be threatened by the possibility of such members refusing to support the government in the National Assembly. In fact as the rules stood there was nothing to prevent a parliamentary candidate from supporting

the presidential candidate of another party.¹⁵ It was therefore very possible for parliamentary candidates from a party with a poor or unpopular presidential candidate to declare support for a more popular candidate of another party and thereby improve their own election chances.

By the end of 1963, KANU was plagued by a deep and irreconcilable intra-party conflict between the KANU radicals and conservatives. These differences led to the breakaway from KANU of the radicals and the formation of KPU. It would be useful to trace this party split, because some members whose declarations of support were crucial to the election of the President, were successfully challenged in an election petition system in 1963, but it also largely spared the nature of such changes. If the support declarations of those M.P.s (whose election are determined invalid) would if discounted, reduce the Presidents declarations of support to less than half, would the election of the President himself be invalidated?¹⁶

Another criticism that may be levelled against the system is that it allows the existence of a power vacuum during presidential elections otherwise than at a general election. Because it does not specify who is to hold and exercise the powers of the office of President between the period when the office falls vacant and when a new President is elected by the Parliament. Such a vacuum of power brings uncertainty, and may even invite chaos especially if the members of parliament are unable to elect the President, or if his election is accompanied by intense political struggle.

Perhaps these weaknesses and omissions were not seen, or were seen and ignored in 1964 since Kenya was at that time a de-facto one-party state, and no one could visualise an election taking place without divisions as alien and irrelevant to African. In fact it claimed to embody not only the interests of all sections of the Kenyan society, but also the universal goals of mankind in general. Independent state than in providing a framework for the sorting out the ambitions for leadership.

By appealing to the deeply entrenched property instinct among the Africans, the system had not been put to test by 1968 when it was changed extensively and it is therefore difficult to accurately evaluate its effectiveness and suitability to Kenya's body politic. Perhaps it was a measure of its weaknesses that it had to be changed so drastically. The system was not put to test in 1964 during the changeover from

The effect of this policy statement was to solidify the intra-party Dominion to Republican status, because the first Constitutional Amendment provided that the first President was to be that person who was Prime-Minister just before 12th December 1964.¹⁷

By the end of 1965, KANU was plagued by a deep and irreconcilable intra-party conflict between the KANU radicals and conservatives. These differences led to the breakaway from KANU of the radicals and the formation of KPU. It would be useful to trace this party split, because the formation of KPU not only contributed to the revision of the electoral system in 1968, but it also largely shaped the nature of such changes.

The conflict was expressed in ideological terms. The two main issues around which the conflict crystallised were the question of landlessness among the squatters, ex-detainees and former freedom fighters who were deprived their land in the process of land consolidation, and secondly the question of free education which had been promised in KANU's 1963 election manifesto.¹⁸

The radicals were led by Oginga Odinga, while the conservatives were led by the late Tom Mboya. Because of this ideological challenge, the ruling KANU government felt compelled to make a policy statement spelling out its ideology. Titled "African Socialism and its Application to Kenya," It was hoped that the statement would dismiss questions of ideology in Kenya's political and economic development.¹⁹ Essentially it was an emphasis on private property, foreign investment as a major factor of economic growth, and a rejection of Marxism or any class divisions as alien and irrelevant to African. In fact it claimed to embody not only the interests of all sections of the Kenyan society, but also the universal goals of mankind in general.

By appealing to the deeply entrenched property instinct among the Africans, and emphasising private investment, it is clear that the statement was a facade to disguise capitalism and a front through which capitalism would masquerade as Socialism. Reading through it, one gets the impression that it was inappropriately titled "African Socialism" because it sounds like it was written by neither a "Socialist" nor an "African".²⁰

The effect of this policy statement was to solidify the intra-party cleavages, which also permeated the machinery of government. It was then only a matter of time before a split within KANU occurred. By the end of 1965, Kenyatta had begun to make moves which would edge Odinga out of power. He continuously chipped away the functions of Odinga's Ministry of Home Affairs, so much so that by the time Odinga resigned from the government, he was almost a Minister without a Ministry. The differences reached a climax in April, 1966, when a highly manipulated KANU delegates conference was arranged at Limuru. Through the machinations of Tom Mboya acting on behalf of Kenyatta, Odinga's seat as Vice-President of KANU was abolished and replaced with seven provincial vice-presidents out of which Odinga secured none. As a reaction, Odinga and his supporters resigned from KANU and formed the KPU. It was later recognised as an opposition party.

KANU's reaction was instantaneous. It employed both legal and extra-legal measures to weaken the new party. It employed the turn-coat rule which had previously been used in Malawi against those who had resigned from the party under which they were elected into Parliament.²¹ The Constitution was amended in one day to provide that any member who resigns from a parliamentary party under whose sponsorship he was elected to parliament, and joins another party, would forfeit his seat at the end of the session then sitting.²² The amendment applied retrospectively so as to cover those MP's who had resigned from KANU to form the KPU. Kenyatta prorogued the Parliament immediately and all the KPU MP's were obliged to seek re-election. Only thirteen were returned to Parliament, but the "Little General Elections" as they were nicknamed demonstrated that KPU had a considerable measure of support in the country especially in Nyanza and parts of Western Province.²³

KANU tried to justify this fifth amendment by arguing that the KPU MP's had got into Parliament on a KANU mandate and had therefore lost it by leaving KANU. It is interesting to note that this argument was not applied to the KADU MP's who having got into Parliament on a KADU mandate, could be said to have lost that mandate when they dissolved in parliament having lost their seats through the operation of the

KADU and joined KANU in November 1964. As a matter of fact the dissolution of KADU in 1964 was hailed by the KANU leaders and seen as an act of great statesmanship that would contribute to National Unity. Mboya had congratulated the KADU leaders for their "courage, wisdom and foresight" in seeing the need to "join hands with the Government in the task of national development".²⁴ On the other hand the resignation of Odinga and his supporters from KANU was seen as being contrary to national unity.

In reply, the KPU forcefully argued that it was the post-Limuru KANU leadership who had lost the KANU mandate with which they had entered Parliament, because it was they who had betrayed the 1963 KANU manifesto and other pledges during the 1963 election.²⁵

It is difficult to tell who (KPU leaders or post-Limuru KANU leadership) had betrayed the 1963 KANU election pledges and had therefore lost the mandate. However it is clear that the measure was punitive, and it was hoped that in the ensuing by-elections most, if not all the KPU leaders would be defeated by KANU candidates. In this way, the strength of KPU in Parliament would be kept at the minimum. The rule illustrates the idea of "survival" which dominated government measures of this period. It exemplifies the application of a legal solution to a problem that was essentially political and which therefore called for a political solution.

The government then went on to use the State machinery to harass the KPU leadership. It was painted as unpatriotic, divisive, foreign financed and influenced, tribalistic and subversive. It was alleged that the security and integrity of the state was threatened and that sweeping powers were needed to equip the government to cope with the communist inspired threat posed by the KPU.

It is therefore not surprising that a constitutional amendment²⁶ amending legislation on Public Security, followed hard upon the heels of the fifth amendment. The Act was introduced debated and enacted when the KPU leadership against who it was targeted, were no longer in parliament having lost their seats through the operation of the

fifth amendment. The Act granted the executive wide and sweeping powers, including detention of person without trial and which powers the president may use

" if it appears to him that it is necessary for the preservation of Public Security to do so".²⁷

The criteria he was to use to satisfy himself that public security was threatened was not specified. The President could bring these emergency powers into operation very easily. He could bring both Part II and Part III into operation without first getting parliamentary approval. But Part III would lapse if not approved by Parliament within twenty eight days. In reckoning the period of 28 days, no account was to be taken of the time during which the Parliament is dissolved.²⁸ A most interesting point was that parliamentary approval was so easy- only a bare majority was required-, while revocation was made very difficult because a motion for revocation required the votes of the majority of all members of Parliament to succeed.²⁹ This is notwithstanding that it would require a very brave MP to introduce such a motion in Parliament.

The rapidity with which the Act came into operation, and the fact that the government embarked on an immediate and concerted campaign to harass the KPU members including the detention of some,³⁰ betrayed the real aim of the Act. Because while the professed aim of the Act was to deal with Public Security, it was clear that it's real purpose was to act as a weapon against the perceived or real threat that the KPU posed to the KANU leadership. For it was not the security of the state that was threatened, but rather the security of the leadership positions enjoyed by Kenyatta and his supporters unless of course one was to treat any threat to Kenyatta as being synonymous with a threat to the state. Like the fifth amendment, this Act exemplifies the employment of legal solutions to problems of political survival.

A systematic harassment of KPU, through detention of some of its leaders, denial of licences for political meetings and a campaign of slander and vilification of the KPU leaders are illustrative of the measures employed by the Kenyatta government to maintain itself in power by making sure that the KPU remains very weak. It is submitted that these measures were subverting the electoral system, because the electorate's

in the general elections must nominate the Presidential Candidate. The

nomination must be supported by at least 1,000 persons registered as voters in the National Assembly elections. If only one candidate for President is validly nominated, he is declared elected President, right and freedom to choose the country's political leadership was being compromised by KANU government's attempt (later successful) to 'kill' the KPU.

Where more than one candidate is validly nominated, a poll for the election of President is also directed to the National Assembly. It is against the background of this KANU-KPU rivalry that we should examine the revision of the electoral system in 1968. In the face of KPU opposition at elections, the revision was aimed at making modifications that would give KANU an advantage over the KPU. How this was realised will be discussed after the revised electoral system is examined.

Another factor that contributed to the revision of the electoral system, was yet another intra-party struggle that was taking place within KANU at this time. Up to 1966, rivalry in KANU was centred on Mboya and Odinga with Kenyatta backing Tom Mboya. With the removal of Odinga, other rivalries within KANU began to swell up, and from 1967, KANU politics appeared to a large extent, an attempt to isolate Mboya and reduce his power. This rivalry was tied to the question of succession to the Presidency because after Odinga's ouster, Mboya became the second most powerful person in the country. The succession question was becoming more and more crucial because of Kenyatta's advanced age and his ailing health,³¹ and while it was not openly discussed, it was implicit in much of the political debate. This intra-party rivalry within KANU will be returned to shortly, and for the moment, it will suffice to note that the rivalry influenced the nature of the revision of the electoral laws in 1968 with the protagonists seeking to remodel the constitution to serve their own leadership ambitions.

(d) the President ceasing to hold office due to

The revised electoral law is to be found in the tenth Constitutional Amendment enacted in 1968,³² but later re-enacted without modification and incorporated in the revised constitution of 1969.³³

The new law still retains the distinction between a Presidential election during general elections after dissolution of Parliament and election at other times. To qualify for nomination as a Presidential candidate, a person had to be a Kenyan citizen of at least thirty-five years of age, and be registered in some constituency as a voter in the elections to the National Assembly.³⁴ If the Presidential election is taking place during general elections, every political party taking part in the general elections must nominate one Presidential Candidate.³⁵ The

nomination must be supported by at least 1,000 persons registered as voters in the National Assembly elections. If only one candidate for President is validly nominated, he is declared elected President, provided he is also elected to the National Assembly to represent a certain constituency.

Where more than one candidate is validly nominated, a poll for the election of President is taken in every constituency. In every constituency only one poll may be taken and only one ballot may be used for both parliamentary and presidential elections. The ballot is therefore in such a form as to pair the parliamentary candidate with the presidential candidate nominated by the same party, so as to permit one vote to be cast for one of the pairs of candidates. The vote is taken to be a vote for each member of the pair. The Presidential candidate who is elected to the National Assembly and receives the greater number of votes cast than any other candidate is declared elected President.

If no presidential candidate is validly nominated, or if validly nominated dies before the polling day, or the winning candidate dies before he is declared elected President, Section 5(4) provides that a fresh election would commence and be held in accordance with the procedure prescribed in Section 5(5). Section 5(5) spells out the procedure or manner in which the election of a President otherwise than at a general election is to be held. This procedure is also to be followed where the office of the President falls vacant for any of the following reasons:

- (a) death of President while in office
- (b) resignation of the President
- (c) the election of President being determined invalid by the High Court or
- (d) the President ceasing to hold office due to his inability to perform the functions of his office by reason of physical or mental infirmity.

Where for any of the above reasons, the President's office falls vacant, an election must be held within ninety-days following the occurrence of the vacancy.³⁷ During that time the Vice-President or a Minister appointed by the Cabinet, becomes acting President and exercises the functions and powers of the office subject to some certain limitations relating to security matters.³⁸

The qualifications of a presidential candidate for this type of of Parliament. The pairing rule then makes a government majority support. more secure by ensuring that the votes cast to enable the President win

the elections will at the same time vote into Parliament a majority election, are the same as those required for candidates in presidential elections during general elections. Each Presidential candidate must be nominated from amongst the elected members of Parliament.³⁹ However unlike in general elections, there is no obligation on political parties to nominate a Presidential candidate. The candidate's nomination must be supported by at least 1,000 persons registered as voters in the National Assembly Elections. If only one candidate is nominated, he is declared elected President, and if there are more than one, a poll is taken in every constituency, and the candidate who receives the highest number of votes cast is declared elected President.

As said earlier the reformed system tried to realise two objectives; advantage KANU over KPU, and address itself to the volatile question of Presidential succession.

It is proposed that an examination of how KANU would be advantaged, be conducted by analysing the implications of the important new rules that were introduced in our electoral law. First the rule requiring that the presidential candidate be paired with the parliamentary candidate allowed KANU to exploit the personal charisma and domineering influence of Kenyatta to help the weaker KANU parliamentary candidates defeat their KPU opponents, because the pairing system prevented a voter from splitting his vote and voting for presidential and parliamentary candidates from different parties. It is admitted that Odinga's political strength and popularity was considerable and that in some areas his presidential candidature would help many KPU candidates be elected into Parliament, but then his political strength was not as great as that of Kenyatta and in any case it was largely confined to some certain areas of the country especially in Nyanza and Western Province.

The same rule would also operate in conjunction with the rule requiring that all candidates must be nominated by a political party (the effect of which was to bar independent candidates) to ensure that the government enjoys a majority support in Parliament.⁴⁰ The 'no-independents' rule promotes a government majority in parliament by preventing the proliferation of loyalties and support amongst the members of Parliament. The pairing rule then makes a government majority support more secure by ensuring that the votes cast to enable the President win

the elections will at the same time vote into Parliament a majority of candidates belonging to his party.

The rule requiring that each political party participating in the general elections must nominate a Presidential candidate, was also aimed at achieving similar ends. The aim was to make sure that the voter will by voting for a parliamentary candidate at the same time be voting for that party's presidential candidate. Therefore if a party would prefer not to field a presidential candidate, it means that it either has none to field (in which case the rule prevents it from capturing any seats in parliament) or it has only a weak candidate to field, again in which case the party's presidential candidature would work against it's parliamentary candidate. Either way, the rule would benefit the party with a strong presidential candidate. And in the Person of Kenyatta, KANU had a very strong presidential candidate.

It is noteworthy that the rule does not apply in presidential elections other than at a general election, and political parties are at liberty to nominate or abstain from nominating a presidential candidate. It appears that the reason behind this, is that since the parliament is already constituted when such an election takes place, requiring all parliamentary parties to nominate a presidential candidate would greatly increase the chances of a candidate from a party that has only a minority in the already constituted parliament, winning the elections. There would in such a case result a minority government, which will be unable to rule because it is faced with a stronger opposition in parliament. Perhaps it was hoped that for the sake of continuity in Government, the smaller parties would abstain from nominating a candidate.

These reforms showed great sensitivity to the question of presidential succession in case the office of the President became vacant. There was understandable anxiety on this issue due to President Kenyatta's age. This anxiety found expression in form of a question. After Kenyatta who? or After Kenyatta what?

By 1968, Tom Mboya was the most powerful person after Kenyatta in Kenya, and under the 1964 framework of election system, he was the man best positioned to succeed the Presidency after Kenyatta. Not only did

the long period of months.

he have enough wealth to buy the support of the MP's, but he also had the necessary political muscle (through his control of the KANU party machinery-he was KANU's Secretary-General) to master the necessary votes in the National Assembly. However there was a small but very powerful and influential group of politicians close to the President who did not relish the idea of Mboya becoming President. Mboya who was the chief architect of the 1964 presidential election system, was suspected by some as having drafted the first constitutional amendment, in such a way as to suit his leadership ambitions.⁴²

This influential group of politicians opposed to Mboya, consisted of a powerful alliance of politicians clustered around Kenyatta with Njoroge Mungai, Charles Njonjo, James Gichuru and Mbiyu Koinange at the centre, and Arap Moi, Gikonyo Kiano, Paul Ngei and a few others at the periphery. They viewed with alarm the growing strength of Tom Mboya which came as a result of many factors: his role in the removal of Odinga from power, his position in KANU, and the fact that he was a very vital asset to the government as no body could explain government policy to the people so clearly and convincingly as Mboya could. It is therefore not surprising that when the Bill was introduced in March, 1968, there was a lot of political manoeuvring by the anti- and pro-Mboya forces seeking to see that the new system would serve their own ends.

The original version of the Bill was strongly opposed by the MP's who strenuously objected to the loss of their power to choose the next President. Indeed three versions were rejected by the Parliament before the bill was enacted, notwithstanding that Kenyatta called the KANU Parliamentary Group (which is informally used to persuade MP's to support government measures in Parliament) and used threats in an effort to have the MP's pass the original version.

The original version provided that the Vice-President would automatically succeed the President for the rest of the Presidential term. The revised version stipulated that the Vice-President would assume the functions of the President for a period of six months after which there would be held presidential elections. The MP's refused to support this bill because they thought that the interim President would be too powerful as he would have full Presidential authority for

the long period of six months.

As a third version was quickly drafted and it provided that the Vice-President would automatically succeed for a period of six months after which presidential elections would be held. He would not however have full Presidential authority. A new addition was a provision raising the qualifying age for President from thirty-five years to forty years. The move can only be interpreted as being directed against Mboya who was at that time only thirty-eight years old. The pro-Mboya forces in Parliament were greatly incensed by this provision and they opposed the Bill in very strong terms.⁴³ They also objected to the Vice-President acting as President for as long as six months before elections are held.

In face of such strong opposition, the Bill was withdrawn and a fourth version introduced. The version not only lowered the age-limit back to thirty-five years, but it also accepted to limit the "acting-period" to three months and even then the acting President would not have the full powers of the President.⁴⁴

The final version which became law, is testimony of Mboya's strength in Parliament. Because although the members of Parliament could not now elect him to the Presidency, he and his supporters had succeeded in putting restrictions on the Vice-President's right to succeed the President especially by limiting the authority of the interim President, and requiring that elections be held within three months. Hopefully, Mboya would use his powerful position as KANU's secretary-General and his strong following in the country to win the Presidency in such elections.

It may therefore be said that the general effect of 1968 reforms, was to take away the power of choosing the President from the National Assembly to the party central organs and the electorate. The electorate could only choose the President from among those candidates nominated by a political party. This gave increased power to those who controlled the party. Registration of new parties is an executive decision, a power which the executive may abuse by refusing to register any new parties⁴⁵ or by de-registering existing ones, to ensure that its presidential nominee is elected unopposed.

their power base by uniting the Kikuyu. The Kikuyu leadership therefore inaugurated a mass wathing programme among the Kikuyu and

As a matter of fact KPU was banned in 1969 following a period of unrest and therefore in the 1969 elections two months later, KANU's nominee - President Kenyatta was elected unopposed. Further in 1974 for Kenyatta, and 1978 and 1979 for Moi, the absence of any opposition party allowed them to be elected unopposed. The final decision as to who the President would be lies with the KANU Party Executive. In 1969 the National Executive comprised of seven Cabinet Ministers, one Assistant Minister and the President himself.⁴⁶ In 1979 just before the November elections, National Executive had four Cabinet Ministers and four Assistant Ministers besides the President.⁴⁷ It would therefore appear that the Cabinet or part of it, acting as the National Executive Committee of the party, would make the final decision. Thus at the very least, the tenth constitutional amendment, as Dr. Okoth Ogendo observes,

"has transferred the processes of political recruitment and the inevitable succession struggle from the public and parliament to the privacy of the cabinet."⁴⁸

After the passing of the tenth constitutional amendment political developments thereafter moved at a startling pace. Because within fifteen months of the passage of the amendment, Mboya around whom much of its controversy centred was assassinated. Mboya was assassinated on 5th July, 1969. The Assassination was a Kikuyu and despite Mboya's role in the removal of Odinga from power and the subsequent harassment of the KPU, his killing was seen as an attack on the whole Luo people through the murder of their most brilliant son. There was a massive demonstration of support for Odinga as a symbol of Luo solidarity. It was suspected that the powerful 'Kikuyu' group clustered around Kenyatta had taken the opportunity to remove a dangerous candidate for the succession to Kenyatta. A Luo crowd demonstrated against Kenyatta at Mboya's requiem service in Nairobi.⁴⁹

In the face of this strong opposition the Kikuyu leadership felt threatened, more so because there were intra-Kikuyu animosities between the Kiambu and Nyeri people. It was thought that the best way to counter the growing Luo opposition, would be to consolidate their power base by uniting the Kikuyu. The Kikuyu leadership therefore inaugurated a mass oath-taking programme among the Kikuyu and

their Embu and Meru neighbours. Within a space of twelve weeks, virtually every Kikuyu adult took the oath to "keep the flag in the House of Mumbi", i.e. keep the government in Kikuyu hands. ⁵⁰

Kikuyu tribalism was pitched against Luo tribalism. Unable to fit in the resulting polarisation of politics around the two rival tribes, Bildad Kaggia the Kikuyu Vice-President of the KPU resigned and rejoined KANU. ⁵¹ His defection together with all the KPU's Kikuyu leadership suggested that he either succumbed to tribal alignment, or he was coerced into doing so under the label of tribal unity. In October the same year, Kenyatta visited Kisumu to open a hospital. The crowd was hostile and the atmosphere became charged with tension when he launched a bitter tirade on Odinga; Emotions flared into stone-throwing demonstrations and many Luos were killed or wounded. ⁵² Five days later the KPU was banned and all its leaders were detained. ⁵³

With the KPU out of the way, the 1969 elections became a one-party affair. The KANU primaries in effect became the general election and all those who won KANU nominations automatically became elected unopposed. The electorate circulated the political elite and 60 per cent of the sitting MP's were removed from Parliament. ⁵⁴

It would at this point, be useful to examine the rules governing parliamentary elections. The preceding chapter observed that at Independence, the Parliament was bicameral in structure comprising of the Senate and the House of Representatives. The Senate served the principle of special representation of minority interests in conjunction with majimboism. The existence of the Senate was resented by many, and Kenyatta saw it as an impediment to national unity. He sought its abolition saying that

" the unification of Parliament is the culmination of our constitutional struggle" ⁵⁵

It was abolished and merged into the Lower House by a constitutional amendment which also prolonged the life of Parliament for a further two years until June 1970. ⁵⁶ The now Unicameral Parliament consists of President and the National Assembly. The National Assembly has three types of membership : the elected members, twelve nominated members, and two ex-officio members who are the speaker and Attorney-General.

KANU nominees have been going to parliament unopposed.

The constitution provides that there shall be twelve nominated members appointed by the President from persons who if nominated would be qualified for election as members of the National Assembly.⁵⁷ The nominated members replaced the specially elected members who were chosen by the elected members sitting as an electoral college in the proportion of one for every ten elected members.⁵⁸ This innovation of Presidential nominations is defended as a means to provide representation for minority, intellectual, professional or other unrepresented interests. It is however undisputable that its primary purpose is to strengthen government representation in Parliament.

To qualify as a candidate for parliamentary elections, first one must be a registered voter. And to qualify for registration, one must be a Kenyan citizen aged eighteen years or more.⁵⁹ The voter must also have lived in the constituency where he seeks registration, for one year or a total of four of the last eight years before registration. He may in the alternative reside or be employed or own property or conduct business for five months out of the twelve preceding registration. Disqualified from registration are persons adjudged to be of unsound mind, persons who are undischarged bankrupts, those under a death sentence or in lawful custody, and those who have been convicted of an election offence.⁶⁰

It therefore follows that to qualify as a parliamentary candidate, one must first meet all the above qualifications for registration as a voter. In addition a candidate must also pass some certain proficiency tests in both English or Kiswahili unless he is exempted after producing evidence of such proficiency.⁶¹ He must also not be a public officer or be on the staff of any local government authority.⁶¹

Finally a candidate must also be nominated by a political party.⁶² Parties are given the power to prescribe their own rules and regulations for such nominations. KANU the only political party since 1969, requires that every prospective candidate be a life member of KANU, adhere to party discipline and subscribe to the party policies and programmes before he can obtain a certificate of compliance and be allowed to contest the party's primary election.⁶³ The constitution envisages a multi-party system and if there were more than one party, a poll would then be conducted between the nominees of various parties. Otherwise since 1969,

KANU nominees have been going to parliament unopposed.

As for the tenure of seats, the general rule is that a member of Parliament whether elected or not retains his seat until the dissolution of Parliament.⁶⁴ The normal life of Parliament is five years unless sooner dissolved by the President.⁶⁵ An MP will also lose his seat, if he incurs any of the disqualifications that would prevent him from standing for parliamentary elections. If he is elected Speaker, he would also have to vacate his seat. Further unless exempted by the president, a member will also lose his seat if he fails to attend the Assembly for eight consecutive days without permission from the speaker. An added disqualification discussed earlier was introduced in 1966 obliging any member who crosses the floor and resigns from a parliamentary party to forfeit his seat and seek re-election.⁶⁶

The requirement that every parliamentary candidate must be nominated by a parliamentary party had the effect of barring independent candidates and tightening discipline among M.P.'s through the threat of denial of party sponsorship. In the 1969 elections, with the exception of Bildad Kaggia and Grace Onyango, all former ex-KPU members were denied sponsorship by KANU.⁶⁷ Further in 1974 and 1979 many former KPU members including Odinga were barred from contesting the elections. This question of "clearance" shall be discussed more thoroughly in the succeeding chapter.

The disability that one must not have been convicted of an election offence was qualified in 1975. A Constitutional Amendment to Section 27 of the Constitution empowered the President to pardon anyone convicted of such an election offence.⁶⁸ Kenyatta exercised this power to pardon Paul Ngei who had been found guilty of an election offence and who would otherwise have been disqualified from contesting elections for five years.

The most recent amendments to our electoral law were introduced in 1979, limiting campaign expenditure to a maximum of shs.40,000 during the elections and making it an election offence resulting in disqualification for a candidate to exceed this sum.⁶⁹ Although many candidates are said to have broken this law, during last year's parliamentary election, none has yet been taken to court and it remains to be seen whether the government is willing to enforce this law strictly.

Another amendment introduced in 1979, required that one must pay a deposit of sh.50,000 before filing an election petition,⁷⁰ The aim was perhaps to discourage petty and vexatious petitions, but the high number of petitions filed after last year's election, suggest that a good many people are willing to enforce their political rights even at very high cost.

To supervise elections, the Constitution has provided for an Independent Electoral Commission. This Commission which is responsible for the conduct and supervision of elections consists of a Chairman and not less than four other members all of who are appointed by the President.⁷¹ Appointments are made for five-year periods and before the expiry of that period, their tenure is secured in the same manner as that of High Court judges. The Commission is responsible for the drawing up the constituency boundaries, the direction and supervision of registration of voters and the conduct of the elections themselves. It is however largely ineffective, because most of it's functions have been assumed by executive-e.g. It is the Ministry of Home and Constitutional Affairs that directs the preparation or revision of the voters registers, while the administration provides the necessary machinery both for the registration, and also for the actual organisation of the elections themselves.

The discussion has traced the development of our electoral law, and has shown how Kenya has come to have a one-party system of government operating within a multi-party electoral system. We now turn to the institutionalisation of that arrangement from 1969 to the present day.

17. Section 3, Act No 25 of 1964
18. Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism (London: Heinemann 1975) p 214-234
19. Government Sessional Paper No 10 of 1965
20. Colin Leys (op cit) says that it was drafted by an American expatriate; p 221
21. Othello Ojendo, op cit
22. Act No 17 of 1966
23. Bennett G., Kenya's Little General Election, World Today, Vol 22 No 8 of 1966
24. Daily Nation 11th November, 1964
25. Othello Ojendo, op cit p 26

CHAPTER TWO

26. Act No 18 of 1966
27. *Ibid*, Second Schedule, FOOTNOTES
28. *Ibid*, First Schedule, Section 29
1. East African Standard 15th August, 1964
2. Now Act No 28 of 1964
3. The Constitution of Kenya Amendment (no 2)
Act No 38 of 1964
4. Okoth Ogendo, The Politics of Constitutional Change in Kenya since Independence, 1963-1969, p 13
5. Okoth Ogendo, op cit p 12
6. Act No 28 of 1964
7. *Ibid* S 33 A (4)
8. *Ibid* S 33 A (5) e
9. *Ibid* S 33 A (5) c
10. *Ibid* S 33 A (5) e
11. *Ibid* S 33 A (5) 2
12. *Ibid* S 33 A (3)
13. *Ibid* S 33 A (6)
14. See Sections 33 A (5) generally for the qualifications the candidate must meet. Compare with S 5 (3) of the 1969 Constitution
15. When debating the Bill, the late Tom Mboya said it would allow KADU candidates to declare support for a KANU President.
16. -House of Representatives, Debates, 27th December, 1964, Volume 3 Part III
17. Or would the election of such MP's be deemed valid for the purposes of validating their declarations of support
18. Section 8, Act No 28 of 1964
19. Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism (London; Heinemann 1975) p 214-234
20. Government Sesssional Paper No 10 of 1965
21. Colin Leys (Op Cit) says that it was drafted by an American expatriate; p 221
22. Okoth Ogendo, op cit
23. Act No 17 of 1966
24. Bennet G, Kenya's Little General Elections, World Today, Vol.22 No 8 of 1966
25. Daily Nation 11th November, 1964
26. Okoth Ogendo, op cit p 26

26. Act No 18 of 1966
27. Ibid, Second Schedule, Section 3(1)
28. Ibid, First Schedule, Section 29
29. Ibid First Schedule Section 29(4)
30. The KPU leaders who were detained were O. Arigi, W. Rading, Oduol, PP Ooko, J.M. Onyangi and O.O. MakAnyengo
-East African Standard 5th August, 1966
31. Africa Report Vol 13, November, 1968, p 44
"One evening last May, President Jomo Kenyatta was walking
with his old friend Mbiyu Koinange. Suddenly and without
warning, the President stumbled and began talking incoherently.....
Dr Njoroge Mungai examined him and called for resuscitation
equipment from Mombasa hospital for a few hours it was
uncertain whether the President would live."
32. Act No 45 of 1968
33. Act No 5 of 1969
34. 1969 Constitution, Section 5 generally
35. Section 5(3) a
36. Section 5(4)
37. Section 6
38. Section 6(2) and (3)
39. See Section 5(5) generally
40. Section 34(d)
41. Section 5(3)
42. In 1964, when Tom Mboya was introducing the bill and explaining the
age-qualification of President (35 years), one M.P. retorted,
"just your age"
-House of Representatives, Debates, Volume 3 Part III
27th October, 1964
43. Mr. Khaoya and M.P. said "it appears that the government is
interested in barring certain persons from standing for Presidential
Elections, so that as they grow, the age limit is raised
National Assembly Official Report, Vol 15 May 1968
44. See Section 6 of the Constitution generally
45. A proposed new party the Kenya Democratic Congress to be led by
Mr. Clement Were was refused registration
- Daily Nation 30th October 1969

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46. R. Wahome, Succession to the Presidency in Kenya, L L B Thesis (University of Nairobi, 1979) unpublished, p 32
47. These were Mwai Kibaki, Robert Matano, Omolo Okero, Nathan Munoko, Maina Wanjigi, Justus Ole Tipis, Aaron Mutunga and Ahmed A. Ogle - Sunday Nation 29th October, 1978
48. Okoth Ogendo, op cit p 33
49. Daily Nation 9th July, 1969
50. Colin Leys, op cit
51. Daily Nation 2nd August, 1969
52. Daily Nation 27th October, 1969
53. Daily Nation 28th October, 1969
54. 93 former MP's (ie 60%) were voted out East African Standard 8th December, 1969.
55. National Assembly Debates, Volume XI, (15th February 1966) Col 9
56. Act No 40 of 1966
57. 1969 Constitution 533
58. 1963 Constitution Ss 37-39
59. Section 34(a) of the 1969 Constitution, as amended by the Age of Majority Act, 1974
60. Section 35 of the Constitution.
61. Ibid.
62. Section 34 d
63. Section or Article 20 of 1974 KANU Constitution does not require one to be a life-member of KANU, but the Party's President made it/necessary requirement prior to the elections in 1979. /a
64. See Section 39 of the Constitution, and by warnings directed
65. Ibid
66. Act No 17 of 1966 now S 40 of the Constitution
67. Daily Nation 7th November, 1969 and 15th November, 1969
68. Act No 14 of 1975
69. Act No 202 of 1979 Section 18(B) 1
70. The Weekly Review, November 23, 1979, p 5
71. Section 41 of the 1969 Constitution

In May 1974, J.W. Serey debating a bill in parliament

said in part,

".....we have only one political party because the Attorney General has refused to register any other...."

HowevTHE INSTITUTIONALISATION OF THE ONE-PARTY STATE
WITHIN A MULTI-PARTY ELECTORAL SYSTEM, 1969-1979

With the banning of the K.P.U. in 1969, Kenya became a de-facto one-party state. Since 1969, electoral politics have therefore been dominated by personality rivalries within K.A.N.U., and the institutionalisation of the one-party state as the basic feature of Kenyan political life. The semi-competitive nature of a one-party political system has led to an emphasis on parochialism, ethnicity and clan ties in the elections, such that the electorate was now concerned with the personality of the candidate rather than the policies of the one-party, not only in our political-system but also he represents. The focus of political debate in the elections has been on local rather than national issues and questions of classes and ideology have been largely irrelevant.

The most important event during this period was the passing away of President Kenyatta, and the apparent success in the institutionalisation of the electoral process, for the electoral system not only survived Kenyatta, but it did in fact facilitate the choosing of a new chief to succeed him. Kenya's one-party system has been maintained both by a refusal to register any new party¹, and by warnings directed against any persons intent on forming another party to desist from doing so. For instance it appeared that not all politicians were satisfied with a one-party political system and would have wanted to form or see formed a second party if the government would allow registration of such party.

In May 1974, J.M. Seroney debating a bill in parliament said in part,

by a rule which provided that all prospective KANU MP's must have been members of KANU for the last six months.

".....we have only one political party because the Attorney General has refused to register any other...."²

However those politicians who may have wished to form a second party, would have pitched themselves against Kenyatta who never lost an opportunity to express his strong opposition to another party, and sound warnings to any persons mindful of forming an opposition party. At a political rally on

Madaraka day, 1974 he said, [redacted] to

"KANU is the father and mother of the government and will always remain in the saddle as the ruling party.

I challenge those political desperados dreaming of forming another party to come out in the open" (emphasis mine).⁴

The extent to which he wanted to see the institutionalisation of the one-party^{State} not only in our political-system but also in the government machinery, may be gauged from his speech to the KANU Governing council in 1974. He indicated that,

"it may be decided that for one to acquire a job in government, he will have to produce a KANU membership ticket because the servants of the government are the servants of KANU which is the party of the wananchi..."⁵

These veiled threats suggest that there was a real possibility of a second party being formed in 1974. Kenyatta's statements illustrate KANU party's determination to remain in power, not necessarily through it's own organisational strength and appeal to the electorate, but through the absence of any opposition party. By having only one party, the government would easily control any political dissidents merely by denying sponsorship to such persons if they wished to contest parliamentary elections. As a matter of fact, a number of Kenyans have been barred from contesting parliamentary elections.

In 1969 all former KPU members were barred from contesting the elections, by a rule which provided that all prospective (for nomination), as the branches would be in a position to tell whether they have identified themselves with development, 6 months.

Identifying oneself with development, meant active participation
All former members of KPU except Bildad Kaggia and Grace Onyango⁷
were disqualified from KANU sponsorship by this rule, because
the elections were held in December which was only two months
after KPU was banned.

In 1974, Robert Matano the acting Secretary-General of
KANU, issued election rules for KANU nomination which were
later incorporated in the revised KANU Constitution of 1974⁸.
The rules provided that to qualify for nomination, one had to
be a member of KANU and also fill forms of compliance. The
forms had to indicate a pledge of loyalty to the President the
party and the country, and that if the ^{applicant} has been a member of
the defunct KPU detained for subversive activities, he has
joined KANU and has been a member for a period of three years
since his release from detention, and that he has fully identified
himself with the party and all its policies during the said
period.⁹

Although some ex-KPU members like Odinga had been members
of KANU for the said period of three years, they were never-
theless barred from contesting the elections on the grounds
that they had not fully identified themselves with the development
policies of the party. In the 1979 elections, the question
of clearance was shrouded in even greater confusion. Most
ex-KPU members had met the "three-year" requirement, but they
were still barred from contesting the elections. Nathan Munoko,
the National Organising Secretary of KANU said that only "genuine"
and "loyal" party candidates would be nominated.¹⁰ The criteria
to be used in determining who is "genuine" or "loyal" and who
is not, was not specified. Matano the Secretary-General then
directed that the ex-KPU members who wished to contest the
elections, had to be recommended by their local party branches
(for nomination), as the branches would be in a position to
tell whether they have identified themselves with development.

It therefore appears that the non-clearance of the ex-KPU identifying oneself with development, meant active participation in Harambee projects and other activities of the community. Most of the ex-KPU members seeking to run in the elections were recommended as required, but Matano later turned around and said that the party branches had no such authority (to recommend an ex-KPU member for nomination) and that "clearance" was the prerogative of the KANU headquarters.¹¹ Eventually the ex-KPU members were barred from contesting the elections, on the grounds that they were still KPU at heart, and had manifested their disloyalty to KANU by suing the party.¹² Also barred from contesting the elections was George Anyona a fiery government critic who had been detained in 1977 for exposing corruption in the government.¹³ Anyona's barring may perhaps be ascribed to the fact that the government was reluctant to have in parliament, a man who had demonstrated that he was not ready to relax his criticisms against the government.¹⁴

It is on the other hand difficult to explain the barring of the ex-KPU members. Because Odinga and other former KPU leaders did not pose any threat to the present political leadership at the time they were barred. They have many times publicly supported Moi's leadership and manifested their willingness to work within the existing political system.¹⁵ Indeed if opposition to Moi was used as a ground for barring persons from contesting the elections, one would have expected the Change-the-Constitution group of politicians (Dr. Njoroge Mungai, Paul Ngei, Kihika Kimani, James Gichuru and Jackson Angaine) rather than the ex-KPU leaders to have been barred, because the Change-the-Constitution clique was until Moi became President in August 1978 opposed to him becoming the President.¹⁶

Another example of the confusion that surrounded KANU's handling of nominations was the question of life-membership. Although the 1974 KANU constitution makes provision for one to become a life-member of KANU by paying \$1,000, it does

It therefore appears that the non-clearance of the ex-KPU leaders was a continuation of the government's effort to demonstrate ^{its} opposition to the existense of another party, by punishing these persons who had formed an opposition party in the mid-sixties.

Whatever be the reason for barring Odinga and other KPU leaders, one very disturbing fact was the way KANU handled the "clearance" issue and other issues related to the nomination of candidates for parliamentary elections. There was a long series of confusing directives from various party officials, many of them contradictory not only making the procedure to be followed difficult, but also indicating a lack of consensus and clear foresight among the officials.¹⁷ For instance instead of clearly stating that the ex-KPU leaders would not be nominated by KANU and give reasons for the decision, confusion over the issue prevailed untill 3rd October, 1979, when the KANU Governing Council met and decided to bar Anyona and the ex-KPU leaders.¹⁸

First Munoko, KANU's National Organising Secretary said that ALL candidates for the elections would need clearance and only "genuine loyal and dedicated party members" would be nominated.¹⁹ Later Matano said that the ex-KPU leaders would require "special clearance" and that required their local KANU branches to recommend them for clearance. As we had seen earlier, Matano

later changed his position, and said that branches did not have the power to recommend.

Matano said that the branches had no authority to make such recommendations, and that clearance for the ex-KPU headquarters to decide on.

Another example of the confusion that surrounded KANU's handling of nominations was the question of life-membership. Although the 1974 KANU constitution makes provision for one to become a life-member of KANU by paying sh.1,000, it does not however require that one be a life-member to qualify for

nomination by KANU. Yet on 15th June, 1979, Matano ruled that all those who wished to contest the parliamentary elections must be life members of KANU.²¹ Five weeks later he was contradicted by Mwai Kibaki the Vice-President of KANU, who said that the KANU constitution was very clear, and all it required was a Sh.2 ordinary membership such that any Kenyan with a Sh.2 ordinary KANU ticket was eligible and free to contest the elections.²² Kibaki was himself later overruled by Moi who said that life-membership was a necessary qualification.

This confusion indicates a lack of consensus among the party officials. It is perhaps attributable to the tendency of the senior KANU officials of issuing directives without consulting the other national officials of the party. In a developing country like ours, where the large majority of the people are uneducated, it is necessary that the election regulations be simple and clear for the people to understand them. Consequently the want of co-ordination and the confusion resulting from the complicated procedures and contradictory directives emanating from various KANU officials, is indeed a sad comment on the much vaunted principles of democracy upon which Kenya's political system is supposedly based.

One might as well try to understand this confusion by looking at the state of the KANU party itself. KANU had been and continues to be played by a form of impotence and organisational weakness that pervades the whole machinery of the party from the headquarters to the local branches. In terms of organisation, it would not be an exaggeration to say that the party is only a loose collection of party bosses at the headquarters and at the local level. Because for instance, looking at the party's record of participation in harambee projects and other communal activities, one observes that it is usually the politicians (in their individual capacities) the administration

only significant changes made by the 1974 constitution (D.D.'s and chiefs) or church organisations rather than KANU, as the replacement of the old cumbersome system of seven provincial vice-presidents with that of one vice-president, efforts.

From February, 1966, when the first post-Uhuru national party elections were held, KANU has been inactive for most of the time, renewing its vigour only on the brink of general elections and falling back into dormancy after the elections.

While the KANU constitution requires that elections for KANU officials be held every two years, the National Executive of the party kept postponing elections for the National offices from 1966 until October, 1978 shortly after Moi was elected president following the death of President Kenyatta. So that from 1969 when Robert Matano became the acting Secretary-General of the party after the assassination of Tom Mboya, he continued to act as Secretary-General for almost ten years. Further the required "annual" delegates conference was never held since 1966 until October, 1978, when a Special Delegates Conference was convened after Kenyatta's death.

Some unsuccessful attempts were made to revitalise the party but the direction in which the party was to be revitalised was never made clear and such efforts came to nothing. The first attempt at reorganisation of the party was made in 1971 after the National Governing Council met in Mombasa, but there was not the necessary political will power to carry out the reorganisation. The only thing that came of the effort was the proposal to draft a new constitution. It took until 1974 for the new constitution to be drafted and even then, the draft was never ratified by a delegates conference as required by the operative 1966 constitution. Indeed the 1974 draft constitution was followed in the nomination of KANU's candidate for Presidential elections after Kenyatta's death, without first being adopted.

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The only significant changes made by the 1974 constitution was the replacement of the old cumbersome system of seven provincial vice-presidents with that of one vice-president, and the creation of a new post of party Chairman.²³

Yet in spite of all its weaknesses, being the only political party, KANU had an important role to play in the question of presidential succession after Kenyatta's death. Because as earlier discussion has shown,²⁴ the process of electing the President for all serious purposes terminates at the nomination of a presidential candidate by KANU, as there would be no other presidential candidate to oppose him.

Contrary to what had been feared, the succession to the presidency after Kenyatta's death was smooth and peaceful. How was KANU weak as it was, able to effect such a transition? Or could it be that the organisational weakness of KANU itself contributed to the smooth transition? To understand the role of KANU, and other forces which may have influenced the transition, it is necessary to look back and examine the succession issue in the context of the electoral politics and alignments of the seventies and their influence on presidential succession. It has been shown how in 1967 and 1968 there were moves by a small but powerful alliance of Kikuyu politicians close to Kenyatta, to frustrate the late Tom Mboya and remove him from the line of presidential succession.²⁵

Even after the assassination of Mboya, and the banning of the KPU, the question of presidential succession continued to dominate the politics of the seventies, the only difference being that there was a change of the key participants in the leadership struggle.

Constitutionally, Arap Moi, who was the then Vice-President was to accede to the presidency if and when Kenyatta died.²⁶

The 'Kikuyu group' appears to have realised that the new succession formula they had helped to bring about did not work in their interests. Dr. Njoboge Mungai a close relative of Kenyatta, and reputed to have presidential ambitions, appeared to be the star being groomed for the presidency by this Kikuyu group. With the failure of the 1969 oathing programme to consolidate Kikuyu unity, the resulting disenchantment and the possibility of potentially violent conflicts within the Kikuyu society, a fresh attempt to position the Kikuyu in a vantage position for an apparently inevitable leadership struggle was hatched. The Gikuyu, Embu and Meru Association (GEMA) was formed to contain intra-Kikuyu rivalry which would not have helped the efforts of this group. With the demise of Mboya, the focus or target against who the group's moves were directed, was the then Vice-President Moi. GEMA as the means of furthering the groups political and economic influence continued to grow from strength to strength. By the mid-seventies it was then possible to identify some new faces in the group, the two most prominent ones being Kihika Kimani and Njenga Karume. While the groups' plans were still on the drawing board, an event which almost tore the country apart occurred. On March 2nd 1975, J.M. Kariuki an ardent government critic was murdered. J.M. was a populist politician who had for a long time vigorously fought for the poor and who had in the early seventies become the target of government harassment. His murder and the subsequent attempts by the government to cover it up greatly incensed the Kenyan people, and created a real possibility of civil war among the Kikuyu. The very continuity of the Kenyatta government looked doubtful and it is indeed a tribute to Kenyatta's talents of political survival, that his government managed to survive this crisis.²⁷

In the immediate aftermath of J.M.'s death, the GEMA group became increasingly powerful, and led by Kihika Kimani, the members of this group spearheaded a nation wide campaign to restore respect and loyalty to the government in the eyes of the people. It is during these delegations organised to pledge loyalty to the President, that the group seems to have thought time was ripe to act and move against Moi. After all Kenyatta was becoming older each day that passed. It app In October, 1976, the group initiated a campaign to change the constitutional provisions that allows the Vice-President to automatically succeed the presidency for ninety days in the event of the presidency falling vacant. Led by the MP for Nakuru North, Dixon Kihika Kimani, the group included three powerful cabinet ministers (Mr. James Gichuru, Paul Ngei and Jackson Angaine), the national chairman of GEMA Mr. Njenga Karume and Dr. Njoroge Mungai then a nominated MP and who appeared to be the intended beneficiary of the change. The group argued that the provisions for succession were undemocratic in that for 90 days, the country would be ruled by a person who was not directly elected into office.²⁸ It was argued that he could within that time abuse and usurp the powers of the office. It was proposed that the provisions be amended to give the Speaker of the National Assembly and not the Vice-President, a caretaker role during the ninety days and confine his powers to the supervision of the elections for a new President. The group intended to introduce a private member's bill in parliament to that effect, but before their plans matured, the group ran into some formidable opposition from the Attorney-General Mr. Charles Njonjo a close ally of Moi. He issued a very strongly worded statement to the effect that those campaigning for the constitutional change, were intending, devising or imagining the death of the President which is an offence, and that they were doing so at their

own peril.²⁹

Looking back at the events of 1976, it is difficult to believe that the late President was against the move to

change the constitution, considering the delicate nature of the issue and the kind of politicians involved. They were seasoned politicians endowed with political experience and talent, who were unlikely to make a mistake of playing around with such a sensitive issue if Kenyatta was against the move. It appears that Kenyatta had allowed the group to proceed with their plans, but on realising the opposition that the move would run into decided to abandon it.

It is abundantly clear that the change the constitution because it looked like it was destined to become a very powerful campaign was directed against Vice-President Moi. The view that if the provisions were amended to replace the words "Vice-President" with "Speaker", there would be no further cause for concern indicated that what concerned the group, was not the office of the Vice-President, but rather the holder of that office: they were bothered not by what a Vice-President can do, but what they thought the present vice-president could do. At the time it appeared that the Moi group was likely to a succession. Because there was no reason why a Speaker acting as President would not be subject to the same temptations as a Vice-President to usurp the powers of the office. The Speaker was also a politician, and he was bound to have his own ambitions and weaknesses and power could be just as tempting to him as it would be to a Vice-President,

The move had a number of other implications: first it stressed the supremacy of the constitution by impressing upon Kenyans that where Presidential succession was concerned it was the constitution that mattered. This fact may have contributed to the constitutional transition that was effected after Kenyatta's death. The move also brought into sharper focus the question of presidential succession which became more sensitive

than ever before. It helped to identify and strengthen the political alignments that had been taking shape in readiness for the time when Kenyatta would be no more.

These alignments showed up again more clearly in the abortive elections for the KANU National Executive planned for 3rd April, 1977. There were two camps - the "incumbents" group associated with Arap Moi, and the "challengers" associated

with Dr. Mungai who however did not attempt to contest any seat.³⁰ The seat that attracted most attention was that of the Vice-President. Moi who looked set to win the seat, was opposed by Taita Arap Towett on behalf of the challengers. The chairmanship of the party also attracted a lot of attention because it looked like it was destined to become a very powerful seat in future. It attracted the candidature of Mwai Kibaki but initially it was not very clear on which side he stood or whether he was an independent. But with the announcement of James Gichuru that he would also contest the party's Chairmanship, it became clear that Kibaki was on the incumbents side associated with Moi, because Gichuru himself was a member of that group which was associated with Njoroge Mungai.³¹

At the time it appeared that the Moi group was likely to sweep all the seats. The most plausible explanation for this was that Moi had benefited a lot from the abortive move to change the constitution six months earlier. The "challengers" group associated with Dr. Mungai, was the same group that had tried to change the constitution, and the opposition that this move had engendered cost them a lot of support prior to the April elections. As it were, the elections never materialised.

They were called off by President Kenyatta at the last minute. It was suspected that Kenyatta cancelled the elections because if they had taken place, Mungai who enjoyed the political support of the Kenyatta family, would have lost to the far too powerful group led by the then Vice-President Arap Moi.³²

When Kenyatta died in August, 1978, these divisions still persisted. The constitution remained unchanged and Moi was still the Vice-President. There was therefore understandable fear and concern, that the constitution would not be adhered to, and that transition into the post - Kenyatta era would be accompanied by strife and perhaps violent leadership struggles.

Indicative of the calm that was to confound those who expected chaos after Kenyatta's death, an emergency meeting of Cabinet Ministers was convened on the same day Kenyatta died. Vice-President Moi was sworn in as the new President of Kenya. In his initial statements in office, he promised to follow in Kenyatta's "Nyayos" (footsteps) and rule as Kenyatta had done. The entire cabinet proclaimed total loyalty to President Moi.³³ This was followed by pledges of loyalty which came from all groups ranging from trade unions to political rivals like Dr. Mungai, Kihika Kimani and Oginga Odinga.³⁴ Loyalty delegations to visit him were organised from all over the country. The culmination of all this was a proposal that Moi be elected unopposed and by late September, the proposal had been endorsed by virtually all Members of Parliament, and all KANU branches.

Because the 1966 constitution vested the power in KANU being the only political party, played an important role in facilitating the peaceful succession to the presidency. Ironically KANU's weakness contributed a great deal to the smooth transition. Being very weak, KANU could not solve the succession problem on its own. KANU could only play its role in the succession effectively, if there was a consensus among those in power as to who would become President. KANU only implemented and legitimised the decision of those who were in power. And at the time of the elections, the axis of power and influence had shifted to the Moi - Kibaki - Njonjo group.

The constitution was followed and on 6th October, Moi was nominated by acclamation as KANU's presidential candidate. And because there was no other party to field an opposing candidate, he was shortly thereafter declared elected unopposed as the President of Kenya.

Although the republican constitution was very clear, the KANU constitution which was to be followed in the nomination was far from clear. The confusion arose from the validity of the 1974 constitution. The 1974 constitution had not yet been ratified by a delegates conference as required by the 1966 constitution it intended to replace, and therefore from a legalistic point of view, it was the 1966 constitution that remained valid. The question of which was the operative constitution was relevant, because it would determine the constitution of KANU delegates to the special delegates conference that was to nominate KANU's candidate for the presidential elections. The unadopted 1974 constitution had been unlawfully followed in the KANU branch elections held in 1976 and 1977. Matano insisted that the 1974 constitution was valid, saying that it had been adopted by KANU's Governing Council under the Chairmanship of the late President in 1976, which was most unconvincing because the 1966 constitution vested the powers of amending the constitution, not with the KANU Governing Council but with its Delegates Conference.

However Moi was elected by acclamation and it was immaterial what ^{party} constitution was followed since he was bound to be elected. It is indicative of the unanimity there was that Moi be elected President, that what controversy surrounded his election was only procedural: the issue was not whether or not he would be elected, but only how or under what rules he would be elected.

gain from chaos and violence. It is therefore clear that

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This suggested that the electoral system was not the real arbitrator as to who would be elected. The decision was made outside the electoral system, and the election laws were followed because they were convenient, and they would not only facilitate but would also legitimise his election. What were those forces outside the electoral system, that facilitated the transition and determined the election of Moi as the second President of Kenya?

First Kenya had never known any President other than Kenyatta and Kenyans were therefore apprehensive that the transition to post - Kenyatta era would be accompanied by violence. There was therefore a widespread desire for peace and stability on the part of many Kenyans. For their own different reasons, most Kenyans saw the accession of Moi to the presidency, as the only way to avoid bloodshed. The minority tribes saw him as a hedge against domination by the bigger tribes. The Non-Kikuyu people saw him as a force to counter - balance the Kikuyu influence in the country, as he was perhaps the only non-Kikuyu politician with a substantial national following. And by accepting him, the Kikuyu could assure the other tribes that they were not out to control the destiny of this country.³⁵

In the final analysis the ruling class which had acquired a real stake in the continuity and stability of Kenya's political economic system was unwilling to see it collapse in the throes of violent leadership struggles. The ruling class here should be seen to include the wealthy members of this country who derive vast material benefits from Kenya's economic system, and whose interests the state champions. The silent but large majority of the poor supported Moi's accession to the presidency, because they had nothing to gain from chaos and violence. It is therefore clear that

economic interests and the desire to preserve the status quo and ensure the continuity of the system contributed greatly to the peaceful transition.

Perhaps what finally effectively determined the election of Moi as President, were the loyalty delegations organised from every corner of the country to visit and pledge loyalty to Moi. Such was the support Moi got, that any politician who may have had presidential ambitions, could not thereafter dare to stand against Moi, for that could perhaps be interpreted as going against the "wishes of the people" as manifested by these loyalty delegations.

It was the loyalty delegations rather than a strict adherence to the ^{party} constitution that determined Moi's election. Because KANU only formalised the already made decision to elect Moi. The Special Delegates Conference held on 6th October 1978, turned out to be a merely pro-forma affair. For as Ngumba the then Nairobi Mayor put it.

"the loyalty delegations are president - making, and on October 6 will just be a formality...."36.

After the nomination of Moi as KANU's presidential candidate, the constitution was thereafter followed meticulously. He presented his nomination papers and in the absence of any other candidate, he was declared elected unopposed and sworn in a few days later.

One however wonders whether the loyalty pledges and proposals that Moi be elected unopposed may not have infringed upon the supremacy of the ^{party} constitution. For it is difficult to argue that there were no Kenyans who had met the necessary qualifications, and who may have wanted to seek election as President. It can therefore be argued that such proposals that Moi be elected unopposed were undemocratic in that they prevented other presidential hopefuls who may have been as

good if not better than Moi to run for the presidential elections.

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The one-party system of government practised in Kenya since 1969, also contributed to the election of Moi as President because the absence of an opposition party paved way for Moi's unopposed election after he secured nomination by KANU. It is most unlikely that the transition would have been as uneventful as it was, had there been an opposition party.

The post-Kenyatta era, popularly referred to as the Nyayo era has been characterised by politics which are conformist in nature. All politicians have tried to outdo each other in pledging their loyalty to Moi. Political rivals refer to each other as being anti-Nyayo. The first year of Moi in Office was characterised by a campaign to end smuggling and other social evils that had become rampant in the later years of President Kenyatta's rule. As part of these populist measures, Moi's government introduced a bill in parliament to amend the Election Offences Act.³⁷ The amendment's most important provision was to limit a candidate's election expenses to a maximum of \$40,000 the violation of which law was to be an election offence. Another Act passed just before the 1979 general elections, amended the National Assembly and Presidential Elections Act, and raised the sum a candidate had to deposit for an election petition to \$50,000.³⁸

In the 1979 elections, every candidate pledged to follow Moi's Nyayos which meant loyalty to Moi himself. To help his political supporters be elected to Parliament, Moi personally involved himself in some election battles and indicated the parliamentary candidates he wished to see elected. Although he was not altogether successful (some loyalists like Nathan Munoko and Omolo Okero were defeated), most of the candidates he supported like Julia Ojiambo, Justus Ole Tipis, Henry Kosgey, Professor Jonathan Ngenō, Henry Wariithi and of course G.G. Kariuki were elected to Parliament.³⁹

In a developing country like ours where most people are illiterate, the intervention of the President's weight and influence in some election battles, most likely influenced the outcome

FOOTNOTES

of the elections in favour of the candidates who are seen by the people to be enjoying the president's support. To the extent that the President's involvement in some elections, influenced the voting patterns of the people and resulted in the election of some persons who would not otherwise have

gone to parliament, such intervention is therefore undesirable as it compromises the free nature of the elections. ✓ I concur

It now remains to be seen, what course the politics of the Nyayo Era will take, and ^{the} effect this will have on the future of Kenya's electoral system. At the moment it is safe to predict that in the foreseeable future there is little likelihood of any major changes being made to our

electoral laws. Barring any unexpected political developments, Kenya is most likely going to remain a one-party political system operating within a multi-party electoral system for a long time. - your prophecy has failed terribly

- 14 Weekly Review 5th and 12th October, 1979
- 15 See for instance, Daily Nation 11th September, 1978.
- 16 Infra p 45-48
- 17 For a detailed discussion on this confusion see the Weekly Review 21st September, 1979.
- 18 Sunday Nation 7th October, 1979.
- 19 Weekly Review 21st September, 1979
- 21 The Standard 16th June, 1979.

22 The Standard 21st July, 1979
23 CHAPTER THREE
24 The Revised KANU Constitution, 1974

24 Supra Chaptre FOOTNOTES

25 1 The Proposed Kenyan Democratic Congress was refused
26 registration in October 1969. 6.

27 Daily Nation 30th October, 1969

28 2 Daily Nation 30th May, 1974
29 See The Weekly Review of March, and April, 1975.

30 Daily Nation 1st April, 1974.

31 4 Daily Nation 2nd June, 1974.
32 The Weekly Review of 11th and 18th October, 1975.

33 5 Daily Nation 6th July, 1974.
34 The Weekly Review 14th March, 1977.

35 6 Daily Nation 7th November, 1969.

36 7 Daily Nation 15th November, 1969.

37 8 Daily Nation 14th June, 1974.
38 Africa Magazine, No. 30, October, 1974 p.20.

39 9 Article 20 of the 1974 revised Constitution of KANU.

40 10 Daily Nation 6th July, 1979.

41 11 Daily Nation 27th June, 1979.
42 For Mungai's loyalty pledge see Daily Nation,

43 12 Sunday Nation 21st October, 1979.

44 13 Weekly Review 15th December, 1978.
45 and for Kihika Kimani, Sunday Nation

46 14 Weekly Review 5th and 12th October, 1979

47 15 See for instance, Daily Nation 11th September, 1978.

48 16 Infra P 45-48
49 minorities, Daily Nation 4th September, 1978.

50 17 For a detailed discussion on this confusion see
51 the Weekly Review 21st September, 1979.

52 18 Sunday Nation 7th October, 1979. the schedule

53 19 Weekly Review 21st September, 1979

54 20 The Standard 27th June, 1979. her 1979, p.5.

55 21 The Standard 16th June, 1979.

56 22 Sunday Nation 11th November, 1979.

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CHAPTER FOUR

- 22 The Standard 21st July, 1979
- 23 The Revised KANU Constitution, 1974
- 24 Supra Chapter two.
- 25 Supra Chapter two.
- 26 The 1969 Constitution, section 6.
- 27 For a detailed treatment of the crises brought by the murder of J.M.
- 28 See The Weekly Review of March, and April, 1975.
- 29 The Weekly Review 4th October, 1976
- 30 The Weekly Review of 11th and 18th October, 1976.
- 31 The Weekly Review 14th March, 1977.
- 32 The Weekly Review 14th March, 1977.
- 33 William Ndege, "Kenya: After Kenyatta" Africa Magazine, No. 86, October, 1978 p 20.
- 34 Daily Nation , 2nd September, 1978
- 35 For Mungai's loyalty pledge see Daily Nation, 5th September, 1978; for Odinga, Daily Nation 11th September 1978; and for Kihika Kimani, Sunday Nation 10th September, 1978.
- 36 Kimani wa Nyoike said that the election of Moi as President would reassure the small tribes and other minorities. Daily Nation 4th September, 1978.
- 37 Daily Nation 7th September, 1978
- 38 Act No 202 of 1979, S 18 (b) of the schedule
- 39 Weekly Review, 23rd November 1979, p5.
- 40 Sunday Nation 11th November, 1979.

CHAPTER FOUR

REFORM OF THE ELECTORAL SYSTEM

Kenya is or is supposed to be a liberal democracy observing the rule of law and principles of constitutionalism.

While the concepts democracy, rule of law and constitutionalism are fluid and vague terms, whose meaning and content is difficult to determine with accuracy and precision, it is sufficient for the purposes of our discussion to understand democracy to mean a system of government in which the people participate through representation. The government is accountable to the citizenry in that it is chosen and removed by the people, and therefore derives authority to rule from the mandate given to it by the electorate. Hence this type of government being referred to as a government of the people, for the people and by the people.

The rule of law may be understood to mean that the actions of the government must result from the exercise of some legal authority conferred by law and that even the exercise of that power is itself ^{be} in accordance with the law. The rule of law also envisages that the laws are fair and just, so that for instance the discriminatory and oppressive laws of the South African Apartheid system do not satisfy the requirements of the rule of law.

Constitutionalism means a limited government. Nwabueze says that the concept of constitutionalism connotes a system of government with checks and safeguards against the arbitrary exercise of power by the government! It means that there are limitations which prevent the government from exercising its power in an oppressive manner. The limitations and checks that one would have in mind are a free and vigorous parliament, an independent judiciary and the existence of an effective electoral system.

An effective electoral system is an important aspect of constitutionalism, because it acts as a check on how the government exercises its power, since it has to face the electorate every four or five years and account for its (mis)deeds while in power.

Therefore in a democracy, the electoral system has two primary functions, and its effectiveness is evidenced by how well it is able to discharge these two functions. These two functions are: first to provide a framework within which a workable majority government to administer the state may be elected and secondly to make the government accountable and responsible to the people. As for the second function there are two levels of responsibility. On one level, the government is responsible to the people, in that it may be voted out of power during general elections if it has become unpopular and has failed to satisfy the wishes of the people. The second level of government accountability is realised through the elections of a legislature to which the executive is responsible. If it be accepted that these are the two primary roles of an electoral system in a democracy, then in the context of this discussion the question that springs up is how efficient is Kenya's electoral system? The rest of this chapter will address itself to this question, examine how the system has been able or unable to discharge the functions identified above and then suggest possible reforms.

Kenya's electoral system has over the years facilitated the election of a majority government to administer the state, and there has been no problems of a minority government being unable to rule since Independence, because it is designed in such a way as to ensure that elections will result in a majority government being elected.

This is realised by requiring that every presidential and parliamentary candidate be nominated by a political party, that every political party participating in the elections nominate a presidential candidate, and that during elections the presidential and parliamentary candidates from the same party be paired together such that the voter is prevented from splitting his vote to vote for a presidential candidate from one party and a parliamentary candidate from another party². In this way the system obviates the possibility of an independent candidate running for presidential elections and probably even win, but thereafter be unable to rule due to his having no party through which he can muster support for government policies in parliament. And the pairing system makes the election of a government majority certain by ensuring that those votes which elect the winning president, will at the same time elect a parliament the majority of whose members come from the same party as the successful presidential candidate.

In practice there has been less worry about the possibilities of a minority government. Because since 1969, Kenya has been a de-facto one-party state and the election laws provide that where only one presidential candidate is validly nominated, he shall be declared elected unopposed. With the banning of the KPU, Kenyatta was unopposed in both the 1969 and 1974 elections, and so was President Moi in the 1978 and 1979 elections. At the same time the absence of an opposition party, has enabled all parliamentary candidates nominated by KANU get into parliament unopposed. In this way, the Kenyan electoral system has been able to guarantee the "election" of a majority government that is strong enough to administer the state.

How has the electoral system made the government responsible to the people? It has been mentioned that government responsibility to the people operates at two levels; i.e. it may be voted out of power during general elections and secondly while in power, the executive is responsible to the people indirectly through their elected representatives in parliament. Lest there be confusion, it is at this point useful to clarify what we mean by the government being responsible and accountable to the people. When reference is made to responsibility during elections, what is meant is the election or removal from power of the President, because the electorate does not elect the Ministers. And since it is the President who appoints and dismisses his Ministers, it means that he is responsible to the electorate for the kind of cabinet he forms. But when reference is made of the executive being responsible to the legislature, what is meant is that the President and his Ministers are answerable to the legislature and not just the President alone. This is because the legislature is expected to criticise not only the general performance of the government, but also specific areas of maladministration of individual Ministries. The principle of collective responsibility operates in such a way that neither the President nor any of his Ministers are individually liable to the legislature. The Cabinet is collectively responsible to the Parliament.

At the first level of responsibility, it appears that the electoral system has not been very effective in that, the extent to which the President may be said to be accountable to the people and may be called upon to answer for his performance while in power is very minimal indeed. Two factors may explain this situation.

First KANU the only lawful political party, is a weak party and therefore allows the incumbent President to remain in power without any challenge.³ It is controlled by the executive and this makes it difficult if not impossible for anyone to challenge the nomination of the incumbent president during Presidential elections. The weaknesses of KANU have been discussed elsewhere;⁴ the point being made here is that because of the weaknesses of KANU and it being largely controlled by the executive, the electorate cannot remove the President from power through the party, if it is dissatisfied with his leadership. The second factor is the nature of our electoral system. Kenya has a multi-party electoral system which envisages and is designed to operate in a multi-party political system. However since 1969, Kenya has been a de-facto one-party state. How the one-party state was realised, and has been maintained was discussed in the preceding two chapters and need not be repeated here. The result of operating a one-party state within a multi-party electoral system, has been that the candidate for Presidential elections who is nominated by KANU is always elected President unopposed. So that since KANU continues to nominate the same person in power for the presidential elections, the incumbent president is never threatened with removal from power through the ballot even if he has become unpopular, simply because there is no other candidate from another party to oppose him. At another level, the executive arm of the government is supposed to be accountable to the electorate through the parliament. The parliament is supposed to be the people's watchdog. It is charged with the responsibility of controlling and criticising the exercise of government power by the executive and also make sure that the government carries out the promises and pledges it made to the electorate during elections.

Theoretically Kenya's parliament can even bring down the government through a vote of no-confidence. However the ability of Kenya's parliament to carry out these functions, has been frustrated in a number of ways. First the fact that Kenya is a one-party state, and all M.P's belong to KANU limits the extent to which they can criticise the government. This is achieved through the KANU Parliamentary Group. Whenever a government measure faces strong opposition in parliament, the KANU Parliamentary Group to which all M.P's belong, is convened and the M.P's are persuaded or threatened to support the government as members of KANU;⁵

Secondly and more importantly, the parliamentary system of our government also limits the independence of parliament to criticise the executive. The executive (President and his Cabinet) belongs to the parliament. By being part of the parliament, the executive is able to exert its influence in the House, to ensure the success of government policies. Today it is nearer the truth to say that the executive controls the parliament. For Kenya's fourth parliament has twenty seven Ministers, fifty assistant Ministers, and twelve nominated M.P's all of whom would be expected to support the government. The composition of the parliament is therefore such as to make it docile and sub-servient to the executive for there are at least eighty-nine out of one hundred and seventy voting M.P's who would by reason of their position be expected to vote in support of the government, especially if the measure being voted on is a crucial and fundamental aspect of government policy.

At any rate, serious criticism of government policy is not tolerated, and criticism whether inside or outside parliament is treated as subversion. Time and again, the President and his Ministers have stressed that only "constructive" criticism of the government which does not vitiate the country's sedition

laws will be tolerated. The result has been that only the most limited and innocuous criticism of government policy is made in parliament. And where M.P's have become so daring as to make serious criticism of the government, they have been dealt with swiftly either through political intimidation or detention without trial. The politically motivated prosecutions and imprisonment of Mutai Chelagat and Mark Mwithaga, and the detention of Martin Shikuku, J.M. Seroney and George Anyona are illustrative of the government's refusal to accept serious criticism of it's policies.

Futhermore where criticism is mild enough to be tolerated, the government may simply ignore such criticism. For instance where a question is asked in parliament, the relevant Minister may simply refuse to answer the question, or give an answer that is clearly inadequate. And even where the Minister admits responsibility, the parliament suffers from an intolerable absence of effective sanctions that M.P's can invoke against dishonest and incompetent Ministers. The M.P's cannot force a Minister to resign. Although the cabinet is supposed to be collectively responsible to the legislature, and can even be forced to resign, through a vote of no-confidence, it is difficult to see the government accepting that it can be removed from power at the instance of the legislature.

In the final analysis, parliamentarians are themselves ill-qualified to question the political economic philosophy that underlies the policies of the government, and they have been unwilling to do so because they are members of the privileged class that derives vast benefits from the capitalist system maintained by Kenya's ruling elite. They are all committed to the maintenance of this system and to the extent that it benefits a small minority, the M.P.'s cannot effectively represent the large majority of the wananchi because that would necessitate criticising the political economic system that is maintained in Kenya.

With the political basis for their control functions removed, and the executive having been able to make parliament stable and docile, it is not surprising that the Kenya legislature is incapable of exerting any real influence over the executive, so that today the role of the legislature in controlling the government, amounts to nothing more than being able to ask the government embarrassing questions.

The inadequacies highlighted above suggest that a reform of our system of government is called for if the electoral system is to function effectively as a means of making the government responsible to the electorate on the one hand, and the executive to the legislature on the other.

It is the author's opinion that the introduction of a presidential system of government in Kenya, would be a step forward in as far as the accountability of government is concerned. The important advantage that a presidential system of government has over the parliamentary system is that the executive would be divorced from the legislative. The President would be elected separately and he would not be a member of the legislature. Representing no constituency, the President's attention to the affairs of the whole nation would not be diverted by any particular constituency. He would also be free to choose the most experienced and qualified personnel for his administration, because under a presidential system, the President is not required to choose his Ministers or any member of his administration from amongst the elected members of the legislature. Such an arrangement would have an additional advantage in that since the executive and the legislature would be independent of each other, the executive would not control the legislature as is the case in a parliamentary system where the executive is a constituent part of the legislature.

Presently Kenya's parliament has amongst it's members seventy-seven (twenty-seven Ministers and fifty assistant Ministers) members of the executive, and therefore the removal of the executive from the legislature would greatly reduce the influence of the executive in the legislature, and conversely increase the independence of the legislature. The legislature would in effect be better placed to criticise and control the executive. The executive would not be able to dissolve the parliament or threaten it with dissolution.

At the same time the executive would still be strong enough in that unlike the position in a parliamentary system, in the presidential system the legislature cannot bring down the government and force the resignation of the President through a vote of no confidence. However this would make no difference, because even under our ^{present} parliamentary system, the legislature possessed this power of bringing down the government in a vote of no confidence only in a theoretical sense.

The introduction of a presidential system would therefore overcome one major drawback of the parliamentary system, as it would improve the responsibility of the executive to the legislature by separating the two and making the legislature independent of the executive.

As has been observed earlier, Kenya has operated a de-facto one party system since 1969 although the constitution permits multi-partism. Would the restoration of multi-partism improve the effectiveness of our electoral system and increase the accountability of the government to the electorate? Much of the blame for the ineffectiveness of our electoral system can be laid at the doorstep of Kenya's one party system operating within a multi-party electoral framework.

The electoral system tries to make the government accountable to the people, by providing a framework through which the electorate may remove from power, the party whose leadership has failed to live up to their expectations while in power. Since 1969 however, the absence of an opposition party has deprived^{of} the Kenyan electorate, the chance of removing the ruling KANU party from power, even though the electorate may not have been wholly satisfied with its performance while in power. While it is conceded that parliamentary elections make the parliamentarians more responsible to the electorate because they are easily removable, presidential elections in our one party system are arranged in such a way that the electorate cannot influence let alone determine the outcome of the elections. Once the party nominates its presidential candidate, he is automatically declared elected president because there is no opposing presidential candidate.

Be that as it may, the case against multipartism is very formidable indeed and there are many factors militating against the suitability of multi-party politics to Kenya. Like other developing countries the most pressing challenges facing Kenya are economic development and cultivating a strong sense of nationhood among the people. It is forcefully argued that multi-party politics is unsuited to developing nations because by its competitive nature, it dissipates the nations's energies which should be fully mobilised to meet the tasks of national unity and economic development.⁶ Developing nations are comprised of a multiplicity of tribal communities and other ethnic minorities, and multipartism if allowed would encourage sectionalism and polarisation of politics along these tribal and ethnic divisions.^{6a} The leadership should be undivided and strong enough to act as a focal point for national unity.

Party loyalties would make the realisation of national unity very difficult indeed.

Even more important is the need for rapid economic development to enhance the standard of living of the people in developing nations. Most of these nations Kenya included, are in a sorry state of mass illiteracy and material deprivation, the alleviation of which calls for determined and concerted action from a strong political leadership. If a party is going to be in power for five years, a second party for another five years and so on, there will be unnecessary and undesirable interruption in the process of economic ~~development~~^{development,} because each party will tend to have different development strategies from the one previously in power. The leadership should be continuous and strong enough to lead, encourage and sometimes even coerce the people to face up to the challenges of ignorance, poverty and disease. The case for a one-party system in developing countries becomes even stronger when one considers that economic imperatives dictate that the task of material accumulation to overcome hunger and poverty assumes first priority, and people are therefore left with little time to attend to matters of political development. At any rate the people cannot understand the intricacies of a multi party system and the various political economic philosophies that each party stands for, if they are largely illiterate. Despite therefore the attractions of a multi-party political system, the author is persuaded that it is less suited to Kenya than is the one-party system. And that it would be far more profitable to increase the responsibility of the government to the people, through making the one-party system more competitive rather than substituting it with a multiparty political system.

It is submitted that presidential elections may be made more competitive by transferring the election process from the party to the electorate. Presently the business of electing the President for all serious purposes, terminates once KANU the only party, nominates its presidential candidate. It is recommended that the party should sponsor more than one candidate as happens with parliamentary elections. Those persons wishing to offer themselves as candidates for the presidential elections should be free to do so provided they satisfy the requirements of a presidential candidate i.e. they are members of KANU, their candidatures be supported by at least one thousand registered voters etc. However in keeping with the earlier recommendation that our parliamentary system of government be changed to a presidential one, the presidential candidates would not therefore contest the parliamentary election since they would not be members of the legislature. At a later date a poll would be held throughout the country, and all registered voters would have a chance of electing the president from amongst those candidates contesting the presidential elections. The presidential candidate who receives more votes than any other candidate would be declared elected President.

It is to be observed that presidential elections if held along these recommendations, would be similar to parliamentary elections in the constituencies with the exception of two important differences; the poll would be held throughout the country as opposed to parliamentary elections where a poll is held in every constituency, and secondly the returning officer would have to be some person other than a District Commissioner as is the case in parliamentary elections. Preferably the Speaker of the National Assembly or the Chief Justice should be the returning officer

For convenience the poll for presidential elections may be conducted simultaneously with those of parliamentary elections so that the voter will be able to cast his vote for the presidential and parliamentary candidates of his choice.

Finally one more recommendation should be made. It has been observed that KANU is a weak political organisation constantly plagued by personality rivalries, elitist in nature and lacking a coherent political ideology and a clear sense of direction.⁷ It is therefore imperative that it be re-organised if it is to play a meaningful role in a one-party democracy along the lines recommended.

During the 1979 general elections the KANU leadership gave a very poor account of itself. The contradictory directives issued by party leaders on the election procedures, created a lot of confusion and exposed a most unfortunate lack of co-ordination between the party leaders.⁸ The party leaders are senior officers of the government who devote only a small part of their time to party affairs. It is therefore recommended that the party should have a small staff of dedicated full-time officers who would devote all their time to the affairs of the party, especially with regard to the formulation and implementation of the party's policies and programmes.⁹ Party elections should be held as regularly and as directed by the constitution of the party. The kind of indolence which was responsible for the failure to hold elections for the national offices of the party between 1966 and October 1978, should not be tolerated.

The party should be transformed from an elitist to a strong mass organisation. It should be strengthened at the grassroot level where it is weakest. The masses should be involved in the formulation of party policies and party activities to implement such policies.

Perhaps because of illiteracy, the rank and file cannot initiate policy but at least they should be given a chance to discuss and comment on, approve or criticise those policies initiated by the party headquarters whenever an important issue is at stake. For instance the publication of Government Sessesional Paper No.10 which contains KANU's political economic philosophy of African Socialism, should have been preceded by a national debate examining the merits and the suitability or otherwise of the philosophy to Kenya. Perhaps a referendum or some other means of enabling the party members to express their approval or disapproval of the philosophy should have been in order. Otherwise the philosophy of African Socialism is little more than a product of the ideas of a few party leaders.

It is also submitted that restrictions on the rights of a party member based on financial considerations should be scrapped. The practice of having two types of membership, - Shs.2 ordinary and Shs.1,000 life membership - is indefensible as it tends to create a small elite of life members. Shs.1,000 is a large sum by the standards of the ordinary Kenyan. But it is even more unfortunate when the full exercise of one's rights as a party member is restricted by one not being a life member. A case in point was the directive that only life members would be allowed to contest the 1979 general elections.¹⁰ This distinction should be removed because, for one it is not possible to measure a members loyalty and dedication to the party by the size of his membership fee, and secondly because it is a great discouragement to those poor but otherwise dedicated members of the party who find that they have less rights than the richer party members.

It is hoped that the recommendations suggested would perhaps assist in the development of a competitive and democratic electoral process which is able to ensure government responsibility to the electorate.

But it must however be added, that much again will have to depend on the calibre of leaders who are elected. Because in the final analysis a model of government however well constructed, and an electoral system however well designed, would be meaningless and ineffective unless the country's leadership is selfless and dedicated, and places the interests of the state above all other interests individual or otherwise, and is determined to see the institutions of the government working effectively. In this regard comment must be made of the general attitude of African leaders to the positions they hold. Africa has become notorious for the ignoble manner in which most leadership changes are effected - usually by a coup. The biggest culprits for these sorry occurrences are the leaders themselves. They personalise and see their positions of leadership as ordained by some divine power, eliminate or immobilise their opponents and cling to power by any means until they are removed by death or by military coups. In some countries like Malawi, this reality has become formalised so that Dr. Kamuzu Banda is officially the life-President of Malawi.

Kenya has so far been spared the ravages and chaos of violent leadership changes, but if this record is to be maintained, our leaders should foster an attitude of seeing themselves as holding their positions at the pleasure and on the mandate of the electorate. There is little evidence that during his years in power Kenyatta ever contemplated the possibility of being removed from power through the ballot especially as from 1969 when KFU was banned. Indeed it is true to say that in the seventies Kenyatta was the "Life-President" of Kenya in everything but name. This attitude towards leadership is in conflict with the principle of government accountability to the people, and it is hoped that both the present and future Kenya leadership will sincerely accept that their positions are dependent on the wishes of the electorate.

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Perhaps it would even be wise to consider introducing a rule limiting a President's stay in power to only two terms in Office. Otherwise it is hoped that Kenya will never find itself in the unfortunate position where the electoral system is neither respected nor complied with, except in as far as it is convenient and expedient for the leaders to do so.

During the passing of the 1968 Constitution Amendment, Act No. 11 of 1968, the original version of the Bill drew so much opposition that Mr. Oginga Odingi, then Member of Parliament and Chairman of the Kenya Parliamentary Group, had to be forced to have the support of the Bill as member of KESU. The interesting point about this particular Bill is that he failed to persuade the KESU M.P.'s to support the bill and it was therefore withdrawn to avert government defeat. Two other versions also failed to carry the day and the final version was passed.

For a thorough discussion of this argument see Kenya: A History, (London, 1970) and Kenya: A History, (London, 1970) and Kenya: A History, (London, 1970).

Kenya, Chapter 10

It is relevant to note that during the recent KESU (Kenya Students Union) Conference held on 20th and 21st of May 1968, the following two resolutions were passed:

- a) that the party should have full time and competent executive officers at national, branch and sub-branch levels and that such officers be provided with office and transport.
- b) that internal reorganisation within the party should be effected to make the party's performance effective and that regular communication between the branches and the headquarters be improved.

The Daily Nation, 1st June 1968, page 21.

The Standard, 16th June 1968

Although the original (1968) version of the Bill drew so much opposition that Mr. Oginga Odingi, then Member of Parliament and Chairman of the Kenya Parliamentary Group, had to be forced to have the support of the Bill as member of KESU. The interesting point about this particular Bill is that he failed to persuade the KESU M.P.'s to support the bill and it was therefore withdrawn to avert government defeat. Two other versions also failed to carry the day and the final version was passed.

FOOT NOTE

1. Nwabueze B, Constitutionalism in Emergent States, p 1-20.
2. Supra, Chapter two
3. Supra, Chapter three
4. Supra, Chapter three
5. During the passing of the tenth Constitutional Amendment, Act No 45 of 1968, the original version of the bill drew so much opposition that Kenyatta summoned KANU members of Parliament and through the "KANU Parliamentary Group" device tried to have them support the bill as member of KANU. The interesting point about this particular bill is that he failed to persuade the KANU M.P's to support the bill and it was therefore withdrawn to avert government defeat. Two other versions also failed to satisfy the M.P's but the forth version was passed.
6. For a thorough discussion of this arguement see Robert Martin, Legislatures and Social Economic Development in Commonwealth Africa, P. 37 - 43.
- 6a. See below
7. Supra, Chapter three
8. Ibid
9. It is relevant to note that during the recent KANU Governing Council Conference held on 28th and 29th of May 1980, the following two resolutions were made;
 - a) that the party should have full time and competent executive officers at national, branch and sub-branch levels and that such officers be provided with offices and transport.
 - b) that internal reorganisation within the party system be effected to make the party's performance effective and that regular communication between the branches and the headquarters be improved.

- Sunday Nation, 1st June 1980, page 23.
10. The Standard, 16th June 1979.

6a. Although the origins of the KRU-KANU rivalry was ideological nature, it had by 1969 changed into a rivalry between the

C O N C L U S I O N

6 This dissertation attempts to address itself to the development of our electoral system, to examine the rules which govern our electoral process and to suggest possible reforms which it is hoped might help in making the electoral ^{system} more potent.

Our electoral system is comprised of the rules which govern both presidential and parliamentary elections. Until 1968, the process of presidential elections during general elections did not directly involve the people. Candidates for parliamentary elections were required to declare support for one or other of the presidential candidates. After parliamentary elections, the presidential candidate who was successfully elected to parliament and received declarations of support from more than half of the candidates successfully elected to parliament was declared elected President. Otherwise where the presidency fell vacant in between general elections, the parliament would convert itself into an electoral college and vote one of its members as President.

This method of presidential elections was changed in 1968. Under the new system, every candidate had to be nominated by a political party. If only one candidate is validly nominated he is declared elected President, and if there are more than one, a poll is held throughout the country. If the presidential election is part of general elections the voting is organised in such a way that the voter cannot split his vote and must vote for a presidential and parliamentary candidate from the same party. The candidate who receives more votes than any other is declared elected President.

In parliamentary elections, the country is divided in constituencies, each of which is represented by a single member of parliament.

In every constituency, the candidates must be nominated by a political party. Where more than one candidate is validly nominated a poll is held and the candidate who receives more votes than any other is declared elected member of parliament to represent that particular constituency.

It is therefore obvious that our electoral system is predicated on the assumption of a multi-party political system. It will be recalled however, that since Independence, multipartism was practised only briefly between 1963 and 1964 and again between 1966 and 1969. Since 1969, Kenya has been a defacto one-party^{state} which means that every time during elections, the presidential candidate nominated by KANU is always elected President unopposed, and "parliamentary elections" are in truth KANU primaries for the nomination of KANU parliamentary candidates. These KANU parliamentary nominees are elected to parliament unopposed because there are no other candidates to oppose them.

Assuming that the primary functions of an electoral system in a liberal democracy are to introduce accountability of the government to the electorate on the one hand, and of the executive to the legislature on the other, it cannot be said that our electoral system has been very effective. Because there is only one party whose presidential candidate (the incumbent) is always elected unopposed, the electorate does not get a chance of removing from or returning to power the President in office at the time of the elections. At the same time, the parliamentary system of our government allows the executive to belong to the legislature. In a liberal democracy the control relationship should be the other way round: the legislature should control the executive.

To rectify these shortcomings two possible reforms have been suggested. First our parliamentary system of government be changed to a presidential one. This would remove the executive from the legislature. The President would be elected separately and he would choose the members of his administration outside the legislature. The independent legislature would therefore be better placed to control the executive and the principle of executive responsibility to the legislature would then be more meaningful.

Secondly to make our one-party democracy more competitive, presidential elections should be re-organised in such a way that the electorate is directly involved. KANU would only need to sponsor those persons who wish to contest the presidential elections and have met the necessary qualifications. A poll would then be held and the voters would then decide who is to become the President. In this way the electoral system might perhaps be a more effective means of ensuring that the government is accountable to the electorate.

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