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**KENYA: GOVERNANCE, ACCOUNTABILITY AND HUMAN RIGHTS
PRACTICE IN THE POST 1992 AND 1997 MULTI-PARTY ELECTORAL
DISPENSATION**

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1. Introduction

At the time of writing, the much publicized breakthrough between the religious-led *Ufungamano* constitutional review commission (dubbed the People's Commission of Kenya - PCK) and the Constitution of Kenya Review Commission (CKRC) of the Parliamentary Select Committee on the issue of the establishment of an inclusive constitutional review project involving all the stakeholders, remains in doubt. Even though Professor Yash Pal Ghai appointed by the Select Committee to chair the CKRC appears to have succeeded in resolving the CKPC-PCK stalemate, one of the fundamental questions which remains is President Daniel arap Moi's intentions. President Moi has not thus far demonstrated a willingness to provide the leadership and statesmanship needed for such an important long-term national project. Instead, he continues to perceive this national issue through the prisms of a personal and partisan ruling party, Kenya African National Union (KANU).

However, for the experts and observers alike of Kenya's econo-political developments over the years during the Moi presidency, his reluctance and failure to steer the country beyond personal predisposition and partisan politics has not come as a surprise. Instead, his behaviour is in conformity with his leadership style and clearly reflects his uncompromising stance *vis-à-vis* the pro-democracy and human rights advocates. Lack of an environment conducive to an inclusive constitution-making project notwithstanding, President Moi only acquiesced in the 1992 multi-party elections as a result of concerted and mounting internal pressure by the advocates for change, and specifically, because of the political conditionalities imposed by aid donors.¹ Some scholars have correctly argued that Kenya's 1992 and 1997 multi-party elections failed "democratic audit" largely because of the lack of constitutional and institutional mechanisms needed for such elections.² Democratic audit is "a systematic, qualitative assessment of the performance of a government's many parts, against agreed democratic standards. It is a snapshot in time of the democratic functioning of a government." Specifically, it is a methodological approach that assesses, *inter alia*, the electoral process, the openness and accountability of a particular government and the extent to which civil and political rights are observed.³

During his presidency, in particular between 1982 and 1992, President Daniel arap Moi has presided over a centralized, authoritarian and oppressive one-party state system in which neopatrimonialism constituted his administration's *raison d'être*.

¹ Adar, K.G., The Interface Between Political Conditionality and Democratization: The Case of Kenya, *Politics Administration and Change*, Vol. 33, January-June 2000, pp. 1-24; Adar, K.G. and F. Vivekananda, The Interface Between Political Conditionality and Democratization: The Case of Kenya, *Scandinavian Journal of Development Alternatives and Area Studies*, Vol. 19, No. 2 and 3, June and September 2000, pp. 71-104

² See for example, Ajulu, R., Kenya's 1997 Elections: Making Sense of the Transition, *New England Journal of Public Policy*, Vol. 14, No. 1, Fall/Winter 1998, pp. 78-87; Ajulu, R., Kenya's Democracy Experiment: The 1997 Elections, *Review of African Political Economy*, Vol. 76, 1998, pp. 275-88; Southall, R., Re-forming the State? Kleptocracy and the Political Transition in Kenya, *Review of African Political Economy*, Vol. 79, 1999, pp. 93-108

³ Baker, B., The Quality of African Democracy: Why and How It Should Be Measured, *Journal of Contemporary African Studies*, Vol. 17, No. 2, July 1999, pp. 277-278

Neopatrimonialism refers to a system in which presidentialism (concentration of political power in the hands of a single ruler) and clientalism (offering economic and political rewards in exchange for loyalty to the patrons) provide the main vehicles for the maintenance of authoritarian one-party state systems as in post-colonial Africa.⁴ In the case of Kenya, President Moi has, throughout his leadership, continued to try to replace the economic and political power acquired by the Kikuyu élite during the Kenyatta era with that of his Kalenjin ethnic group. In order to strengthen the economic base of the Kalenjins and their loyalists, President Moi has accommodated Asian business interests with the objective of neutralizing Kikuyu dominance.⁵ Central to these strategies is the issue of the control of the state with its inherent econo-political benefits.⁶

Indeed, the *de jure* one-party state system enhanced President Moi's leverage over the institutional structures of governance. His reluctance to accept multi-partyism can be understood in this context. In order to continue to control the state in the post-1992 and 1997 multi-party electoral dispensations, President Moi has adopted other strategies to survive politically. For example, apart from maintaining traditional neopatrimonial tactics, he has also succeeded in engaging in political manoeuvring by establishing informal co-operation with the opposition parties and individuals in the ranks of the Opposition. What is important to note is that the KANU-Opposition political co-operation is based on econo-political rewards, which are either offered or promised to those in the opposition movement who are loyal and willing to support the Government. Specifically, the strategy is not based on placing a value on co-operation *per se*. It is designed to benefit individuals *qua* individuals and not the country.

President Moi's main objectives are threefold. Firstly, he is not prepared to lose control of the state - his only means for maintaining his political power and wealth accumulation. Secondly, the strategy is designed to weaken the political base and strength of the opposition parties as well as the pro-democracy and human rights movements in general. Thirdly, President Moi is reluctant to allow an inclusive comprehensive constitutional review process to be established, mainly because pursuit of national issues in a more coherent and united front by the opposition parties and the pro-democracy and human rights groups would pose a formidable challenge to his policies and leadership. His success thus far in persuading elements within the Opposition to break ranks even within Parliament and to vote in favour of his government is a testimony to this strategy.

A notable example of this strategy at work is the ongoing co-operation between Raila Odinga's National Development Party (NDP) - the third largest opposition party in the country - and the ruling party, KANU. It was mainly because of the KANU-NDP informal political marriage that the no confidence motion tabled in Parliament in 1998 by a leading pro-reform Member of Parliament, James A. B. Orengo, designed to

⁴ See Bratton, M. and N. Van de Walle, *Democratic Experiments in Africa: Regime Transition in Comparative Perspective*, Cambridge: Cambridge University Press, 1997, pp. 61- 96

⁵ Ndegwa, S.N., Citizenship amid Economic and Political Change in Kenya, *Africa Today*, Vol. 45, No. 3-4, 1998, p. 360

⁶ See Adar, K.G., Assessing Democratization Trends in Kenya: A Post-mortem of the Moi Regime, *Commonwealth & Comparative Politics*, Vol. 38, No. 3, November 2000, pp. 103-104

remove the Government from power through legislative mechanisms as provided for in the Constitution, was defeated.⁷ This new grand design adopted by the government of President Moi in the multi-party era can best be characterized as a post-neopatrimonial strategy. It is against this background that the issues pertaining to good governance, accountability and human rights practice by the government of President Moi in the post-1992 and 1997 multi-party era are assessed. However, before examining them, a brief treatment of the socio-economic situation in Kenya in the 1990s is necessary.

1.1. The Socio-Economic Scenario

In its Sessional Paper No. 2 of 1996, the Kenya Government acknowledged that over 43 per cent of the population in the country live below the poverty line, with the 1995 per capita Gross Domestic Product (GDP) estimated to be only US\$275.⁸ According to World Bank estimates, Kenya's Gross National Product (GNP) per capita in the 1990s remained below the figures for the 1980s. Whereas in 1980 Kenya's GNP per capita reached US\$450, in 1993, 1995 and 1998 it had declined to US\$250, US\$260 and US\$350 respectively.⁹

Unemployment, inflation, high interest rates, and the growing influx of people into the urban areas pose endemic problems for the Moi administration. Kenya's annual growth rate of GDP declined from 4.1 per cent in 1989 to an average of 2.5 per cent between 1990 and 1995,¹⁰ and 4.6 per cent, 2.8 per cent, and 1.8 per cent in 1996, 1997, and 1998 respectively.¹¹ Of the estimated 29 million people living in Kenya in 1997, the urban population accounted for more than 30 per cent, with an average of 6.3 per cent annual growth of the urban population recorded between 1989 and 1997.¹²

1.2. The Character of the State under President Moi's Administration

Kenya's 1992 and 1997 flawed transitions to a multi-party system continued to perpetuate the authoritarian character of the state, making it reminiscent of the one-party state system.¹³ Even though the Constitution of Kenya (Amendment) Act, No 7, of 1982 - which transformed the country into a *de jure* one-party state - was removed prior to the 1992 multi-party elections, the repressive laws still remained intact. For example, the Chief's Authority Act, the Preservation of Public Security Act, the Public Order Act and the Penal Codes conferred on the President, among other things, powers to arrest and detain individuals without trial. Whereas the Public Order Act

⁷ Adar and Vivekananda, pp. 87-8

⁸ Kenya, *Industrial Transformation to the Year 2020*, Sessional Paper No. 2 of 1996, Nairobi: Government Printer, 1996, p. 35

⁹ World Bank, *African Development Indicators 2000*, Washington DC, 2000, p. 35

¹⁰ Kenya, *The Eighth National Development Plan for the Period 1997 to 2001*, Nairobi: Government Printer, 1997, p. 2; Kenya, *Recovery and Sustainable Development to the Year 2010*, Sessional Paper No. 1 of 1994, Nairobi: Government Printer, 1994

¹¹ Van Buren, L., Kenya: Economy, in *Africa South of the Sahara 2000*, 29th ed. London: Europa Publications, 2000, p. 585

¹² World Bank, p. 320.

¹³ See Adar, K.G., The Interface Between Elections and Democracy: Kenya's Search for a Sustainable Democratic System, 1960s-1990s, in J. Hyslop (ed.), *African Democracy in the Era of Globalisation*, Johannesburg: Witwatersrand University Press, 1999, pp. 340-60

gave the provincial administrations (provincial commissioners, district commissioners and district officers, who are political appointees) the power to license public gatherings or to withdraw the licenses, the Preservation of Public Security Act empowered the President to detain individuals considered to be of national security risk for indefinite periods of time. These powers enabled the President to impose limitations on the rights of assembly and association as provided for in the Constitution, even in the post 1992 and 1997 multi-party electoral dispensation.¹⁴ Specifically, those considered to be critical of the Government, even if they are elected officials and Members of Parliament, are frequently denied their rights of assembly and association. The chiefs are authorized under the Chief's Authority Act to implement the Public Order Act within their areas of jurisdiction, with less limitations.¹⁵

Irrespective of the conclusion of the November 1997 Inter Party Parliamentary Group (IPPG) agreement, its provisions have not been adhered to strictly by the Government. The IPPG negotiations involved KANU and the moderate Opposition MPs. It was a KANU strategy designed to distance the call for a comprehensive constitutional review from the Church and the pro-reform movements within the ranks of the opposition parties as well as among civil society in general, grouped together under the National Convention Executive Council (NCEC). In many respects, KANU succeeded in creating a wedge within the ranks of the opposition parties and the pro-reform movement.¹⁶ Those who joined the IPPG were regarded by the pro-reform movement as renegades. A number of members of the opposition parties and the pro-reform movement were sceptical about President Moi's sincerity in initiating the IPPG review as an independent constitution-making project which would be beyond his personal control.

At the core of the IPPG package were the oppressive laws which were inconsistent with a multi-party system. Notably, some of the provisions of the IPPG package enacted into law provided for, *inter alia*, the establishment of a separate court to deal with electoral complaints; the amendment and repeal of oppressive laws; the establishment of an independent Electoral Commission of Kenya, de-linked from the presidency and consisting of 11 and 10 members from KANU and the Opposition respectively; the amendment of the Kenya Broadcasting Corporation Act to accommodate the interests of the opposition parties; and the establishment of a constitutional review commission at the end of the elections.¹⁷ Significantly, however, the provincial administrators did not de-link from KANU, with the district commissioners, district officers and chiefs providing the ruling party with, among other things, the logistical materials needed for elections.¹⁸ Repression of KANU's

¹⁴ Institute for Education in Democracy, Catholic Justice and Peace Commission, and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya, 29-30 December 1997*, Nairobi, 1998, pp. 76-7

¹⁵ Ndegwa, S.N., *The Incomplete Transition: The Constitutional and Electoral Context in Kenya*, *Africa Today*, Vol. 45, No. 2, 1998, p. 199

¹⁶ Mutunga, Willy, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, Nairobi: Sareat, 1999, p. 210-11

¹⁷ See generally, Kenya, *The Constitution of Kenya Review Commission Act*, Nairobi: Government Printer, 1997; Kenya, *The Constitution of Kenya (Amendment) Act 1997*, Nairobi: Government Printer, 1997; Kenya, *Statute Law (Repeals and Miscellaneous Amendments) Act 1997*, Nairobi: Government Printer, 1997

¹⁸ Institute for Education in Democracy ... , pp. 76-7

political opponents continued in the post-1992 and 1997 multi-party dispensation, with oppressive laws such as the Preservation of Public Security Act, Public Order Act, Administrative Police Act and the Societies Act being persistently invoked by the Government.

2. The Post-1992 and 1997 Democratization Trends

2.1. Ethnicity and Electoral Process

Elite manipulation of ethnicity as the focal point for political power is a common phenomenon in Kenya's post-independence history, with the 1992 and 1997 multi-party elections clearly demonstrating this pattern.¹⁹ At the core of this trend of electoral process is the issue of the control of the state, the locus of political power and wealth accumulation. This behaviour by the élites not only encourages political patronage and undermines democratization but also perpetuates ethnic polarization and differences. Ethnic conflicts in the Rift Valley, Nyanza, Coast and Western Provinces which continued prior to, and after, the 1992 and 1997 elections can be understood in this context. Specifically, ethnic cleansing is a consequence of élite manipulation. Apart from ethnic-centred elections, other endemic problems that continue to undermine democratization in Kenya include, *inter alia*, an authoritarian state system, intra-party differences, inter-party polarization, the multiplicity of political parties, personal ambitions, and differences, vote buying, corruption, lack of an independent judiciary, constituencies gerrymandered in favour of the ruling party (KANU), lack of a constitutional framework consistent with a multi-party system, and lack of political will within the administration to allow democratization.

By the time elections were held in 1992, there were nine registered political parties, with the number increasing to more than 30 in 1997.²⁰ However, only four political parties, namely KANU (led by Daniel arap Moi), the Democratic Party of Kenya (DP, led by Mwai Kibaki), the Forum for the Restoration of Democracy-Asili (FORD-A, led by Kenneth Matiba), and the Forum for the Restoration of Democracy-Kenya (FORD-K, led by Jaramogi Oginga Odinga), received significant support during the 1992 elections. In the 1997 general elections, the National Development Party (NDP, led by Raila Odinga) and the Social Democratic Party (SDP, led by Charity Ngilu) also registered widespread voter support. Divisions within the ranks of FORD-K, mainly due to personal ambition, exacerbated following the death of its chairman, Oginga Odinga in 1994. After the defeat of Raila Odinga by James A. Orengo for the Vice-Chairmanship of the party, and his failure to take over the party's leadership from Kijana Wamalwa in 1995, Raila Odinga withdrew his membership from the party. Instead he took over the leadership of the little known NDP, and popularized it mainly in Luo Nyanza, his ethnic base. We will turn to ethnic-oriented political support later in the study, but what is important to stress is that the intra-party conflicts also affected other political parties, KANU included. The differences set the stage for defections to other political parties, and led to further disintegration of the Opposition.²¹

¹⁹ See Adar, K.G. Ethnicity and Ethnic Kings: The Enduring Dual Constraint in Kenya's Multiethnic Democratic Electoral Experiment, *Journal of the Third World Spectrum*, Vol. 5, No. 2, 1998, pp. 71-96

²⁰ See Appendix, Political Parties Registered in Preparation for the 1992 and 1997 Elections

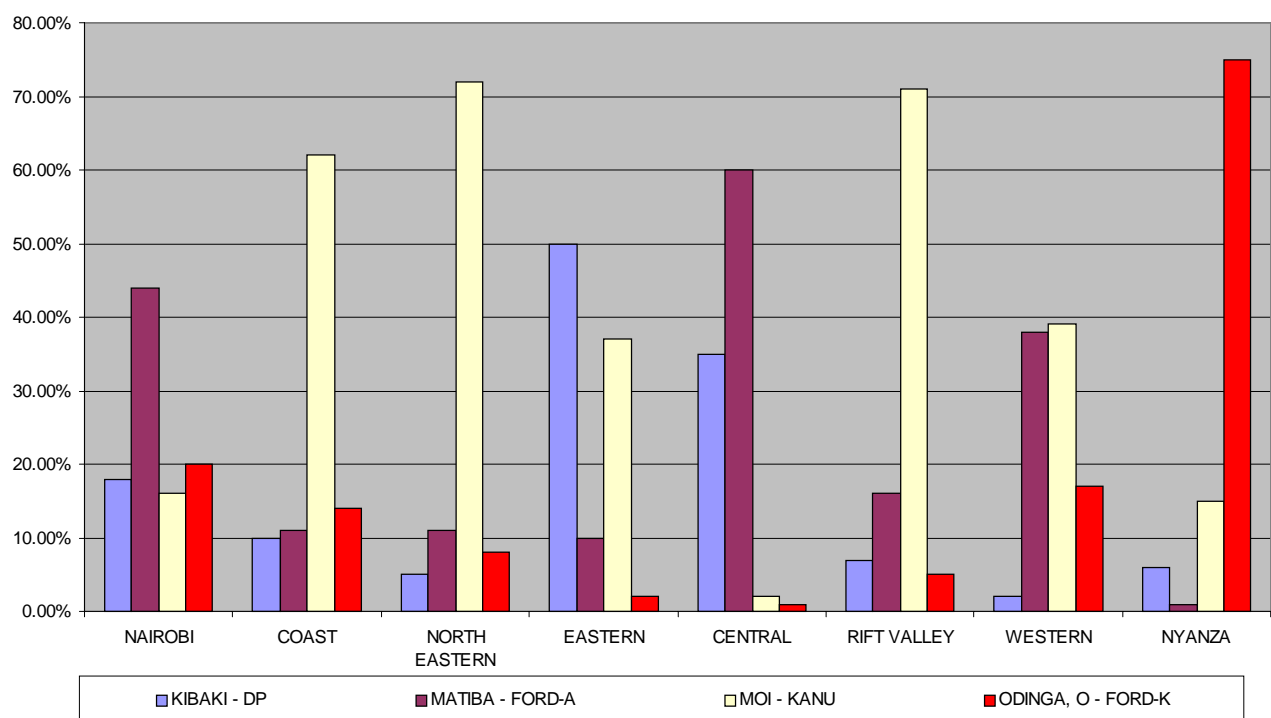
²¹ Throup, D.W. and C. Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election*, Oxford: James Currey, 1998, pp. 407- 412

It was because of internal differences that Charity Ngilu was forced to leave the DP for the SDP, prior to the 1997 elections. Indeed, KANU also experienced internal conflicts, particularly between the so-called KANU-A (led by Simeon Nyachae, a former Chief Secretary in the Office of the President and Secretary to the Cabinet) and KANU-B (led by Vice-President George Sartoti, KANU Secretary-General Joseph Kamotho and President Moi's long time confidant and business partner, Nicholas Biwott). One of the main differences between KANU-A and KANU-B is that whereas the former has been accommodative of the socio-economic and political transformations suggested by the International Monetary Fund (IMF) and the World Bank, KANU-B takes a hard line on the issues of political transformation. Simeon Nyachae and his so-called "rebel group" (Kipkalya Kones, Jimmy Angwenyi, Cyrus Jirongo, Anthony Kimetto, and Kipruto arap Kirwa) were eventually suspended by KANU's National Governing Council (NGC) in December 2000.²² Apart from Simeon Nyachae and Kipkalya Kones, the other members of the "rebel group" have not necessarily been part of KANU-A. The "rebel group" was suspended by the NGC mainly because of their refusal to toe the party line and their frequent voting in Parliament against the party wishes.

Apart from the inter-party polarization, one of the major stumbling blocks to democratization is the ethnic-oriented voting patterns, encouraged by the political leaders. In both the 1992 and the 1997 elections support for the leading presidential candidates was heavily concentrated to their ethnic strongholds. See Figures 1 and 2 for the detailed distribution of votes.

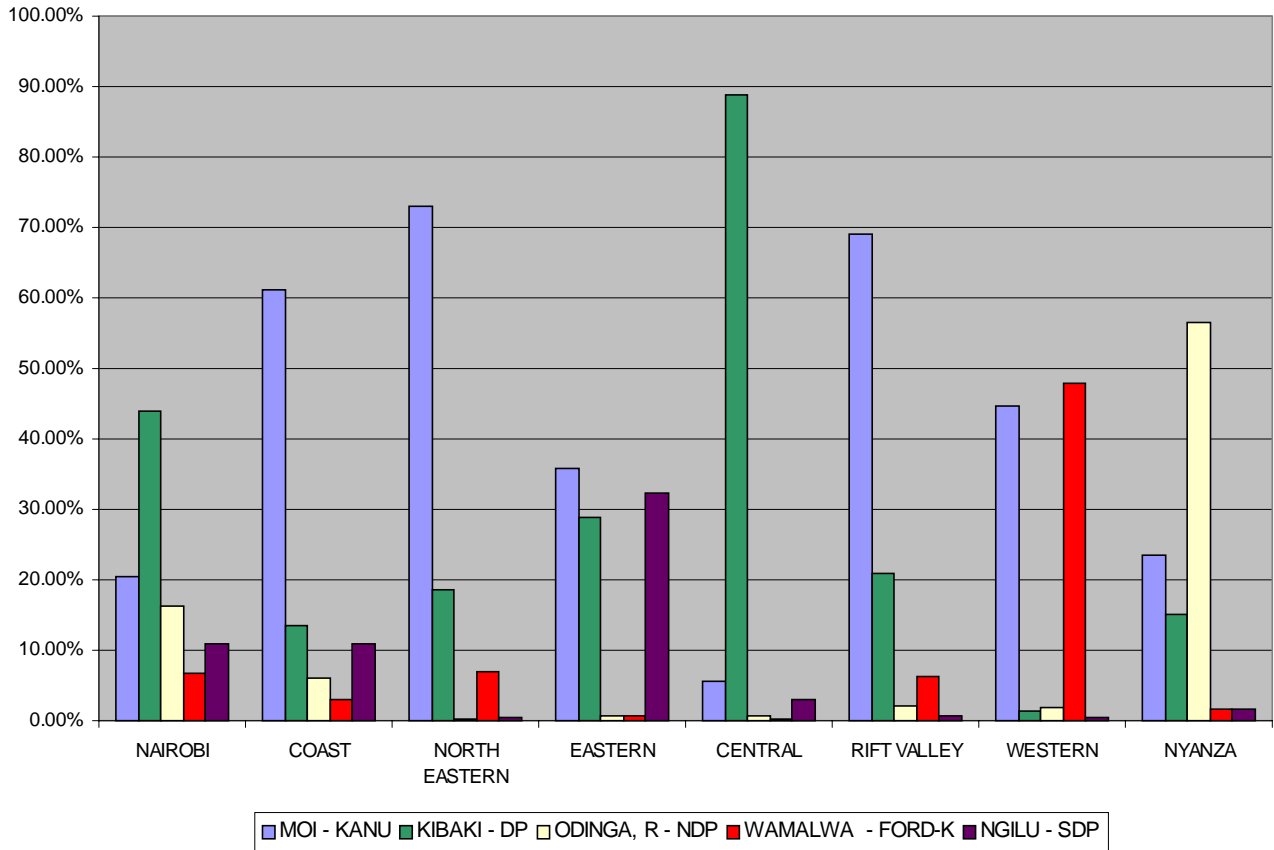
²² Nyamboga, N., Rebel MP Dares KANU to Suspend Him, *East African Standard*, 2 January 2001

FIGURE 1

ETHNIC-ORIENTED VOTING PATTERN IN THE 1992 ELECTION²³

²³ Compiled from National Election Monitoring Unit, *The Multi-Party General Elections in Kenya, 29 December 1992: The Report of the National Election Monitoring Unit (NEMU)*, Nairobi, 1993

FIGURE 2

ETHNIC-ORIENTED VOTING PATTERN IN THE 1997 ELECTION²⁴

In 1992 Daniel arap Moi, a Kalenjin, won the presidency on a strong majority in the North, Rift Valley and Coast provinces, but he scored less than 20 per cent in three of the remaining five provinces. The other leading contenders were even more unbalanced in their support: Oginga Odinga, a Luo, scored over 70 per cent in his stronghold of Nyanza Province, but did not reach 20 per cent in any other province; Kenneth Matiba, a Kikuyu, gained 60 per cent in Central Province and 44 per cent and 38 per cent in Nairobi and Western Provinces respectively, but under 20 per cent in the other five; while Mwai Kibaki, a Nyeri, reached 50 per cent in Eastern Province and 35 per cent in Central but less than 20 per cent in the six remaining provinces.

²⁴ Institute for Education in Democracy

In 1997 President Moi's rivals in the presidential elections were if anything more reliant on support in their ethnic areas only, reflecting KANU's increasing hold on the electoral process. This was also suggested by the fact that the President's support, although also uneven, was less so than in the previous election, with between 60 and 70 per cent of the votes in North East, Rift Valley and Coast provinces, and between 20 and 40 per cent in the other provinces with the exception of Central where he scored less than 10 per cent. Of the other candidates only the Democratic Party's Mwai Kibaki, who took 90 per cent of the vote in Central province and 44 per cent in Nairobi, consistently reached above 10 per cent in other provinces. Raila Odinga saw his father's majority in Nyanza province shrink to from 70 to 55 per cent without any compensating increase in the share of the votes in the other provinces, while neither Ford-K's Kijana Wamalwa nor the SDP's Charity Ngilu managed to secure a majority even in their core province, and drew less than 10 per cent in all other provinces.

The distribution of elected MPs across the provinces also reflects this ethnic voting pattern. For example, in the 1997 elections KANU won 39 of its 107 electoral seats in the Rift Valley, the DP won 19 of its 39 seats in Central Province and NDP achieved 19 of its 21 parliamentary seats in Nyanza Province, while the Eastern Province yielded 9 of the SDP's 15 seats in Parliament.²⁵ Ethnicity therefore plays an important role in Kenya's elections.

2.2. Political Parties and Democratization

The flawed nature of Kenya's 1992 transition to democracy cannot solely be attributed to the unwillingness of the Moi administration to institute tangible institutional and constitutional mechanisms for democratization. It is fair to argue that in many respects, political parties of the Opposition have contributed to the perpetuation of oppression and authoritarianism in the country. A number of the pro-democracy and human rights groups as well as religious organizations tried but failed to convince the opposition parties not to participate in the 1992 and 1997 elections before the conclusion of the comprehensive reform of the Constitution.²⁶ Most of the advocates for systemic change are of the view that a complete review of the Constitution would pave the way for the establishment of institutions necessary for a multi-party system. The reluctance of the opposition parties to refrain from participating in elections that favour the government in power suggests that they are not sincere about the issue of democratization. There is no guarantee, therefore, that the opposition parties would embark on comprehensive constitutional review if they were to take over the leadership.

In one of their many attempts to impress upon Kenyans that they were willing to shelve their personal and presidential ambitions, 73 Opposition MPs signed a pact in March 1996 to achieve the objective of a constitutional review prior to the 1997 elections.²⁷ In conjunction with the Citizens Coalition for Constitutional Change, popularly known as the 4Cs, the Inter-Parties Committee (IPC) - the executive wing of the opposition parties' Inter-Parliamentary Group (IPG) - formed a Planning Committee of the National Convention to lay the groundwork for a comprehensive

²⁵ *Ibid.*, p. 88

²⁶ Mutunga, p. 28

²⁷ *Ibid.*, p. 116

review of the Constitution and other related issues. However, differences between the National Alliance (NA), the radical grouping of the opposition parties and the moderate group, the Solidarity Alliance (SA), stalled the initiative. Indeed, the conclusion of the 1997 IPPG minimal reforms which, as expected, have not been fully implemented by the Government, was a clear testimony to the opposition parties' interest in assuming the presidency as opposed to advocating for the constitution-making project.

Apart from their inability to unite, a number of Opposition MPs defected to KANU, particularly between 1994 and 1997. By mid-1997, the total number of Opposition MPs had been reduced from 88 to 76. By the time elections were held in 1997, FORD-A had lost six MPs to KANU and one each to FORD-K and the DP, while the DP lost two MPs to KANU, and FORD-K's Raila Odinga decamped to the NDP in 1996.²⁸ The registration of SAFINA (Noah's Ark) just before the 1997 elections enabled one of its original founders, Paul Muite, to abandon FORD-K and to throw his weight behind the new party. Empirical evidence therefore puts into question the commitment of the opposition parties on the issue of instituting tangible democratization.

The intra and inter party violence and the reluctance of the opposition parties to democratize their own institutional hierarchies continued to impose constraints on democratization. Apart from KANU which has not held party elections since 1988 (irrespective of frequent demands by some party members), the opposition parties have also followed the same pattern. In 1995, for example, Jomo Kenyatta's nephew, Ngengi Muigai, took the DP to court to force Mwai Kibaki to call party elections. Whereas FORD-K has not held meaningful elections since Kijana Wamalwa took over in 1994, FORD-A remains in disarray following Kenneth Matiba's departure from the party and the defeat of the Secretary-General, Martin Skikuku, during the 1997 general elections.

Following KANU's long-standing practice of expelling party members critical of party policies and the leadership, the NDP has since 1999 threatened to expel what the party leadership calls "renegade MPs".²⁹ However, persistent violence allegedly instigated by the state and the NDP *vis-à-vis* the critics of KANU and the NDP, poses a danger to stability and democratization, is inconsistent with democratic principles and violates the constitutional rights of individuals. The MPs who have been victims of such violence by KANU-NDP supporters, particularly between 1999 and 2000, include, among others, James Orengo, Mukhisa Kituyi and Enock Magara from FORD-K as well as Shem Ochuodho and Peter Oloo Aringo from the NDP.³⁰

²⁸ Throup and Hornsby, p. 569

²⁹ Opposition NDP Set to Expel Renegade MPs, *Daily Nation* [Nairobi], 1 November 1999; It's Dangerous for Democracy, Raila, *Daily Nation* [Nairobi], 31 August 2000

³⁰ Opondo, O., Ochuodho Points a Finger at Raila, *Daily Nation* [Nairobi], 20 October 2000; Awori, F. and N. Nyaranga, Youth Petrol-Bomb Ufungamano Meeting, *East African Standard*, 27 November 2000

2.3. Civil Society and Democratization Trends in Kenya

Over the years, particularly from the 1980s to the 1990s, civil society organizations in Kenya have been highly critical of the authoritarian state system. In the periods following the 1992 and 1997 elections, the issues of democracy and human rights have continued to dominate the agenda of the Church and other non-governmental organizations (NGOs) advocating for change. Apart from the culture of violence generated by the fighting within and between political parties, the religious organizations and other NGOs advocating political and constitutional reforms have also suffered at the hands of the state (and recently, suffered KANU-NDP sponsored violence).³¹ Within the ranks of the religious organizations, the Church of the Province of Kenya (CPK), the Catholic Church, the Episcopal Conference and the Presbyterian Church of East Africa - with a total membership of over 70 per cent of all church members in Kenya - as well as the religious umbrella body - the National Council of Churches in Kenya (NCCCK) - have remained the dominant actors in the national discourse on democracy and human rights. However, it is important to point out that even religious organizations have not been immune from internal divisions. For example, the African Inland Church (AIC) and the Legio Maria Church have been supportive of the government in power and persistently distanced themselves from challenging the Moi administration on issues pertaining to power, democracy, accountability and systemic change in general.³² President Moi himself received his early education under AIC guidance. The other organization with institutional capacity and independence to challenge the Government has been the Law Society of Kenya (LSK).

The Church, the LSK and the other pro-democracy and human rights NGOs have made the issue of constitution-making the focal agenda for debate in the period of the 1992 and 1997 multi-party elections. With the initiative of the 4Cs, the National Conventional Planning Committee (NCPC) - a grouping of political parties and civic organizations - met in May 1996 to discuss the future direction of the constitutional reforms.³³ The constitutional reform initiative gained momentum for the greater part of 1996 and 1997 and was perceived by the Government as a threat to its survival.³⁴ At the All Africa Conference of Churches (AACC) premises in Nairobi, a concept paper entitled *Njia ya Katiba Mpya* (The Way to the New Constitution: Towards the National Convention) was launched by more than 100 people drawn from civil society. At the conclusion of the NCPC meeting, two competing groups supporting

³¹ Orlale, O., Genesis of Political Violence in Nyanza, *Daily Nation* [Nairobi], 29 November 2000

³² See Sabar-Friedman, G., Church and State in Kenya, 1986-1992: The Churches' Involvement in the 'Game of Change', *African Affairs*, Vol. 96, 1997, pp. 25-52; Abuom, A.C., The Churches' Involvement in the Democratisation Process in Kenya, in H. Assefa and G. Wachira (eds.), *Peacemaking and Democratisation in Africa: Theoretical Perspectives and Church Initiatives*, Nairobi: East African Educational Publishers, 1996, pp. 95-116

³³ The meeting was attended by representatives from the political parties, except KANU, as well as the NCCCK, National Council of NGOs, Law Society of Kenya, Kenya Consumer Organisation, the Human Rights NGO Network, the National Commission for the Status of Women, the National Council of Women of Kenya, the National University Students Organization, SAFINA, the Islamic Party of Kenya, and the Universities Academic Staff Union. The organizations that registered their apologies were Maendeleo Ya Wanawake, the Green Belt Movement, the Kenya Association of Manufacturers, the Supreme Council of Kenya Muslims and the Federation of Kenya Employers.

³⁴ Mutunga, p. 125

minimalist and maximalist perspectives on the question of constitutional reforms emerged.

The maximalists - mainly the LSK, the 4Cs, church groups and some factions within the opposition parties - advocated comprehensive constitutional reform prior to the 1997 elections. The central point of departure that brought the maximalists together was the unwillingness of the Government to institute comprehensive constitutional reforms that would lay the foundation for its removal from power. Specifically, decentralization of the state conceptualized within the contexts of democratic and human rights principles, guided by constitutional and legal mechanisms, were viewed as the best options for long-term solutions to Kenya's political problems. On the other hand, the minimalists, supported by the mainstream opposition political parties, called for the enactment and the implementation of specific minimum constitutional, legal and administrative reforms which, in their view, would pave the way for an environment conducive to multi-party elections and comprehensive constitutional reforms.

The main administrative concerns targeted by the advocates for minimal reforms were the following:

- delinking of provincial and district administrators and chiefs and other civil servants from the electoral process;
- licensing of private radio;
- registration of all political parties;
- release of all political prisoners;
- resettlement of victims of ethnic cleansing;
- prohibition of presidential decrees on elections;
- the Government to refrain from interfering with the press and the church.³⁵

The legal questions that the minimalists considered required immediate reform included, among others, the Public Order Act, the Preservation of Public Security Act, the Societies Act, the Chiefs' Authority Act, the Penal Law and the Election Code. On the issue of constitutional change the opposition parties suggested, *inter alia*, that the date for general elections should be established under the Constitution; that in addition to getting at least 25 per cent of the votes cast in at least 5 provinces as provided for in Section 5 of the Constitution, the successful presidential candidate should also get over 50 per cent of the votes cast; that the Electoral Commission should be an independent institution; that Section 33 of the Constitution which empowers the President to nominate 12 MPs should be repealed; that the Constitution should provide for the participation of independent presidential, parliamentary and civic candidates; and that the Constitution should provide for the formation of a coalition government.³⁶

The Moi administration capitalized on the differences within the ranks of the opposition parties and succeeded in convincing the pro-minimal Constitution reforms to work with KANU to institute the reforms within the framework of the IPPG. As already stated, even though the IPPG package incorporated most of the minimalist's

³⁵ *Ibid.*, p. 153

³⁶ *Ibid.*

proposals the Government has failed to adhere strictly to the provisions, thus confirming the maximalists' perception that the Moi administration did not with any sincerity wish to liberalize the political space. The IPPG agreement was, therefore, viewed by the other members of the NCEC - that is, the Church, the LSK and the 4Cs - as a setback for democracy and the human rights movement. The failure of the Moi administration to adhere to and implement the IPPG package *in toto* encouraged the opposition political parties to rally behind the religious-led, people-centred *Ufungamano* constitution-making movement.³⁷

2.4. The Post-1997 Competing Debates on the Constitution-making Process

After lengthy negotiations under the chairmanship of Professor Yash Pal Ghai of the Constitution of Kenya Review Commission (CKRC), the agreement of 26 January 2001 between the *Ufungamano* initiative and the CKRC of the Parliamentary Select Committee has brought a new dimension to the ongoing debate on constitutional reforms.³⁸ Professor Ghai, appointed by the Parliamentary Select Committee to head the CKRC, had earlier in November 2000 refused to take oath of office together with the other CKRC Commissioners until he had successfully established a consensus between the CKRC and the PCK. The CKRC was established under the Constitution of Kenya Review Commission (Amendment) Act, 1998.³⁹ Before examining the principles contained in the CKRC-PCK merger, it is necessary to put into proper context the events relating to constitutional reforms.

It was through the tactical influence of President Moi that the moderate MPs of the NCEC and the National Convention Assembly (NCA) joined the IPPG. As explained above, Moi managed not only to diffuse the influence of the pro-democracy and human rights groups opposed to minimal constitutional reforms, but also brought the constitutional momentum under his control. Whereas the IPPG provisions were incorporated in the remit for the 1997 CKRC, the President was empowered to appoint its Chairman and select 29 other nominees. President Moi, therefore, succeeded in re-directing the constitution-making process within Parliament, an institution which he can control. He managed to create a wedge between the NCEC-NCA and the opposition parties who joined the IPPG, and also to exacerbate the intra-Opposition conflicts.

While President Moi continued with his emphasis on Parliament-centred constitutional reforms, in February 1998 the Church, together with the NCEC and other stakeholders, rejected the IPPG package and called instead for the immediate establishment of a multi-party Conference for a Democratic Kenya to replace the CKRC.⁴⁰ The Government once again activated the Inter-Parties Parliamentary Committee (IPPC), which included most of the political parties, to re-examine the 1997 CKRC Act. However, in spite of attempts to expand this process into a broad

³⁷ Adar, *Assessing Democratization Trends*, pp. 124-7. The writer was a member of the 4Cs and the NCEC.

³⁸ Agina, B., *Breakthrough in Reform Talks*, *East African Standard*, 27 January 2001; Ojwang, A. and E. Miringuh, *Reform Breakthrough a Miracle, Says Gitari*, *East African Standard*, 29 January 2001

³⁹ Kenya, *The Constitution of Kenya Review Commission (Amendment) Act 1998*, Nairobi: Government Printer, 1998

⁴⁰ Southall, p. 101

based constitutional review, the outcome was that President Moi succeeded in making Parliament the centre of constitutional reforms.⁴¹

3. Human Rights Situation

3.1. The State vs. the Pro-democracy and Human Rights Movement

In spite of the adoption of a multi-party system in 1992, it is questionable whether an enabling environment consistent with a liberalized polity exists in Kenya. Human rights violations including arbitrary arrests, torture, and intimidation of individuals advocating change continued in the post-1992 and 1997 multi-party electoral dispensation in a way that was reminiscent of the previous *de facto* and *de jure* one-party state systems.

For the greater part of the 1990s and 2000, the Government continued to undermine the individual's right to freedom of expression, assembly, association and movement as provided for in Chapter V, Sections 79, 80 and 81 of Kenya's Constitution.⁴² In contravention of these fundamental freedoms, the Government has frequently invoked the Public Order Act, the Preservation of Public Security Act, and the Penal Codes in the name of upholding law and order. Even elected legislators, opposition party officials and some church leaders have been the victims of authoritarian and oppressive state actions.

For example, in August 2000 a number of public rallies were organized by a cross-party group of legislators, followed in September by the creation of a lobby organization called Muungano wa Mageuzi (People's Movement for Change - PMC). The leaders included James A. Orenge (FORD-K), Mukhisa Kituyi (FORD-K), Oloo Aringo (NDP), Shen Ochuodho (NDP), Kipruto arap Kirwa (KANU), Jimmy Angwenyi (KANU), Enock Magara (FORD-K, who later died in a road accident under mysterious circumstances) and Njehu Kathangu (FORD-A). Among the objectives of the PMC are issues related to the demand for comprehensive constitutional change prior to the next general election scheduled for 2002, such as education of the general public on their constitutional rights, and empowering the people to resist oppression by the KANU-NDP alliance.⁴³ Even though the PMC leaders have suffered from police intimidation, interference and even arrest, the PMC has attracted some of the largest public rallies in the period of multi-party politics since 1997. The lobby group also received widespread support among the pro-democracy and human rights movements as well as the Democratic Development Wing (DDW) of the foreign missions accredited to Kenya.⁴⁴ President Moi countered this in his usual direct way by issuing statements critical of the group. Other KANU-NDP leaders followed his example. President Moi has also directed the security forces not to allow the PMC (or what he calls "revolutionary and destructive people") to organize public rallies,⁴⁵ thus maintaining, even under the multi-party dispensation, his practice of issuing

⁴¹ *Ibid.*, pp. 104-5

⁴² Kenya, *The Constitution of Kenya*, Rev. ed., Nairobi: Government Printer, 1998

⁴³ Mburu, S. and P. Mutai, Opposition MPs Launch Pro-Reform Initiative, *Sunday Standard* [Nairobi], 24 September 2000

⁴⁴ Teyie, A. and R. Hersi, UK, US back Orenge Rally, *East African Standard*, 25 August 2000. The foreign missions that supported PMC include: Canada, Czech Republic, Hungary, Germany, Poland, Belgium, Finland, France, Sweden, Italy, Spain, Portugal, Switzerland, United Nations and United Kingdom.

⁴⁵ Opondo, O. and J. Otieno, Mageuzi is Violent, Says Moi, *Daily Nation* [Nairobi], 28 November 2000

instructions to the security forces to take action against the critics of the Government.⁴⁶

More than 1,000 people were killed and 260,000 forced to leave their homes in the Rift Valley, Nyanza and Western Provinces in the period before and after the 1992 election. Various reports have confirmed that the Government has been party to such ethnic cleansing both in the 1992 and 1997 election and post-election periods.⁴⁷ In both cases politically motivated violence, particularly around Trans Nzoia and Nakuru Districts (Rift Valley Province) and Likoni-Kwale (Coast Province) was targeted against the sympathizers of the opposition political parties. In the Coast Province, mainly Mombasa, Likoni and Kwale, the so-called up-country people (Kamba, Luo, Kikuyu, and Luhya) were the main victims of violence. It was reported that local KANU officials, Rashid Saijad, E. Karisa Maitha and Rashid S. Shakombo, had recruited young men from Uganda and Rwanda for secret military training at Kaya Bombo, Kaya Waa, Shimba Hills at the Coast, Similani and Masai-Mara.⁴⁸

It is instructive that in 1997 no opposition party won a single seat in four constituencies in the Likoni-Kiwale area. More than 100 people were killed, 200 injured and 100,000 displaced. In the 1992 elections, FORD-K won the Likoni constituency, while KANU won the other three, but though in 1997 KANU won the same seats, the Likoni constituency seats went to candidates representing the Shirikisho party, who had earlier run for nomination on a KANU ticket.

In addition to the ethnocentric nature of politics in Kenya, the multi-party electoral system has also been accompanied by an increase in violence against those perceived to be anti-establishment, even to the extent that one might speak of a culture of militarization of Kenyan politics. One example is the militia group commonly known as *Jeshi la Mzee* (The Old Man's Army), recruited mainly from low-income urban neighbourhoods, which is frequently used by KANU against opposition political parties and pro-democracy and human rights groups. The members of *Jeshi la Mzee* are mainly drawn from the Luhya community and financed by a leading Luhya KANU official. The ethnicization of Kenya's political terrain and the intra-and-inter party conflicts have also encouraged some of the opposition parties to establish their own militias. One of the well-known militias, called the Baghdad Boys, was established by some officials of FORD-K in 1991 in Kisumu, Nyanza Province, as a reaction against the Government's brutality.⁴⁹ Indeed, there are other militias operating within the Rift Valley Province allegedly organized and funded by some influential KANU leaders. It is estimated that over 60,000 militia were trained in the Rift Valley, particularly

⁴⁶ Kenya Human Rights Commission and Article 19, *Media Censorship in a Plural Context: A Report on the Kenya Broadcasting Corporation*, Nairobi, 1998, p. 4

⁴⁷ National Council of Churches of Kenya, *CPK/ARCH Synod Committee Report*, Nairobi, April 1992; Article 19, *Kenya: Post-Election Political Violence*, London, 1998; United States, Embassy of the United States of America [Nairobi], *Kenya: Human Rights Report*, Nairobi, 1995

⁴⁸ See generally, Amnesty International, *Annual Report 1997*, London, 1998; also Kenya Human Rights Commission, *Kayas Revisited: A Post-Election Balance Sheet*, Nairobi, 1998, p. 2; Law Society of Kenya, *A Report of Massacre/Violence in Mombasa, Kwale and Kilifi Districts*, Nairobi, 1997, p. 8

⁴⁹ Kahura, D., and G. Nyaga, Urban Militarisation: Youth Nihilism and Private Armies, *East African Alternatives*, September/October 1999, p. 25

around Doinett, Nesuit, Marigat and Kerio Valley forests during the pre-and-post 1992 ethnic cleansing, with military helicopters being used during the operations.⁵⁰ In its report, the Parliamentary Select Committee established to investigate ethnic cleansing, reported that the militia were paid US\$6.50 for safe return from the frontline, US\$12.50-US\$25 for killing one person or burning a grass-thatched house and US\$125 for burning a permanent house.⁵¹

It is important to note that human rights violations by the Government have continued for most of the post-1992 and post-1997 election periods. Whereas in 1994, the total number of arbitrary arrests reached 1,308, in 1995 the figure climbed to over 2,104, and then declined to 1,086. The number of legislators from the opposition political parties who were arrested, detained and charged in the courts of law in 1993, 1994 and 1995 were 36, 26 and 10 respectively.⁵² In 1998 and 1999 at least a dozen Opposition MPs were arrested and charged in court with participating in what the Government called “illegal gatherings”. The volatility of the political environment during the years since the 1992 elections, mainly due to the persistence of ethnic cleansing and of arbitrary arrests, detentions and trials of members of the pro-reform groups was compounded by the Government’s announcement in 1994 of the existence of a little-known guerrilla organization called February Eighteen Movement (FEM). Between 1994 and 1995 a number of people, particularly from the Western Province - the alleged base of the movement - were detained and tortured for supporting FEM and its military wing, February Eighteen Revolutionary Army (FERA).⁵³ These extra-judicial actions clearly contravene the spirit of the IPPG and violate the rights of Kenyans as provided for within the Constitution. Kenya is also a party to a number of international human rights treaties, for example, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Covenant Relating to the Status of Refugees (CRSR), and the African Charter on Human and People’s Rights (ACHPR). Arbitrary arrests are prohibited by Article 9(1) of the ICCPR and Article 6 of the ACHPR.⁵⁴

A further group subjected to extra-judicial treatment in the period of multi-party dispensation since 1992 is that of journalists and others connected with the media. For example, in May 1993, the administration impounded more than 6,000 copies of the Presbyterian Church’s magazine, *Jitegemea* (Swahili for self-reliance), in which the Government was accused of genocide. Between 1992 and 1993 the offices of the *Finance* magazine were raided by security forces a number of times and over 10,000

⁵⁰ Kenya Human Rights Commission, *Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya*, Nairobi, 1998, p. 15

⁵¹ See generally, Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, Nairobi: Government Printer, September 1992; Kenya Human Rights Commission, *Mission to Repress: Torture, Illegal Detentions and Extra-judicial Killings by the Kenyan Police*, Nairobi, 1998, p. 17

⁵² These figures are drawn from a number of sources namely, Amnesty International, *Annual Report [1993-1999]*, London, 1994-2000; United States, Department of State, *Country Reports on Human Rights Practices [1993-1999]: Kenya*, Washington DC: Bureau of Democracy, Human Rights and Labor, 1994-2000

⁵³ Kenya Human Rights Commission, *Mission to Repress*, pp. 39-40

⁵⁴ Organization of African Unity, *African Charter on Human and People’s Rights*, Addis Ababa, 1981

copies as well as plates and negatives were seized.⁵⁵ As a result of this frequent intimidation and harassment journalists have had to practise a degree of self-censorship in the multi-party elections.⁵⁶ In 1998 President Moi warned what he called the “gutter press” against undermining him and his government; he banned the publication of *Finance*, *The Star*, *Kenya Confidential*, *The Post on Sunday*, *Kenya Dispatch*, *The Concord Weekly*, *The Weekly Express*, *The Citizen* and *The Metropolis*.⁵⁷ The editor of *The Post*, Tony Gachoka, who published an article in July 1998 implicating the Government in corruption, was arrested and his publishing company fined US\$14,000.⁵⁸ He received a six-month prison sentence for libel. It is important to note that the Constitution of Kenya, Section 79(1) only guarantees press freedom by way of inference, that is, “freedom of expression ... freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference ... and freedom from interference with his correspondence.”⁵⁹ However, the main obstacles to press freedom are a number of laws, some of which were inherited at the time of Kenya’s independence in 1963. For example, Section 52 of the Penal Code empowers the relevant minister to impose a ban on any publication, past, present or future. Indeed, it was under this provision that the Catholic Diocese newsletter, *Inooro*, was banned in 1992. Additionally Section 66 of the Penal Code makes it an offence for anyone to publish “any false statement, rumour or report which is likely to cause fear and alarm to the public or disturb public peace”, while Section 96 makes it an offence for anyone to “utter, print or publish” anything that defeats the enforcement of any written law.⁶⁰ Other restrictive laws which have been invoked against publishers and journalists include, among others, the Law of Defamation, the Books and Newspapers Act, the Law of Contempt (Penal Code) and the Incitement to Disobedience (Penal Code). Read together with the other oppressive laws already discussed, it is clear that the legal regime imposes constraints not only on journalists and publishers but also on democracy and human rights in Kenya in general.

3.2. The Role of the Judiciary

As explained above, the legal regime - imposed and regulated by restrictive constitutional and legal provisions - has not been transformed to conform with multi-partyism. In a number of the so-called political cases, the courts of law have ruled in favour of the Government. A case becomes political the President makes a direct statement regarding it, even if this has implications for the *sub judice* status of the case. The events which led to the arrest, detention and trial of a number of university academics, as well as the court rulings against the Universities Academic Staff Union (UASU) and its officials between 1993 and 1997, serve as good examples of political cases. None of the cases brought before the courts of law on behalf of the dismissed UASU officials by human rights lawyers, G. Kamau Kuria, Pheroze Nowrojee, James

⁵⁵ United States, Department of State, *Country Reports on Human Rights Practices 1993: Kenya*, Washington DC, 1994, pp. 18-19

⁵⁶ United States, Department of State, *Country Reports on Human Rights Practices 1998: Kenya*, Washington DC: Bureau of Democracy, Human Rights and Labor, February 1999, p. 6

⁵⁷ *Ibid.*, p. 7

⁵⁸ United States, Department of State, *Country Reports on Human Rights Practices 1999: Kenya*, Washington DC: Bureau of Democracy, Human Rights and Labor, 25 February 2000

⁵⁹ Kenya, *The Constitution of Kenya*, Section 79 (1)

⁶⁰ See generally, Okoth-Owiro, A., *Law and Press Freedom in Kenya: Report Submitted to the Royal Netherlands Embassy*, Nairobi: Royal Netherlands Embassy, September 1994

A. Orengo, Paul Muite, Kiraitu Murungi, Otieno Kajwang and Kathurima M'Inoti, for legal redress, succeeded.⁶¹

The 1989 ruling by the High Court Justice Norbury Dugdale that the courts have no power to enforce the "Bill of Rights", which is part of the Constitution of Kenya, has not been overruled, irrespective of numerous challenges to it.⁶² Justice R. Otieno Kwach has observed that the judiciary has failed to uphold its traditional duty of promoting and upholding democracy, human rights and the rule of law. In his 1998 report submitted to the Chief Justice Zaccheus Chesoni, Justice Kwach cited corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering as some of the impediments of the judiciary.⁶³ In 1997, the International Bar Association reported that there is a persistent and deliberate pattern on the part of the government of President Moi of misuse of the judiciary for purposes of harassing opponents and critics of the Government.⁶⁴

Members of the Kenya Magistrates and Judges Association (KMJA), have expressed their unhappiness with the Government's persistent interference with the judiciary, for example, in 1996, when the Chief Justice, who is a political appointee, issued a circular in which he requested members of the KMJA to submit, in advance, topics of discussions and lists of speakers organized by the Law Society. One of the main objectives of the circular was to prevent discussion of topics that relate to the rule of law, human rights, independence and accountability of the judiciary.⁶⁵ It has also been noted that in Kenya, judges and magistrates who support those advocating democracy and human rights have been subjected to harassment and career stagnation. For example, in 1994 when the Senior Principal Magistrate, O. Githinji, acquitted suspects who were allegedly planning to destabilize the Government, he was subsequently transferred to a remote area in Eastern Province.⁶⁶

Statements by the President to the effect that the courts of law should not be involved in certain matters not only undermines the rule of law and the independence of the judiciary but also confirms that in Kenya the constitutional doctrine of separation of powers is not upheld. Under Chapter IV, Part 1, Section 61, the Constitution empowers the President to appoint the Chief Justice and judges of the High Court, whilst the administrative staff of the judiciary is appointed by him through the Public Service Commission, as stipulated in Chapter VIII, Section 106(2) of the Constitution. However, independence of the judiciary constitutes an important precondition for the maintenance of democracy and human rights. As one Justice of the Kenya Court of Appeal observed, "I believe ... that anyone who does not believe in human rights, democracy and the rule of law, which are core values of a stable society, has no business being a judge or a magistrate."⁶⁷ The appointment of Bernard Chunga, the former Chief Public Prosecutor, as the Chief Justice of the Supreme Court following

⁶¹ Adar, K.G., Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union, *Human Rights Quarterly*, Vol.21, No.1, 1999, pp.179-206

⁶² United States, Department of State, *Country Reports on Human Rights Practices 1993*, p.1

⁶³ United States, Department of State, *Country Reports on Human Rights Practices 1999*, p. 10

⁶⁴ *Ibid.*

⁶⁵ International Commission of Jurists (Kenya Section), *The State of the Rule of Law in Kenya, 1997 Report*, Nairobi,, 1997, p. 22

⁶⁶ Kenya Human Rights Commission, *Killing the Vote*, p. 45

⁶⁷ Quoted in *The East African* [Nairobi], 27 October - 2 November 1997

the death of Chesoni in September 1999, raises questions about how far President Moi is prepared to sanction the independence of the judiciary. When he was the Chief Prosecutor, Bernard Chunga was the key person used by the Government to lead a team of prosecutors on cases involving politically motivated trials of high profile critics of the Government.⁶⁸ Bernard Chunga was also the main prosecutor during the inquiries into the 1990 mysterious assassination of the former Minister for Foreign Affairs, Robert Ouko.

3.3. The Situation of the Refugees

Even though Kenya has not enacted national refugee legislation, Kenya became a signatory to the 1951 Convention and the 1967 Protocol related to the status of refugees in 1966 and 1981 respectively. On 23 June 1992 Kenya became the 41st African country to ratify the *Convention Governing the Specific Aspects of Refugee Problems in Africa* adopted by the members of the Organization of African Unity (OAU) in Addis Ababa, Ethiopia, on 10 September, 1969.⁶⁹ Whereas Article 2(3) of the OAU Convention provides that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, or physical integrity or liberty would be threatened”, Article 4 urges Member States to “undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions”.⁷⁰ It is the responsibility of the host country to provide protection for the refugees.

Kenya’s stability and multi-party dispensation continues to be threatened by the persistent politically motivated ethnic conflict and instability in the region, particularly in Ethiopia, Sudan, Somalia, Uganda, Burundi and Rwanda. The number of refugees in Kenya increased sharply from 14,400 in 1990 to 120,200 and 401,900 in 1991 and 1992 respectively. This sharp increase was attributed to the collapse of the Soya Bare regime in Somalia in 1990 and the intensified civil war in Ethiopia between 1992 and 1993. In 1993 and 1994 the number of refugees was estimated to be 301,600 and 252,400 respectively. Since 1995, the number of refugees has remained within the 200,000 range: in 1995 the number reached 239,500, in 1996, 1997 and 1998 the United Nations High Commissioner for Refugees (UNHCR) estimated refugee figures to be 223,600, 232,100, and 238,200 respectively.⁷¹ This decrease in the number of refugees from over 400,000 in 1992 to 240,000 in 1998 is mainly due to the repatriation of over 55,000 Somalis to Somalia and the return of 70,000 Ethiopians. More than 75 per cent of refugees in Kenya are Somalis, with most of them concentrated in Dada camps in Garish District (North-eastern Province), along the Somali-Kenya border as well as in Nairobi and areas around Mombasa.

⁶⁸ United States, Department of State, *Country Reports on Human Rights Practices 1999*, p. 10

⁶⁹ Organization for African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969, <http://www.unhcr.org/cgi-bin/texis/vtx/template?page=research&src=static/legal.html> and United Nations High Commissioner for Refugees, *UNHCR Country Profiles: Kenya*, Geneva, 2001, <http://www.unhcr.org/cgi-bin/texis/vtx/rsd> [accessed 11 April 2001]

⁷⁰ Organisation of African Unity, *Convention ...*

⁷¹ United Nations High Commissioner for Refugees, *UNHCR Country Profiles: Kenya*, Geneva, 2001, <http://www.unhcr.org/cgi-bin/texis/vtx/rsd> [accessed 11 April 2001]

In 1999 and 2000, there were 255,000 and 203,500 refugees in Kenya respectively. Of the 255,000 refugees who lived in Kenya in 1999, 160,000, 65,000 and 20,000 were from Somalia, Sudan and Ethiopia respectively.⁷² Most of the Sudanese and Ethiopian refugees were accommodated in north-western Kenya at Kakuma, Turkana District (Rift Valley Province). The Ethiopian refugees are mainly ethnic Oromos who are running away from their country because of the continued military confrontation between the Ethiopian military and the Oromo Liberation Front (OLF) who are fighting for self-determination.⁷³ Of the additional 13,000 refugees who arrived in Kenya during the course of the year 2000 most were Sudanese from East Equatoria, with a total of 10,000 of them settled around the Kenya-Sudanese border at Lokichokio, northwestern Kenya. As a precaution against rivalries and for security reasons the two large camps at Dadaab and Kakuma hold refugees from different nationalities. However, this has not prevented frequent skirmishes among the refugees and also between the refugees and Kenyans who live in the areas around the camps. On a number of occasions in 2000, for example, conflicts arose between the Turkana and the Sudanese refugees around Kakuma as well as the refugees from Somalia and the Kenya-Somalis around Dadaab.⁷⁴

The policy of confinement of refugees in camps was introduced Kenya in the 1990s, particularly because of security considerations.⁷⁵ Some of the refugees, particularly from Ethiopia, Somalia and Sudan are rebel fighters. This policy violates the rights of movement of the refugees as provided for in Article 31(2) of the UN Refugees Convention. The practice is also in violation of the OAU Convention on Refugees, particularly Article 2(6), which stipulates that “for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin”.⁷⁶ On a number of occasions the OLF and Somali militias from Somalia have crossed into Kenya in pursuit of their opponents. Except for stating that part of its 2001 strategy will be to pursue the enactment of national refugee legislation with President Moi’s Administration, the UNHCR has been unable to act on these pertinent issues since the 1990s.⁷⁷ It would be fair to argue that the UNHCR’s response to the plight of refugees in Africa is not as forthcoming as in the case of other parts of the world. For example, whereas the UNHCR was only able to spend US\$0.11 per refugee per day in Africa in 1999, in the Balkans the agency spent US\$1.23 per day per refugees in the same year.⁷⁸

⁷² United States Committee for Refugees, *1998 Country Reports: Kenya*, Washington DC, 1998, <http://www.refugees.org/world/country/afri/kenya.htm> [accessed 10 April 2001]

⁷³ Nowrojee, B., In the Name of Security: Erosion of Refugee Rights in East Africa, in *World Refugee Survey 2000*, Washington: USCR, 2000, <http://www.refugees.org/world/articles/wrs00-eafrica.htm> [accessed 10 April 2001]. See also, Sorenson, J., The State, Ethnicity and Human Rights in Ethiopia, in P. Toggia, P. Lauderdale, and A. Zegeye, (eds.), *Crisis and Terror in the Horn of Africa: Autopsy of Democracy, Human Rights and Freedom*, Aldershot: Ashgate, 2000, pp. 39-63

⁷⁴ United Nations High Commissioner for Refugees, *Global Appeal 2001*, Geneva, 2000, <http://www.unhcr.org/pubs> [accessed 10 April 2001]

⁷⁵ Nowrojee

⁷⁶ Organization of African Unity, *Convention*

⁷⁷ United Nations High Commissioner for Refugees, *Global Appeal 2001*

⁷⁸ Nowrojee

3.4. The Internally Displaced

The term internally displaced person (IDP) refers to a refugee who has not left his or her own country for various reasons. IDPs are generally more vulnerable than their refugee counterparts, particularly because of lack of international protection and the availability of humanitarian assistance. Quite often governments invoke the principle of non-interference in their internal affairs as a mechanism to prevent the international community from assisting the IDPs. In conformity with this practice in international relations, state and non-state actors are generally reluctant to overstep the sovereign rights of states. The IDPs are, therefore, more vulnerable than refugees, particularly in civil war ravaged or politically motivated conflict situations. As explained, the situation of the internally displaced people in Kenya, particularly between 1991 and 2001 has mainly been politically instigated. However, it is necessary to stress that the advocates of the *status quo*, that is, those opposed to pluralism, have used ethnicity and land as the nexus against multi-party politics.

The issue of land ownership in Kenya, with its inherent colonial historical implications, is a strategy used by the advocates of anti-pluralism to garner support nationally. The principle of “willing seller, willing buyer” of land in the post independence Kenya, particularly in areas originally categorized as “white highlands” in the Nakuru, Molo, Kericho, Nandi, Uasin Gishu, Trans-Mara and Marakwet (Rift Valley Province), Trans-Nzoia, Bungoma and Mt. Elgon (Western Province) and Mombasa (Coast Province) excluded large numbers of people (even those evicted during colonial days) from owning land. It needs to be noted that under the leadership of President Jomo Kenyatta, thousands of Kikuyus (his ethnic group) were given preferential treatment in obtaining land in the process of the Africanization of the “white highlands”. Thousands of potential voters were displaced in the period leading to the 1992 multi-party elections, during which nearly 400,000 people were displaced and 1,500 killed.⁷⁹ More than 90 per cent of those displaced were in the Rift Valley Province, the majority of whom were non-Kalenjins (i.e. Kikuyus, Luos and Luhyas). In 1994 the Government debarred an American priest, Fr. John Kaiser (who was found murdered on 24 August 2000), from visiting more than 2,000 people displaced in Maela, Rift Valley Province. Even though President Moi’s Administration had revoked the security operation zones in areas plagued by ethnic tension, the Government destroyed relief supplies which had been prepared by *Médecins Sans Frontières* (Spain) for displaced people.⁸⁰

When the DP presidential candidate, Mwai Kibaki, announced that he was preparing to institute legal proceedings against the election of President Moi in 1997, almost immediately ethnic clashes began in the Rift Valley. People were attacked, killed and displaced only in areas where the DP had won seats, namely Laikipia and Nakuru districts. The attacks spread to areas around Magadi, Ol Moran, Survey, Miharati, Meerigwit, Manche, Naishim Mwureri and Mutukanio, with the Pokots, Masais and

⁷⁹ United States Committee for Refugees; Kenya Human Rights Commission, *Killing the Vote*, p. 20

⁸⁰ NCCCK, FERA Crackdown: Over 400 May Not Return, *Clashes Update* [Nairobi], 25 February 1995, pp. 3-11

Samburus organizing themselves against other ethnic groups. More than 300 people were killed and 3,000 displaced at the end of the operations in 1998.⁸¹

Once again, as Kenyans have witnessed since 1991, President Moi's administration failed to employ its constitutional prerogatives and responsibilities to protect the citizens of Kenya.

It has been clearly documented that the persistent and systematic random killing and displacement of people (1991-1997) have been politically motivated, with some top KANU officials and members of parliament opposed to multi-partyism being at the centre of the campaign against the so-called "foreigners"(non-Kalenjins in the Rift Valley).⁸² It is also important to put into proper context the other forms of endemic inter-and intra-ethnic conflicts which have persistently led to the displacement of people in Kenya. The intra-ethnic clashes particularly among the pastoral groups in the Rift Valley continues to be a major problem for the Government. In October 1999, for example, more than 1,000 Pokots from Tot and Tangelbei areas (Rift Valley) attacked Keiyos and Marakwets (both belong to the Kalenjin ethnic group) in Trans Nzoia (Rift Valley) in competition for grazing areas. Inter-and intra-ethnic cattle-rustling has also frequently pitted Boranas against Somalis (Northeastern Province), Ormas against Somalis (Eastern Province), Kurias against Luos, Kisiis and Kurias (Nyanza Province). Between 1998 and 2000, more than 1,000 people were killed in the country because of cattle-rustling.⁸³

4. Conclusion

The events examined in this study demonstrate that Kenya's post-1992 and 1997 multi-party electoral dispensation is still clouded with uncertainty. Specifically, the direction which the CKPC- PCK will take with respect to a comprehensive review of the Constitution acceptable to Kenyans will have far reaching implications on the institutionalization of multi-partyism in Kenya. The fact that by early 2001 President Moi is still giving conflicting signals as to whether or not he will step down as president at the end of his second term of office in 2002, is another indication of the uncertainty which prevails in the country. However, what is more worrying for most Kenyans as well as observers of the econo-political developments in the country is that if the Bill tabled in Parliament by the KANU member of parliament, David Noti Kombe, to remove Section 9(2) of the Constitution, which limits the presidential term to two five-year terms in office, succeeds, the country may plunge into an unstable situation.⁸⁴

⁸¹ Amnesty International, *Kenya: Political Violence Spirals*, London, 10 June 1998. See also, Global IDP Project, *Profile of Internal Displacement: Kenya*, Geneva: Norwegian Refugee Council/Global IDP Project, 2000, pp.21-22, <http://www.db.idpproject.org/sites/> [accessed 11 April 2001]

⁸² Kenya, *Report of the Parliamentary Select Committee ...*; Kenya Human Rights Commission, *Killing the Vote*; Mutunga

⁸³ Global IDP Project, pp. 9-10

⁸⁴ Moi Will Leave in 2002, Says Raila, *Daily Nation* [Nairobi], 9 April 2001; Notice Given on Moi Term Motion, *East African Standard*, 11 April 2001; Kenya, *The Constitution of Kenya*

The frequent call by some high ranking KANU officials for President Moi to continue in office for a third term and beyond tend to reaffirm these observations. These propositions are carefully being coached in ethnic terms. For example, two Cabinet ministers from the Rift Valley, Stephen ole Ntutu and Joseph Lotodo, insist that their suggestions for the continuation of President Moi in office parallel the support President Kenyatta received from his fellow Kikuyus during his tenure of office.⁸⁵ Whether or not these and similar suggestions by KANU officials and others will carry weight is another issue altogether. What is important to stress - as has already been done in this study - is that such statements may lead to further ethnic conflict as Kenyans have already experienced in the post 1992 and 1997 electoral dispensation.

⁸⁵ Make Moi President for Life - Ministers, *East African Standard*, 9 April 2001

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Appendix: Political Parties Registered in Preparation for the 1992 and 1997 Elections

	PARTY	1992 ELECTIONS	1997 ELECTIONS
1	Democratic Assistance Party		1997
2	Democratic Congress Party of Kenya		1997
3	Democratic Movement*		
4	Democratic Party of Kenya	1992	1997
5	Economic Independence Party		1997
6	Forum for the Restoration of Democracy - Asili	1992	1997
7	Forum for the Restoration of Democracy - Kenya	1992	1997
8	Forum for the Restoration of Democracy - People		1997
9	Federal Party of Kenya		1997
10	Green African Party*		1997
11	Green Party*		
12	Islamic Party of Kenya*		
13	Kenya African National Union**	1992	1997
14	Kenya National Democratic Alliance	1992	1997
15	Kenya National Congress	1992	1997
16	Kenya Nationalist People's Democratic Party*		1997
17	Kenya Party of Proletariat and Peasants' Party*		
18	Kenya Social Congress	1992	1997
19	Labour Party Democracy		
20	Liberal Party of Kenya		1997
21	National Development Party of Kenya	1992	1997
22	New People's Democratic Party		1997
23	National Treaty Party of Kenya*		
24	Party of Independent Candidates of Kenya	1992	1997
25	Reform of Political and Kenya Union		1997
26	Republican Reformed Party		1997
27	SAFINA		1997
28	Social Democratic Party	1992	1997
29	Shirikisho Party of Kenya		1997
30	United Patriotic Front		1997
31	Umma Patriotic Party of Kenya		1997
32	United People's Party of Kenya		