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Interview

Gibson Kamau Kuria:†

The Rule of Law in Kenya and the Status of Human Rights

Gibson Kamau Kuria currently lives in the United States as a political exile from his homeland, Kenya. Since the development of opposition to recent changes in Kenya’s constitutional and political systems, Mr. Kamau Kuria has turned his skills as a lawyer to representing those individuals designated as dissidents by Kenya’s government and who consequently have been charged with sedition, detained without trial and sometimes tortured.

In February 1987, Mr. Kamau Kuria was detained by the government without charge for over nine months, during which time his captors tortured him and threatened him with death. Undeterred by such forceful tactics, Mr. Kamau Kuria resumed his defense of dissidents upon his release from prison. The harassment of Gibson Kamau Kuria and other lawyers acting in defense of human rights continued and in early July of 1990, Mr. Kamau Kuria received word that the police awaited him at his home, his office, and in the courts. He sought asylum in the American embassy and soon thereafter left Kenya with his family.

Born forty-three years ago in central Kenya, Gibson Kamau Kuria attended Kenyan schools before entering the University of Dar-es-Salaam, Tanzania to pursue undergraduate studies in law. He did his post-graduate work in law at Oxford University, returning to Kenya to teach law at the University of Nairobi. While teaching, Mr. Kamau Kuria published articles on issues of constitutional theory and the rule of law in Kenya.

Since 1976, Mr. Kamau Kuria also has participated actively in the debate over the status of the Kenyan Constitution. Together with other Kenyan lawyers, Mr. Kamau Kuria has continued to speak out against the passage of various constitutional amendments that threaten to undermine the democratic government established at independence. After achieving independence in 1963, Kenya was widely regarded as a successful nation, relatively stable, democratic and prosperous with a good human rights record on a continent otherwise racked with political turmoil in the post-colonial period. Kenya’s first Presi-

† Gibson Kamau Kuria was, until recently, a practicing attorney and professor of constitutional law at the University of Nairobi. He is a recipient of numerous awards in recognition of his contributions to the pursuit of human rights in Kenya, including the Robert F. Kennedy Memorial Human Rights Award. Mr. Kamau Kuria spent the fall semester of 1990 at Harvard Law School and is currently a Schell Fellow at the Yale Law School. Regan E. Ralph, J.D., Yale Law School, 1991, interviewed Mr. Kamau Kuria in Cambridge, Massachusetts on November 16, 1990. Special thanks are due to Soledad Bastiancich, Daniel S. Ehrenberg, Lori Lynn Phillips, and Matthew L. Sperling of the Yale Journal of International Law for their hours of assistance in the preparation of this interview.
dent, Jomo Kenyatta, in 1969 outlawed the main opposition political party that was socialist in orientation. With Kenyatta's party, the Kenya African People's Union (KANU), in control, regular parliamentary elections were held until Kenyatta's death in 1978.

Kenyatta was succeeded by his Vice-President, Daniel arap Moi, who pledged fidelity to Kenyatta's principles. In 1982, the Kenyan legislature passed a constitutional amendment that officially changed Kenya from a multiparty to a single-party state and made KANU the sole legal political party. Later that year, a coup attempt by disgruntled non-Kikuyu Air Force officers was quickly and firmly suppressed by a shaken President Moi, who soon after moved to consolidate his power. Beginning in 1986, an underground opposition group known as Mwakenya began a campaign of resistance to the Moi government. Moi's government responded by clamping down further on dissent and detaining and torturing many intellectuals and academics suspected of involvement in Mwakenya.

In 1988, Moi moved to weaken the judiciary with a constitutional amendment removing security of tenure from judges, as well as from members of the Public Service Commission responsible for the appointment and discipline of civil servants. Another amendment passed at that time increased the period in which people detained for certain offenses might be held without access to a lawyer, a doctor, or family member from twenty-four hours to fourteen days. Strong opposition to these amendments sprang from a variety of sources, including President Moi's fellow KANU party members. Charles Rubia and Kenneth Matiba, both prominent KANU politicians, were arrested in the summer of 1990 for their outspoken criticism of the government. Among other things, they were calling for the restoration of multiparty politics. Leading members of the legal community were also harassed, such as Gitobu Imanyara, the editor of the Nairobi Law Monthly, who was imprisoned by the government in July 1990 on charges of sedition and technical violations of the media laws. The political situation in Kenya remains in flux. In December 1990, President Moi agreed to repeal the constitutional amendment that took away the tenure of judges and some controversial election rules, and to reinstate some ousted KANU members who were critical of the government. But he has continued to detain other dissenters and to resist calls for a return to multiparty democracy.

Following are Mr. Kamau Kuria's comments on the political state of Kenya today, the meaning of Moi's presidency and the concomitant shifts in the status of the Kenyan Constitution, the observance of human rights in Kenya and the future of the rule of law in Kenya.
I. PERSONAL INVOLVEMENT WITH HUMAN RIGHTS IN KENYA

Beginning in 1976, I saw moves to undermine the Kenyan Constitution and started writing articles to oppose the kind of totalitarianism that was being imposed. In taking up cases representing dissidents, I was doing two things, namely trying to prevent further erosion of the rule of law, and to put an end to the government’s disrespect for human rights. My representation of these people acted as a kind of strategy for bringing about social change, although I would say that, honestly, I didn’t see it as a strategy. I saw this work generally as a way to check constitutional decay and to ensure that the government respected the rule of law. Now I see that, as an academic and as a practicing lawyer, my active support over the years for the rule of law did have a very positive effect on the Kenyan people. As I learned when I was being interrogated prior to my detention, my work had interested many people and many people were talking about me. I found that, because of the great interest taken in my work by newspapers, many people knew me and indicated that I was holding out hope for the country and that I should keep up my efforts.

Until the last four years, few people spoke out against the Moi regime. So, from 1978 until fairly recently, I had been the lone cry in the wilderness. But over time, the monster, taking the form of totalitarianism, became more and more manifest. Now other groups have become more outspoken against the government. So far, the Kenyan Bar Association has been the most outspoken group.

At the time I left Kenya, I was engaged in two things. First, I was advising the leaders advocating a multiparty system who had been detained, and, second, I was trying to put a lid on the lawlessness which the state had engaged in, beginning in the middle of June 1990. The government had been acting as if there was a state of emergency. The government decided that the Constitution was inconvenient to its operations and acted accordingly, although the Constitution protects freedom of association, freedom of expression, the right not to be discriminated against because of one’s political opinions, and also the right to protection of the law. The government was not going to permit any debate on multiparty politics. Those supporting political pluralism would be dealt with harshly. Our president ordered the police into action, and constant harassment of lawyers began. The police placed three intelligence officers outside of my office. On June 22, 1990, more intelligence officers were placed outside another two lawyers’ offices to ensure that there would be no further consultation between leaders of the pro-democracy movement and their lawyers, or even amongst the lawyers themselves.
I joined the attempts to bring an end to the government's lawlessness by filing a suit seeking an injunction to restrict intelligence police from illegally occupying one of the lawyer's offices and to restrain them from interfering with his law practice. One of the lawyers who was supposed to have argued the case with me was arrested and detained without trial. I then filed an application to have the person in charge of intelligence police in Nairobi committed to jail for contempt of court for having arrested the lawyer, preventing him from going about his legal work. That action caused the government's greatest annoyance with me. They started hunting for me at home and in my office. I realized that I had pushed the government too far. Of course, in 1987 I had been detained without trial for nine and a half months, and I had been threatened with death. But I continued with my work. My role in the opposition movement was such that, if I were to be removed, the government could more easily pursue its repressive policies.

II. HUMAN RIGHTS IN KENYA: THE CURRENT POLITICAL SITUATION

By the time the crackdown came in June 1990, or even earlier, it was quite clear that human rights consciousness had grown very much with the effect of empowering ordinary people. President Moi found himself with a difficult situation that made him violate the Constitution much more openly than he had previously done. The police started going into lawyers' offices to prevent them from giving legal advice. They started breaking up legal consultations, not because the lawyers were committing any offense, but because of Moi's fear of the law. Since Moi became president in 1978, he has treated the law as one of the greatest obstacles to his acquiring power and retaining it for life.

When discussing Kenyan politics, one has to bear in mind two periods in Kenya's constitutional history. Kenya started as a constitutional democracy in 1963, with a constitution based partly on American constitutional theory and partly on British constitutional theory. Whilst many other countries in Africa rejected Western democratic institutions, Kenya retained them, but at the same time weakened them in pursuit of what was called a policy of African socialism. This was not real socialism; it was an attempt to establish a welfare state. But it is a welfare state in which the government intervenes in the economy - owning banks, industries, even some farms. Desiring to intervene in the economy, the government found certain constitutional checks and balances unpalatable. In response, it introduced amendments to remove the federalism from the original constitution, to replace a bicameral legislature with a single-tier legislature, to relax the restrictions on the power of the legislature to amend the Constitution, and also to relax the restrictions governing exercise of emergency powers.
When Jomo Kenyatta was the president, the government position was that the country had to be a democracy. Even with the initial amendments to the Constitution, the government accepted the doctrinal separation of powers with the independence of the judiciary and of the public service. The electoral process worked very democratically and the market economy, or the mixed economy, was doing very well. When, therefore, one is talking about prosperity in Kenya, one is talking about the period during which time Kenya lived as a democracy and was respected as such, and received much support from Western countries.

The second phase of Kenya’s recent political history started in 1978 when President Moi came to power. Daniel arap Moi was appointed Vice President in 1966 by the late President Jomo Kenyatta because Kenyatta believed that Moi was so incompetent amongst opposition politicians that he would pose no threat to Kenyatta. In other words, he was seen not to have ambitions that would make Kenyatta anxious. He had formerly belonged to another opposition party, but the stronger leaders of that party were not given the post.

It is also important that, at the time Moi became president in 1978, many other African governments were changing through coups d’etat. As Kenyans, we were determined to succeed in following our Constitution. Moi realized this and said that he would follow in the footsteps of the late president. But Moi is a person who cannot live up to constitutional standards. He cannot face competition, either in politics or in economics. Yet, he found a constitution that embodied these high values. His first task was to acquire power and, to do so, he had to manipulate democratic institutions. He first removed senior officers who held constitutional offices. Next, he acted to ensure that there were no factions that could offer political resistance to him. Then, because he found that these manipulations were not going far enough, Moi introduced legislation to weaken further democratic institutions. Soon he found that he could not make even that legislation work, so he had to suspend the Constitution in fact. One therefore sees that, between 1978 and 1982, Moi’s political competition was limited to the governing political party, KANU. In 1982, a constitutional amendment outlawed political competition by making the country a one-party state.

From 1982 to 1987, political participation was further undermined. The KANU party recommended outlawing the secret ballot method of nominations. In 1986, a constitutional amendment took away the Attorney-General’s security of tenure. In 1988, a constitutional amendment was passed to take away the independence of civil servants. Then, in 1990, when there was a call for a return to the multiparty democracy system, Moi detained leaders of the movement and placed intelligence officers at their homes. We have had judges who asserted their independence and who were then forced to resign.
At this time, the economic prosperity began to decline. Disinvestment had already occurred and intervention in the economy began to take place. For instance, in some public companies, the boards of directors were removed by Moi without legal authority and were replaced by public officers. We are talking about a country whose economy has been doing very badly. We have a situation where, increasingly, the incentive of the farmer and the businessman is being killed by the big government. There is a great level of discontent due to the deterioration of the economy and to the increase in oppression. The one-party system has become oppressive, and the people are impatient with it. In Kenya, as in other African countries, people now have proof that the model of the one-party state does not work, and the sooner it goes, the better.

The majority of Kenyans, having seen the multiparty system and the Kenyatta administration at work, support multiparty politics. Even people who are not very well-informed can tell that the situation has become very bad during the Moi administration. The ordinary person’s sentiment is reflected in a song that was composed following the demolition of some urban slums. The musician said that the reason that eight lives were lost in the demolition was because there was no political party which could speak up for these poor people. When I was in rural areas and in Nairobi, the people told me that they were waiting for the registration of the next party. They would register in great numbers because they were fed up with having KANU as the sole party.

The weight of this one party is felt by everybody. For the first time in Kenyan history, a peasant farmer growing coffee is embarrassed by the fact that she cannot make ends meet. Coffee is grown, but the proceeds of sale are withheld and not released. Then there is a very burdensome and illegal system of taxation based on allegedly voluntary contributions to charitable causes. Instead of the government financing schools and other things, it claims that it is asking the people to contribute voluntarily to support these services by charging them a fee to send their children to school.

Even though Moi claims that the one-party state is the only way to avoid ethnic violence, his policies work to exacerbate ethnic tension. Moi promotes his own people to the exclusion of others in the areas of government and politics. He knows that when we had multiparty politics there was no violence of this kind and the political parties were not formed along ethnic lines. Moi’s own party was conservative and had support from many ethnic groups. But now he tries to create ethnic divisions as a means of consolidating his own power.

Moi also uses a racist argument to support his ideology of the single-party state. He wants to suggest to outsiders that the black person is different from other human beings, that there is a passion evoked by the fact of belonging to an ethnic group. Other humans do not have that kind of passion in places that have a multiparty system. He alludes to the time when anthropologists
used to see people from Africa as being different. Moi says that we are such a complicated species of human beings that outsiders cannot understand us. Multiparty politics is good for Westerners, but it is not good for us. In fact, when he was in the opposition, Moi said that Kenya was not ready for independence. It is really the same argument that he is trying to get across, the view that the African does not have a strong make-up.

Following political riots in Nairobi in July 1990, and at the same time that it was cracking down on dissidents, Kenya's ruling party sent representatives throughout the country to interview people, allegedly to find out what kind of political change people wanted, and with the stated intent of adopting those changes into the political system.¹

The intention of the government in inviting recommendations from the Kenyan people after the suppression of democracy supporters was not to introduce political reforms. Rather, the intent was to lie to the international community by showing that Moi's government was taking part in the global movement toward democracy. This undertaking was also intended to ease the pressure on the government from within by creating an expectation that it was now prepared to give in to the will of the people. I say this because in August and September of 1989, the government indicated that it was not going to permit any changes. But outside influence could help force change in Kenya. This is the kind of pressure that I have been urging abroad.

III. HUMAN RIGHTS AND FOREIGN RELATIONS

Donor countries could apply economic sanctions against Kenya because of Moi's appalling human rights record.² When President Moi and his chairman say that they are going to punish all those calling for changes in the Constitution, they express their determination to hold on to power. On November 6, 1990, Moi declared that he had ordered the Attorney-General to draw up legislation to restore tenure to judges and to the offices of the Attorney-General and the Comptroller-General. He was then responding to world attention, not to the recommendations the people made to the review committee. The tenure of judges was suspended in 1988 by a Moi-sponsored constitutional amendment, the tenure of the Attorney-General in 1986, and that of the Comptroller-General in 1988. Moi also said that the other submissions they made were being considered, and other changes might come. I think what must have happened is that he had clear signals that aid which makes him accountable

¹. These and the following italicized comments are included by the interviewer for informational purposes. They are not the comments of Mr. Kamau Kuria.

². For example, Kenya lost $20 million in aid from Norway when President Moi cut diplomatic ties in October 1990 over a dispute concerning a Kenyan exile arrested on charges of treason.
would disappear if he failed to introduce reforms. If changes are introduced, it would be because of that kind of pressure.

But, for Moi, time has run out for introducing changes. Before the recent crackdown on multiparty proponents, the call was that reforms be introduced, that the Parliament be asked to repeal all of the unconstitutional amendments, that a multiparty system be restored, and that there be fair elections supervised by an independent body. Following the crackdown, some people were detained, others were killed, and there has been general persecution and intimidation of people. Moi has deprived himself of the capacity and the moral authority to rule. To many people, he is a murderer. He cannot be trusted to pursue reforms now.

Where sanctions have been applied against a particular country, it has been in enforcement of both a moral position and international obligation. The United Nations, of which Kenya is a member, has in the preamble of its Charter the commitment to support and further the universal observance of human rights. So far, only the United States has legislation like the Foreign Assistance Act that seeks to promote human rights by prohibiting assistance to countries that are involved in gross violations of human rights. If one were to decide not to give aid to somebody who is not honoring international obligations, that is eminently reasonable. I would even consider that one would be morally wrong to give aid to a member who is violating his moral obligations in the international community.

By accepting international standards, a country accepts that the area covered by the standards is not protected from scrutiny under a theory of sovereign immunity from foreign interference in domestic affairs. A country must live within international norms. The question of interference with internal affairs does not arise because the obligations are like contracts. Once one has an obligation, you cannot go to inquire into the motive with which you are implementing the contract. If Kenya accepts a contract for aid that stipulates among its terms that aid is contingent upon compliance with human rights standards, it also accepts those terms of the contract.

The expression "neocolonialism" is often misused, just like the expressions "freedom of contract" or "consent." We have two types of consent or freedom. One is consent that is free of constraints. But there are concerns that go with the constraints that aren't invalid. For instance, a bank is entitled to impose very stringent conditions upon its lending, although the customers of the bank are not in an equal relationship. That is taken to be consent. We can apply this analogy to international relations, even as they apply to the new nations. If a government is properly elected by a people -- dictatorships don't have authority over the governed in the conduct of foreign relations -- it can enter into certain international obligations or contracts on behalf of the governed.
The element of neocolonialism sometimes seems to suggest that the new state is being overpowered or dominated, but it is within its freedom to choose the kind of undertakings into which it wants to enter relations with other nations. Once you have signed acceptance of a contract with a bank, it won’t help you to come and argue that the bargain is unconscionable. Similarly, if wealthy nations make contracts that protect their interests better than the new nations, the new nations have only themselves to blame. One could also take an example from the law of wills, where there is the idea of coercion. If you have a person who is able to talk nicely, to flatter, to influence a person to get a new will in his favor, the court will say that the will is still valid. We do not worry about this behavior.

The colonial bitterness is exercising too great an influence both with the wealthy nations and with the newly independent nations. It is inhibiting proper development. As far as the younger nations are concerned, they are always ready to shout "foul play!" The wealthy nations, however, are weighed down with colonial guilt and say they don’t want to be accused of wanting to continue colonialism.

Unfortunately, sanctions intended to effect Moi’s regime may also have negative consequences for the Kenyan people. Still, I do not consider such a contract to be unconscionable. If, for instance, the U.S. forces Saddam Hussein from Kuwait and removes his regime from power, is there a way of avoiding the loss of innocent lives? I don’t see it. We start with acceptance of the fact that the removal of Saddam Hussein is necessary and, therefore, innocent lives will be lost. The consideration is, then, how can we minimize that loss. Using that analogy, if you want to reduce the power of an evil regime, how can you do it without harming some innocent people? I simply do not believe you can achieve the desirable result without any cost.

Assuming that you should reduce the suffering as much as possible even when you cut aid, quite often you find that not much additional suffering results because the regime is so corrupt that very little of that money reaches the ordinary person in the first place. If, of course, you had a way of ensuring that aid would only support the beneficiary and not support the oppressor, that would be very good. But people are prepared to suffer in order to remove the greater harm.

The United States Ambassador to Kenya, Smith Hempstone, has actively supported the proponents of political pluralism in Kenya. For example, in a speech to the Rotary Club in Nairobi in May 1990, he emphasized to his audience the sentiment in the United States Congress that foreign aid likely would continue only for those countries who diligently pursued democratic ideals. President Moi criticized Ambassador Hempstone for participating in
the multiparty debate and stated that he considers such behavior to be inappropriate interference with the operation of a sovereign state.

My understanding of U.S. foreign policy is that, over the last ten years, the policy has been, particularly in Eastern European countries, to maintain links with both the dissidents and the government. Ambassadors in those countries used to meet with the groups from both sides. Now, to the extent that Ambassador Hempstone is doing that, he is really doing what any other ambassador does.

The passion with which the Kenyan government hates the American ambassador is the same with which it hates Kenyan dissidents. If you look at the dissidents, they are lawyers and churchmen, not people you traditionally associate with radicalism. Now, Smith Hempstone happens to be a conservative Republican. But, I feel that the common denominator between a conservative Republican and political radicals in Kenya, including churchmen and lawyers, is really common decency. The criticism that he is acting unfairly is not well-founded, because there is no way he can do his job well without annoying the Kenyan government.

The question might arise: has he really commented on internal policies? I have not seen evidence that he was doing this. What excited the Kenyan government in connection with the multiparty system debate and drew attention to the ambassador was the fact that by sheer coincidence the day two former cabinet ministers -- Rubia and Matiba -- announced their support for the multiparty system was the very day Ambassador Hempstone was addressing a Rotary Club meeting. All that he said was that the inclination of the U.S. Congress is to give countries aid if they are respecting human rights, democracy and political pluralism. He even went out of his way to indicate that he was not telling Kenya what it should do. He was telling them what the Congress' goals are. What is significant about the timing of that statement made May 2, 1990, is that between January 3, 1990 and May 2, 1990, the debate on whether the multiparty system could be restored had been going on, and lawyers and the clergy were participating in it actively in public. Before the debate commenced, I had published in the Nairobi Law Monthly an article on the subject. We had been carrying on the debate even before the changes in Eastern Europe came. But that's the time the debate came out into the open. The Kenyan government got excited because up until the entry into the debate by the two cabinet ministers, it appeared that the debate was being conducted by Moi's traditional enemies -- the lawyers and the clergy. But the entry into the debate of former cabinet ministers who had worked with Moi indicated a new phase of the debate. I would say that criticism of either Ambassador Hempstone or dissidents is really unfair because we are dealing with a government that does not respect rationality.
IV. KENYA'S POLITICAL FUTURE

I think there will be more demonstrations and maybe strikes continuing to call for President Moi's resignation. There has been a call for Moi and his government to resign in order to permit a democratic government to come into being. In addition, people like the Attorney-General, the Chief Justice, and the Commissioner of Police will have to resign. They have been so closely involved in the undermining of the rule of law that their continuation in office will make the situation more untenable. I doubt whether Moi can accept the fact that he has lost power and that he should be content with retaining his life.

There are other, more frightening, possibilities for changing the government. The lawyers in the opposition oppose violent changes of government because they all are afraid of bloodshed. They just don't want to see it. They would prefer to see the kind of change that took place in Czechoslovakia or East Germany. But what they see is the possibility of Rumanian-style change, if Moi continues the way he has been going. He has been acting like Ceausescu, the executed leader of Rumania, by attacking people and getting the Chief of Staff to say that the armed forces are ready to assist the police in suppressing demonstrations. I can see an uprising of people, also saying that they will pursue change, executing Moi and those in government. One can also see an even worse situation in which great uncertainty and paralysis of the government would lead some of the young military to try to give orders to the government.

You probably have read that there is a movement called the Mwakenya. Mwakenya was ostensibly a movement involved in the overthrow of the government through violence. Unfortunately, the Mwakenya, which has been spreading many leaflets in the country, has never painted a vivid picture or an attractive picture of the kind of government it would establish. The group operates in a clandestine manner and does not reach many people. Kenyans remember too well the kind of human suffering that went with the struggle for independence in the 1950s. It is partly because of their desire to avoid that kind of bloodshed that they have given Moi too much time. Mwakenya has not understood this aspect of the Kenyan psychology, that you need to prepare people very well for combat in light of their experience.

One also could foresee, if this oppression continues for quite some time and if Moi continued to receive support despite the oppression, that the opposition groups might conclude that they find themselves without any alternative and that there would have to be fighting. But as of now, violence is not a serious proposition. I didn't hear of Mwakenya's alleged activities except when the government tortured people and brought them to court to plead guilty to the charge of being a member of an illegal movement. But since
I was accused of being a member of Mwakenya prior to my detention, and this was a lie, I don’t attach truth to anything said by the Kenyan government unless it is corroborated. Perhaps the bottom line would be to say that there could be a number of people who belong to the movement because these pamphlets do come to the country. At least outside Kenya, there must be Mwakenya. But from within it is so small and so insignificant that one does not really give any consideration to it when one is thinking of various options available.

V. AFRICAN POLITICS AND THE OAU

In July 1990, following a summit in Addis Ababa, the Organization of African Unity (OAU) issued a declaration on "The Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World." The document recognized that a political environment that protects human rights and observes the rule of law would be conducive to high standards of probity and accountability on the part of public office holders, and that popular-based political processes would ensure the involvement of all people in development efforts. Although the declaration avowed its signers’ commitment to the process of democratization, it also affirmed the rights of African nations to maintain sovereignty over their internal operations. Thus the declaration stands for the right of each nation to determine its system of democracy on the basis of its social and cultural values and to take into account the realities of its situation.

There are two tensions operating in African politics. One tension demands that democracy, which has been conspicuously absent in most countries, be restored. The opposing tension, advocating that the current authoritarianism should remain, makes a show of making reforms. One can say that the first part of the OAU declaration manifests the dream OAU has been holding out - the dream of a united Africa, a democratic Africa. Therefore, at the level of a dream it is quite good, but on a practical level there is only one way in which one can say that the OAU has been helpful, that is in assisting in the solution of disputes between some states. For instance, Kenya and Somalia had a border problem. Somalia claimed a big chunk of Kenya as its territory because it was inhabited by people of Somalian descent who are now Kenyans. There were discussions between Kenya and Somalia and an agreement was signed. From then on tensions eased. So there have been situations in which the OAU has provided a forum where nations can meet and reach an understanding.

Then one can say that the adoption of the African Charter on Human Rights is again a part of the dream. However, one does not see much else that
has been done. One cannot foresee much else that is likely to be achieved in the near future in support of democracy.

One way of looking at the OAU is that in the meeting place people find themselves. They come with all their imperfections. What can be achieved is largely determined by the thinking and the conditions in the place or places where people come from. So, it won't be until there are many countries which are democratic and which respect human rights in Africa that the OAU will be able to exercise either moral influence or other kinds of influence. As of now the majority of states are not democratic, and therefore democracy and the respect for human rights has radicalism built into it. That kind of radicalism can only undermine the dictators who come to OAU meetings. Yet, if the OAU members are to continue paying their dues, it is only on the understanding that these dues will not be used to undermine them.

I see the first part of the OAU declaration as significant in that Africa as a community is not going to be left behind by Latin America and Eastern Europe in the quest for democratization. The majority of African countries came to independence with constitutions that supported democracy and a kind of mixed or market economy. But this happened at a time when it appeared that socialism was winning the Cold War. Consequently, countries started introducing a form of socialism -- African socialism. This happened in Mozambique, Somalia, the Sudan, Libya, Algeria, Ghana, Guinea, Guinea-Bissau, Gabon, everywhere. Then, in the 1970s, we saw even more radicalism in the form of Marxism-Leninism in those countries. This was an expression in Africa of the view that socialism was better placed than a market economy to solve Africa's problems. That also went with the Stalinist view that to develop very fast you need authoritarianism. So you saw authoritarianism followed by coups d'état or by single-party systems being made respectable. That's how development took place. There is impatience with democratic systems because in most new nations democratic governments were perceived as being inefficient; they don't move fast enough. Yet one sees now in Eastern Europe an acceptance of the idea that authoritarianism does not permit economic development and does not allow democracy. Africa must experience an identical revolution.

So far we have seen the early signs of that revolution in the call for multiparty politics. The World Bank and the IMF have also been trying to encourage this through enforcing various lending conditions. For example, Tanzania has taken a somewhat ambiguous position. Tanzania's former President Nyerere was the theoretician of the one-party state. Now he sees that people should be allowed to participate in the political process -- that democracy should be restored. But the regime there is reluctant to follow through on this recognition because it knows that multiparty politics will lead to its losing
power. Therefore, in Tanzania, although they are going gradually to a market economy, they are reluctant to admit their mistakes. Zambia finally agreed to allow multiparty politics. If you go to Zimbabwe, there Mugabe follows a market economy, but the theory is that it is a socialist economy. There is an absence of renunciation of authoritarianism in Africa and an absence of admission of the fact that the big government has wreaked havoc.

Then there are other factors. Colonialism still causes problems. It has left serious intellectual problems because it has led to scholarship reflected by the kind of view, shared by Moi, that there is something peculiar about Africa, that we as Africans do not accept common standards. We have regimes that are prepared to oppose democratization and certain kinds of economic policies on the grounds that they constitute recolonization of Africa. We must differentiate between what can be said to be attempts to recolonize and protect certain interests, and what constitutes democracy and efficient economic organization. One therefore finds a solidarity of dictators. They say they are against Western imperialism. The most important consideration is the demonstration of the failure of the planned economy and its attendant political theory and institutions.

VI. THE RULE OF LAW IN KENYA

I take it as given that certain institutions are essential to any democracy, including the doctrine of separation of powers and the rule of law. There has to be a bill of rights. One might, however, have different contents for a bill of rights. For example, the people's right to bear arms is really a means of removing dictators. I doubt whether coups d'état could take place in Africa if the right to bear arms appeared in constitutions and was respected. But the constitutional failure in Kenya and presumably in other countries is explained by, first of all, the failure of the writers of the Constitution to identify what the basic structure of a people's democracy is in Africa. There are institutions that should have been included but were not.

The second problem arose from the failure to understand pre-colonial political thought. For instance, in most traditional legal systems in Kenya, there was no distinction between civil and criminal cases. There were just wrongs. The people with power held an open trial. There were more participants. The people who were making the decision would even sometimes be more than the twelve jurors. They used an institution that is analogous to that of a jury. The jury or an analogous institution is an essential institution in a constitutional democracy because it guards against the corruption of judges and magistrates.

In Kenya, the only party in the parliament acts as though it represents everybody and passes legislation and constitutional amendments the total effect
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of which is to justify oppression. To believe that the people would empower the legislature to go and pass oppressive legislation is absurd.

At the time of independence, as I have been seeing during my study of discussion around the Constitution, the constitutional makers and their advisors were in a dialogue. At one stage the drafters of the Constitution were assisted by Thurgood Marshall, one of the justices of the American Supreme Court. Basically, the Kenya Constitution is in many ways like the American Constitution. But overall, the influence of the British Constitution is more dominant. One paragraph of the Kenyan Constitutional Conference Reports of 1963 states that Kenya has a constitution of its own. It is neither a federal constitution nor a central government kind of constitution. This is the heart of the Constitution that was agreed upon at independence.

This emphasis on the singularity of the Kenyan Constitution reflected lack of clarity of thought because clearly it had to be decided whether you wanted the legislature to have the power to amend the Constitution the way it wants, as it has done. If that is not the case, it is really a question of going the way the American system has gone, not copying everything within that structure, but the general idea will be the same.

The second consideration was the position of colonial law. One can say that there are three types of law operating in Kenya -- what you might call English jurisprudence in that it is the kind of jurisprudence that you find working in England today, and colonial jurisprudence in the sense that it was the law of suppression. The third branch of the law is a kind of traditional law or pre-colonial political thought. I think that an examination of political thought would show that there are basic similarities between traditional and other forms of societies. It is a question of adapting institutions, because we are dealing with a situation where, following colonization, small groups which have lived like big nations were put together. It was not possible to retain the pre-colonial structures that existed.

In remaking the Kenyan Constitution today, it is really a question of, first of all, correcting the errors which appeared in the original constitution, which, simply stated, were twofold. First of all, I would say that the current crisis in democracy in Kenya is really a reflection of the flawed constitutional theory that was adopted at the time the Constitution was being written. The theorists failed to draw from precolonial and colonial experience and also from the experiences of other democracies. The second error is a kind of subtle racism or intellectual bias that stills works in colonial theory. For instance, the provision pertaining to the appointment of judges provides that those to be appointed are people trained the way English people are trained. And what did we have? Colonial judges and magistrates who are opposed to liberty. All those
with useful experiences from working democracies should have been equally eligible to serve as judges in the Kenyan system.

First we must correct these flaws in constitutional theory. Secondly, we must overcome the other factors that worked against the coming of democracy. The welfare state is an institution that goes with democracy. What was left undecided was the sense of this welfare state. In the Kenyan situation, we have had that welfare state run by a government that does not have checks and balances.

One has to look at the need to popularize the constitutional order as much as can be done. For instance, in the way this has occurred with human rights issues. When you talk about human rights, you present what people see to be just even if they are not sophisticated. Human rights are an expression of what truth and justice should be all about.

There is a search for African democracy, African human rights, and other African things. Even in China, authoritarians try to say that China has been unique in some ways, and it can be said that supporters of dictators always try to claim some kind of uniqueness which exempts them from other standards. My temptation is to view with skepticism the endeavor to term international standards as Western standards.

Then there were other hostile factors. There was the Cold War. In the Cold War, Kenya was friendly to the West. Consequently, any law that the Kenyan government made and explained as being designed to weaken the communists was accepted by the West, although these laws actually had the effect of restraining liberty or weakening democracy.

Another important obstacle to democracy must be faced squarely. Once we go as far as accepting our international obligations, we shall not have gone very far unless we address the issue of inequality. The issue that does arise is whether the pursuit of a nation’s economic interest is inconsistent with that nation’s obligations under international law. Britain and France, which colonized Africa, saw the coming of independence for African nations as potentially reducing their economic opportunities. So they were keen to support dictatorial regimes that were able to meet their economic needs. Are we condemned to a situation where pursuit of national interest must lead to support of dictators, or are we prepared to apply to the political sphere the idea we try to apply in economics? Economists say let’s have a free market in the whole world. But it looks like we don’t want a free market in ideas and democracy.

The nations of the world should understand that if they have recognized human equality in the Universal Declaration of Human Rights, it is illogical and inconsistent for them not to extend that equality to the economic sphere. If that inconsistency is removed, then you will want to cooperate with other people on the basis of equality. Ethics have everything to do with our conduct of international business. Of course, this is a revolutionary idea. But it follows
from the acceptance of equality. Just like when we remove corruption from the political system, we raise our moral standards. That must happen in the international arena. Otherwise, we are encouraging the development of a split personality: one is moral in the conduct of life within the country, but hypocritical in dealing with other countries.

It is optimistic to believe that because logic is on your side you will win the battle, but at the same time I appreciate the pessimistic lessons of history and historical experience. But what history also indicates is that we have gone through periods of great success when democracy spreads and then dictators stop the progress. But even when dictatorship or authoritarianism comes, it is followed by positive change. So that, qualitatively, the human condition has been improving. One can see life as a perpetual competition between good and evil. There will be periods during which evil dominates, and that is the time of authoritarianism and persecution. But evil has self-destructive qualities. Good can bring complacency and it is in complacency that evil sows its seed.

The development of human rights law is a movement toward raising standards. What explains the fact of people rising up against their dictators? Before the 1960s the uprising was against white colonialism. Following independence, people did not find liberty brought by fellow black people; it was really oppression. We are now going to move into an era of international humanity.

I look at the problem of reconciling theory and practice from two perspectives. First, taking the issue from a pragmatic view, the concern over whether government practice lives up to the standards of constitutional theory is not likely to be addressed in Kenya until we have a situation with many political parties, where a lawyer can go about his business without being intimidated. The way in which some of these concerns may be addressed is in devising a mixed economy. The problem of the constitutional theorist is having a strong economy, but with more egalitarianism than one sees in America. On has to accept that this is a serious issue. But if one looks at the works of people like Ronald Dworkin and others such as Robert Nozick and Michael Sandel, the debate is still going on. The opportunities for trying to experiment with something else still exist.

I think there is a need for lowered expectations, in a sense, because one cannot study political theory and not fail to appreciate the difficulty there is in devising a very good constitution. That is sufficient reason not to introduce utopianism. On the other hand, there must be sufficient utopianism to make you believe that the present situation can be reformed.