

ANALYSEN UND BERICHTE

Political Justice in Kenya: Prolegomena to an Inquiry into the Use of Legal Procedures for Political Purposes in Post-Kenyatta Era

by *O. Ooko-Ombaka*

Introduction

In a brilliant but surprisingly little used theoretical analysis in subsequent research, Otto Kirchheimer uses the term 'political justice' to connote the utilization of judicial devices generally and court proceedings in particular for bolstering and consolidating or creating new power positions.¹ Adopting the essential theoretical basis of Kirchheimer's thesis, this study essays to analyse the use of judicial procedures by the post-Kenyatta government in Kenya to consolidate its power, ensure its ideological legitimacy to succession and to keep political opposition in check.

A fundamental aspect of the philosophical basis of the liberal democratic system is the clear institutional separation between, the judicial, legislative and executive branches of government.

The courts derive a considerable amount of their authority: from their disassociation from matters political. In a democracy, . . . the determination of matters political rests ultimately with the will of the people through the ballot box. For that purpose the people elect the executive and the legislature and it is on those two branches . . . that the primary responsibility rests. The third branch . . . the Judiciary – is not elected and should not seek to interfere in a sphere which is outside the true function of the judges.²

Political justice signifies a breakdown of this ideological foundation since it brings politics into the courtroom. It is pertinent to establish circumstances which lead to this breakdown.

Preliminarily, it may be hypothesised that in a constitutional (as opposed to a fascist) system, a confident ruling class relies on the political process to bolster and consolidate its rule. Under such circumstances, political institutions such as the party, elections, parliament and public debate play a prominent role in resolving power conflicts and controlling power relations. Conversely a weak ruling class, fearful that a democratic operation of the political process may result in its displacement, relies more on non-political measu-

1 Kirchheimer, C. **Political Justice**, Princeton: Princeton Univ. Press (1961).

2 Newbold, D. 'The Role of a Judge as a Policy Maker', 2 **East Afr. L. R.** 127, 131 (1969).

res, such as administrative and judicial procedures, sectors in which it exercises appointive independence and hence domination, to ensure its political survival. An extreme case is a fascist dictatorship which by definition, completely negates the political process in which naked militaristic and other repressive measures are the instruments for ensuring its continued existence. The hypothesis may be advanced therefore that the degree of political justice is inversely proportional to the political power and confidence of the ruling class. The more it is relied upon, the weaker is the political base of the ruling class. This hypothesis is tested by a concrete examination of Kenya's ruling class.

The Political Economy of Political Justice in Kenya

Kenya emerged from colonialism with extremely weak political institutions and an equally weak political culture. This was to be expected given the fact that the basic problem of colonial rule was security, specifically, how to subjugate and dominate a numerically superior people. The rule was consequently law-and-order oriented, repression being the major mechanism for ensuring 'stability'. Under the circumstances, politics among the colonised was not tolerated and was correctly perceived as subversive of the colonial order.

One of the major problems of the period leading to political independence in 1963 and the period immediately following the date was how to open up the society to politics. Political parties were hastily formed to contest elections. These parties were in essence never popular mass-initiated movements, but bureaucratically organised structures. Nevertheless there were genuine attempts, arising from some form of nationalist consensus at independence, to democratize the political process. In many respects, the 1960's were the most democratic years of Kenya's post-independence history. Witness the extremely open parliamentary debates reported in the **Hansards** of the period, the public debates accompanying the announcement of government economic blueprint on African Socialism, and the formation of an opposition party, Kenya People's Party (KPU).

But precisely because of the weak political culture resulting from colonialism, this democratic beginning did not, and objectively could not be institutionalised, given the fact that the essential features of the colonial political economy were continued under a neocolonial hierarchy. The inertia created by a law-and-order orientation of government and a repressive administrative system, quickly re-asserted itself in the process of governing and politics once again became considered subversive.

Personalistic rule has increasingly replaced institutional responses to politics and in the circumstances, charisma or personal dictatorship of the sole ruler becomes institutionalised,³ and in absence of a civic culture and »widely accepted normative rules defining the proper ends of political action, the dominant orientation is moral pragmatism.«⁴

3 Okumu, J. »Charisma and Politics in Kenya« **East Afr. J.** p. 9 (March 1968).

4 Sandbrook, R. **Proletarians and African Capitalism: The Kenya Case 1960-1972**. Cambridge: Cambridge Univ. Press p. 20 (1975).

It is against the foregoing background that a characterization of the neocolonial state in Kenya as Bonapartist is illuminating.⁵ In his classic essay »The Eighteenth Brumaire of Louis Bonaparte«, Marx argues that at a particular stage in capitalist development where pre-capitalist modes of production still survive and the generic traits of peasant society preponderate; and where none of the propertied classes is consolidated enough to exercise its domination independent of alliances nor the proletariat sufficiently politicised to challenge the power of the propertied classes, the state acquires a relative autonomy and the greater power resides in the sole ruler because of his role as an arbiter between finely and delicately balanced classes as well as his role as their agent. Under such circumstances, the class consciousness is embryonic or inarticulate and class cleavages are perceived in terms of ethnic, cultural racial or linguistic particularities.⁶

The government in a Bonapartist state acts in a highly contradictory manner, simultaneously building up the economic and political power of the unpropertied classes; but at the same time curbing this very class in the course of entrenching the ultimately superior power of the bourgeoisie. Thus, in Kenya, the government enlists the support of the workers and peasants through populist slogans such as »**Harambee** (let's pull together)«, »Love Peace and Unity«, »Alleviation of Poverty«, »Rural Development« »African Socialism« etc., while at the same time emasculating the growing movement of these very classes by co-opting their leaders, restricting trade unionism and harassment and isolation of their political spokesmen.

Solutions to socio-economic problems, in this context are seen in what has been called inter-personalistic, client-patron terms.⁷ The patron offers a trickle-down of economic benefits such as cash handouts, jobs or protection, while the client reciprocates intangibly with esteem or information about the machinations of the patron's enemies. Nationally, there exists a whole complexity of networks of patron-client relationships within hierarchies of the civil service, state corporations, trade unions, army and indeed, parliament which arise to fill the vacuum existing by lack of institutional norms. But precisely because of this fact, a structural response to national socio-economic problems is compromised. Loyalty based on self-interest and material incentives naturally registers itself in the practice of corruption, an increasingly rampant problem in Kenya.

There was some form of popular national consensus in the first few years of Kenya's independence. Kenya African National Union (KANU), the ruling party, was the institutional structure in which this consensus manifested itself politically. The party was therefore able to bolster its power by political means **vis a vis** Kenya African Democratic Uni-

5 See Leys, C. **Underdevelopment in Kenya: The Political Economy of Neo-Colonialism**. 1964-1971, London Heinemann (1975).

6 Marx, K. »The Eighteenth Brumaire of Louis Bonaparte« in Marx, K & Engels, F. **Selected Works in Three Volumes** Vol. I Moscow: Progress p. 398 (1973); See also the review of Ley' book (supra n. 15) in 62 **Afr. Communist**, London p. 100 (3rd quarter 1975); and Ooko-Ombaka, O. **Law and The Limits of National and International Reform** (Forthcoming) Howard Univ. Press Chapter 12.

7 **Supra** n. 4 pp. 20-22.

on (KADU), the opposition party, resulting in the latter's dissolution and the absorption of its members by KANU. Alongside this nationalist consensus the legitimacy of Kenyatta, the first President of the country as the sole ruler was never seriously contended, save in the brief interlude by the short-lived (KPU). His claim to the leadership of the nationalist struggle though of dubious historical accuracy and role in the Pan-Africanist movement since the Manchester Conference of 1945, reinforced each other nationally and internationally to feed an at once charismatic, self-assured, confident and almost deified personality.

To the extent that Kenyatta had some political constituency and a historic claim to leadership, his government was able, in the first decade of his rule to fight major political battles within the bounds of existing political institutions. Thus faced with the first major political challenge of his rule in the formation of KPU, a socialist oriented opposition party, the Kenyatta government marshalled parliamentary and party support to amend the Constitution and the standing orders of the National Assembly and party regulations to head the challenge. The constitutional amendments such as one requiring members of parliament (MPs) who changed party allegiance in favour of KPU to lose their seat, the so-called 'turncoat rule', was rushed through parliament by suspending the standing orders with the sole purpose of stopping defection to KPU ranks.⁸ Similarly, KPU was denied the designation of an official opposition party by an amendment of the standing orders to provide that no party with less than the number of MPs KPU had, could be an official opposition party. The amendment of election rules in 1968 which invalidated the candidacy of independents also worked in favour of KANU, the more established party.⁹ It may be safely stated that down to his death, Kenyatta though increasingly unpopular, was the sole and unquestioned political head of government. All power struggles were waged, not to dislodge him from power, but in anticipation of his demise. It is therefore important to examine briefly, the politics of succession.

Anyan'g-Nyong'o has correctly argued that »The problems of succeeding Jomo Kenyatta, and the politics in the post-Kenyatta era, can . . . only be understood within the context of the struggle between the social forces Kenyatta represented and those that sought to substitute his leadership for somebody else to further their own interests.«¹⁰

The central problem of a Bonapartist state is succession, specifically, how to reproduce personal leadership. Since every class faction perceives the sole ruler as a personal protector of its interests, on his death, each faction attempts to promote its own candidate to ensure continuity of this protection. To the extent that the different factions ultimately

8 **The Constitution of Kenya (Amendment) Act.** No. 17 of 1966 & No. 4 of 1967. For a discussion of these and other constitutional amendments, see generally Ghai, Y. P. & McAuslan, J. P. W. **B Public Law and Political Change in Kenya**, Nairobi Oxford Univ. Press (1970) and Gertzel, C. **The Politics of Independent Kenya** Nairobi East Afr. Publishing House (1970).

9 **The Constitution of Kenya (Amendment) Act.** No. 2 of 1968.

10 Anyang-Nyong'o, p. »Kenya's Political Legacy and the Politics of the New Presidency« Dept. of Government, University of Nairobi, Mimeo p. 2 (1980).

represent one dominant interest, that of the bourgeoisie, they can be characterized as fraction of capital.¹¹

The Change-the-Constitution crisis immediately preceeding Kenyatta's death was in essence, a manifestation of the struggle between different fractions of capital for succession. The fractions who wanted the Constitution changed aimed to thwart Moi's succession then assured by virtue of his Vice-Presidency while those who opposed the move saw Moi as the best protector of their interests. The latter fractions were personalised in the Moi-Kibaki-Njonjo triumvirate. The triumvirate succeeded because the various fractions of capital realised that the consequences of open struggle was uncertain and stability, (i. e. the conditions under which all capitals can reproduce themselves) was threatened.¹² Thus the objective material interests of capitals met in the personality of Moi. To the extent that he was perceived by all fractions as lacking in personal ambition and historical alignment with any particular fraction, he was the best choice for stability to represent the community of interest of the various capitals.

Unlike Kenyatta, Moi came to power with no historic claim to it. He had played no direct role in the nationalist struggles leading to independence and his role in the early years of independence, had in fact been in opposition to the nationalist consensus as a member of KADU. Under the circumstances, his claim to leadership could at best, be vicarious. Thus his rallying slogan of **Nyayo** or, following the footsteps of Kenyatta.

Moi's personal attributes were dramatically opposed to those of Kenyatta. He lacked his predecessors's charisma, confidence and exuberance. He was as humble as he was non-manipulative. To the extent that manipulation is an art of politics, he was not a politician. He thus paradoxically became the chief political leader because he was non-political. This was his best credential to leadership in the sense that he would not radically alter the existing power relations.

The fact that the new political leadership personalized in the Moi-Kibaki-Njonjo and the Keep-the Constitution politicians lacked a political or historical base of leadership forms the basis of increased political justice in post-Kenyatta era. Given this background, political justice has been essentially conservative in that it has been aimed at bolstering existing power relations or consolidating and entrenching them along the lines established under Kenyatta. How has political justice manifested itself in Kenya?

Kirchheimer distinguishes four levels of political justice that are relevant for the present study.¹³ The first level involve cases where it is »inextricably mingled« with ordinary criminal cases and »only the personality or the motive of the offender suggests a political element«. ¹⁴ The second involve cases where the defendant takes or attempts to undertake

11 See *id.*; Clarke S. »Capital, Fractions of Capital and the State: 'Neo-Marxist' Analysis of the South African State« **5 Capital and Class** (Summer 1978).

12 Burin, F. S. & Shell K. L. (eds) **Politics, Law and Social Change: Selected Essays of Otto Kirchheimer**. New York: Columbia Univ. Press p. 17 (1969).

13 *Supra* n. 12 pp. 413–422. He identifies a total of five levels. The fifth level comprises of artificially created political offences, a level which is not identified in Kenya.

14 *Supra* n. 12 p. 413.

a direct attack of the established constitutional order, for example seditious or treasonable activities. The third are those cases which may be termed political prosecutions. Unlike the second level, there is »lack of definite action which would turn dangerous ideas, propaganda, discussions, incipient organisational forms, common elaboration of doctrinal platforms, and consequent indoctrination into something akin to concrete moves directed toward the overthrow of the constitutional order«.¹⁵

Criminal prosecutions are in general instituted by the state. All the foregoing levels of political justice can therefore only be invoked by the government or a fraction within it. The result of such use of, political justice is essentially conservative in that it results in preserving or confirming existing power relations. It is however, possible for:

the adversaries of the present government (to) try, though in a somewhat more limited way, to work via the judicial apparatus. By provoking libel suits and starting the spadework for perjury charges they may try to change popular concepts of political reality as a condition precedent for dislodging the present powerholders.¹⁶

When employed by adversaries of the system such attempts are revolutionary in the sense that they attempt to alter existing power relations. Powerholders may also however, invoke civil suits for conservative purposes. Such attempts by both adversaries and powerholders constitute the fourth level of political justice.

In the remaining pages of the study, recent decisions of Kenyan courts are analysed to show how political justice has been operationalised on the four levels.

Criminalization of politics

Three recent cases present themselves as a manifestation of political justice in the sense that they objectively criminalised political opposition. They are **Republic v. Waruru Kanja**,¹⁷ **Republic v. Jonesmus Mwanzia Kikuyu**¹⁸ and **Republic v. Chelagat Mutai**.¹⁹ Before examining these cases in some detail, it is useful to indicate the tactical moves the prosecution and the defence adopt in such cases.

The prosecution, generally attempts to minimize the political aspects of such cases with the aim of reducing them to ordinary criminal trials. Conversely, the defence tries to either publicize the political motivations in committing the offence if it admits to the facts as charged, or the singular zeal with which the state has singled out its case for prosecution.²⁰

15 *Supra* n. 12 p. 414.

16 *Supra* n. 12 p. 411.

17 **Criminal case No. 1433 of 1981.**

18 Criminal Case No. 861 of 1981.

19 Criminal case No. 2179 of 1981.

20 See *supra* n. 12 p. 413.

1. Republic v. Waruru Kanja

Kanja was charged with contravening a requirement imposed by **The Exchange Control Act** and regulations and orders made thereunder.²¹ He pleaded not guilty. The Magistrate found him guilty of the offence and sentenced him to three years imprisonment. Kanja appealed the decision to the High Court where the sentence was reduced to one year's imprisonment.

At the time of his conviction, Kanja was the MP for Nyeri constituency. His role in the struggle for Kenya's independence earned him a conviction and a death sentence at the hands of the British colonial government in 1953. The sentence was later reduced to life imprisonment. He was released in 1959 in the wake of independence. He was elected to parliament in 1969 during Kenyatta's rule and was appointed an Assistant Minister in 1979 by Moi. He was dismissed from the cabinet soon thereafter. After he challenged the government to name the assassins of Tom Mboya, a powerful member of Kenyatta's cabinet and his heir apparent gunned down in 1969 as a result of a power struggle, and J. M. Kariuki, an outspoken critic of government policy and a popular politician brutally killed in 1975. Government had been deeply implicated in both assassinations. A further factor leading to Kanja's dismissal from the cabinet was his assertion that Charles Njonjo, one of the most powerful personalities in the political hierarchy, and G. G. Kariuki, a ranking and then close ally of Njonjo's were dishonest and abusive of their public offices. He alleged that because of his political views, Njonjo, in collusion with the director of the Criminal Investigation Department (CID), were planning to kill him. It is against this background that the political significance of the sentence imposed on Kanja is to be analysed.

Under Section 39(1)(b) of **The Constitution of Kenya**, an MP loses his seat when sentenced to imprisonment for more than six months.²² For the prosecution to achieve political justice it had to argue for a custodial sentence of at least six months. This would ensure that Kanja lost the political platform which he had successfully used to embarrass people in power. The Defence on the other hand had to prevent such a sentence, or that failing get publicity on the political nature of the prosecution. How did the adversaries argue their case?

21 Cap. 113 **Laws of Kenya** S. 4 (1) (1); 4 (1) (3); Part II fifth Schedule.

22 It is provided that

»A member of the National Assembly shall vacate his seat if –

(b) any circumstances arise that if he were not a member of the Assembly would cause him to be disqualified by section 35 (1) of this Constitution or any law made in pursuance of section 35 (3) or section 35 (4) of this Constitution to be elected as a member.«

The relevant provision in section 35 (1) (b) in our case provides that:

»A person shall not be qualified to be elected as an elected member if at the date of his nomination for election he –

(c) is under sentence of death or is under sentence of imprisonment (by whatever name called) exceeding six months imposed on him by such court or substituted by competent authority for some other sentence imposed on him by such court.«

Arguing for a **special** sentence, the prosecution asserted that »sentence must depend entirely on the facts and circumstances of each case« in an attempt to distinguish a whole line of cases under **The Exchange Control Act** in which custodial sentence had not been imposed.²³ The defence, attempted to pre-empt the state's aim by likening the case to similar cases, submitting that according to widely recognised practice, like cases should be decided alike. Citing a long list of cases under the relevant section of the Act, it established that the sentence in all those cases where the amount of money involved was generally higher than Kanja's, had been fines. Moreover, the defence submitted, in most of these cases, the contravention consisted of money being taken **out** of the country, a much more serious contravention from the viewpoint of the national economy than its case which involved money being brought into the country. It concluded by praying that since the contravention was merely technical »if the accused is sentenced it should be a mild rebuke«.²⁴

Taking a novel and rather stretched conception of justice, the Magistrate unconvincingly distinguished all the cases cited by the defence on grounds that in »most of the cases . . . quoted, the accused had pleaded guilty, and were remorseful. (It) has not quoted a single case on sentence where, the circumstances of the offence, facts, behaviour of the accused, status of the accused, experience of the accused, etc. are similar to the present case«.²⁵ He was therefore »constrained to say that custodial sentence« was inevitable.²⁶ Kanja appealed to the High Court against the conviction and the sentence.²⁷

The defence argued that assuming he had committed the offence, a fine was the only sentence open to the trial court, basing its argument on the jurisprudence of Kenyan Courts and general principles of sentencing.²⁸ The defence also, and this is an important tactic in a political case, opened a political flank by stating that in »the light of the judicial trend, a sentence of imprisonment was impermissible, unless the appellant was being discriminated against possibly because he exercises the parliamentary privilege and speaks about matters some people would rather neither speak nor wish to hear«.²⁹ It reinforced this flank by arguing that the trial court had erred in considering factors such as the accused's refusal to plead guilty, his status in society and the defence's failure to quote cases with similar facts to those of the appellant.

There is strong evidence to suggest at this juncture that there was a plea bargain in which the defence agreed to abandon the grounds relating to conviction in the appeal on the state's undertaking not to object to the grounds relating to sentence thus rendering a cu-

23 Unreported Judgment, **Republic v. Waruru Kanja** p. 41 Chief Magistrate's Court, Nairobi.

24 *Id.* p. 47.

25 *Id.*, p. 48; Karl Llewellyn terms this restrictive type of distinguishing »confining the case to its particular facts.« »This rule« he writes, »holds only of redheaded Walpoles in pale mangenta Buick cars« **The Bramble Bush** New York: Oceana Publications pp. 64-68 (1951).

26 *Supra* n. 23.

27 The memorandum of appeal was filed on 28th November 1981.

28 Defence submissions.

29 *Id.*

stodial sentence unnecessary.³⁰ The defence acted on this understanding but the state did not keep its part of the bargain, since it proceeded to argue that the sentence imposed by the trial court was proper. Indeed, in reducing the sentence from three to one year imprisonment, the appellate court indicated that had the appellant offered to pay a fine through his lawyers during the appeal, it might have imposed only a fine.³¹

After the High Court decision, Kanja was, for all practical **legal** purposes, left without a judicial remedy since appeals to the Court of Appeal under the Kenyan judicial system, must be on merits of the case, not sentence. Faced with this fact, Kanja decided to clothe his case in complete political battle-dress by petitioning the President for pardon under Section 27(a) of the Constitution which provides that:

The President may grant to any person convicted of any offence a pardon either free or subject to conditions.

Before examining the substance of the petition, it is useful to refer to Kirchheimer's theory of political justice to illuminate Kanja's strategy.

Kirchheimer argues that a defendant in a political trial may completely submit to accepted procedures and prove that he has kept within the established bounds of society. In such cases, the established society invariably triumphs in its objective. »But the great majority of defendants in political trials are unwilling to undertake this act of total submission . . . they will not only deny the ideals for which the courts stands, but negate its very authority«.³² Under such conditions, the defence strategy is to acknowledge enough of the courts authority so as to use established procedures to press for acquittal or impugn the prosecution for propagandist purposes.³³ Kanja had exhausted these tactics in both the trial and appellate courts. Knowing that established legal procedures were thus exhausted, he decided to invoke the last established procedure, Presidential pardon. This recourse carried the possibility of success or failure. If it succeeded, the established society would triumph because the legitimacy of its rules and procedures would have been acknowledged by a political opponent. If it failed, Kanja as an individual, would be in no worse position, but his political image stood a chance of tarnishment by virtue of his submission.

Since the object of the accused in a political trial is to maintain and possibly improve his status in his group, »the exploitation of the court proceedings for the propaganda purposes of his group, and the public manifestation of his loyalty to the ideals of that group, remain unuppermost« in his mind.³⁴ Whether the petition failed or succeeded, Kanja the nationalist needed to maintain his political credentials. It is against this background that the substance of the petition is to be understood.

30 See Kanja's Petition to President Moi for clemency. The author also had the benefit of interviewing counsels for the defence.

31 See *id.*

32 *Supra* n. 12 p. 425.

33 *Id.*

34 *Supra* n. 12 p. 426.

The petition reiterated the legal arguments already advanced in the courts as to the usual sentencing imposed, given the courts jurisprudence and then proceeded to argue politically. »It is this striking discrepancy« Kanja petitioned the President, which »makes me feel it is my kind of politics . . . that would have had a negative effect on the subconscious part of the mind, in the courts which imposed on me a custodial sentence.«³⁵ Taking the political nature of the case further, Kanja argued that given the colonial history of Kenya and the roots of the judiciary in that history »the composition of the courts which have tried my case, and my political past, the custodial sentence, as the trial court stated, was inevitable.«³⁶ Under the circumstances »it is difficult or impossible for me to obtain the fairest trial before those who may have no liking for my politics, even were they to adhere most meticulously to the technical procedures laid down by law«.³⁷

On the same day he petitioned the President, December 22, 1981, Kanja wrote to the Speaker of the National Assembly informing him of the petition and requesting him therefore not to declare his parliamentary seat vacant under section 39 (i)(b) of the Constitution already referred to for an election as stipulated in **The Parliamentary and Presidential Elections Act**, since a pardon was still a possibility.³⁸ Moving with unusual haste suggesting political motivation, the Speaker gazetted Kanja's seat vacant, **before** the President made a decision on the petition.³⁹ Gutto has argued that this speedy move by the Speaker may not only have pre-empted the President's decision but was also done in ignorance or defiance of relevant laws.⁴⁰

The President rejected the petition on grounds that he found it »extremely difficult to accept« the assertion »that our courts will not give you a fair trial. This amounts to a question of the integrity and impartiality of our judiciary. Accordingly, I find no merit in pardoning you«.⁴¹ For political justice to succeed, at least on its educative function, it is crucial to maintain the illusion that the judiciary is independent and insulated from politics under separation of powers. The President's statement was meant, precisely to cement this illusion. In any event, the repressive function of political justice succeeded, at least in the short run in that Kanja lost his seat and was condemned to serve his prison term.

It is worthy of note that two developments taking place since Kanja's imprisonment have strengthened the evidence of the political motives in the prosecution. The first incident was the summary dismissal of a Chief Prison Officer at Kamiti Medium Security Prison where Kanja was imprisoned and the second incident was the government's refusal to

35 *Supra* n. 30 p. 6. para. 16.

36 *Supra* n. 30 p. 6. para. 17.

37 *Supra* n. 30 preamble p. 2.

38 Cap. 7 **Laws of Kenya**.

39 The notice was dated 23rd December 1981. LXXXIII **The Kenya Gazette** No. 56 p. 1628 Nairobi. Government Printer (31st Dec. 1981).

40 S.B.O. Gutto »Some Legal Comments on Hon Waruru Kanja's Petition for Executive Clemency« **Verfassung und Recht in Übersee**. Hamburg (3/1982).

41 **The Standard** Editorial comment, Nairobi (December 31, 1981).

grant Kanja a remission on his sentence as is the prevalent practice under the relevant laws. What is the background to these incidents?

The prison official was charged with, *inter alia*, the nebulous offence of allowing a prisoner (Kanja), to be visited in the Prison's Duty Office. **The Prison Rules** recognise no such offence and it is a Common practice to allow prisoners to be seen in the Duty Office.⁴² It would appear that his real ›crime‹ was political in that one of the visitors in question was Koigi wa Wamwere, the MP for Nakuru North, a consistent and articulate critic of government policies with growing grassroots following. Mbugua had also evidently treated Kanja and his visitors with too much deference.

The government's refusal to remit Kanja's sentence raises further questions as to the motive behind the case. Section 46 of **The Prison's Act** stipulates that a criminal prisoner may earn a remission of one third his sentence by reason of good conduct and industry. Kanja by all reports was a model prisoner and despite his ill-health, was denied remission.⁴³

2. Republic v. Jonesmus Mwanzia Kikuyu

Kikuyu was charged with sedition, contrary to sections 57(1)(b) and 56(1)(b) of **The Penal Code**.⁴⁴ The relevant sections make it an offence, for any person to utter any words with an intention to bring into hatred or contempt or to excite disaffection against the person of the President or the Government of Kenya.

The facts were that Kikuyu who was engaged in a political discussion in a Machakos bar with eight people, uttered words to the effect: »You people will be surprised one of these days to find Hon. Mwai Kibaki as the President of this Republic and Hon. Ngei as Vice-President and you will see me flying a flag from Nairobi to this place being Minister.«⁴⁵

Unlike Kanja's case where the accused was a prominent politician with nationalist credentials and powerful political opponents in high places, Kikuyu was at the time of the incident a little known, first-term legislator from the Iveti North constituency with no national political constituency. It is therefore unlikely that his personality *per se* posed a threat to anybody. Moreover, the words constituting the *actus reus* of the crime were at best innocuous. Further, the fact that the alleged words were uttered before only eight persons, late at night in a drinking place, would make the prosecution's task of proving beyond any reasonable doubt that Kikuyu had seditious intentions, an almost impossible task in purely evidentiary terms. It is probably these considerations, rather than the state's magnanimity as stated by the Chief Magistrate, which led the state to prefer the

42 See **The Prison Act** Section 74 and rules made Thereunder (Cap. 90); Mbugua's appeal against the dismissal on January 26, 1982 to the Public Service Commission was denied.

43 As we go to press, there are attempts by Nyeri University Students and Kanja's family to apply to the Minister for Home Affairs, Mr. Mwai Kibaki to restore Kanja's remission.

44 Cap. 63 **Laws of Kenya**.

45 Unreported Judgment, **Republic v. Jonesmus Mwanzia Kikuyu** p. 4.

lesser and alternative charge of conduct likely to cause breach of the peace contrary to section 94(1) of the **Penal Code**.⁴⁶ Kikuyu pleaded guilty to this latter charge, was convicted and sentenced to three months in jail, served the term, never losing his Parliamentary seat.

All evidence available to the author suggests that there was nothing at stake politically in this case. It is however illustrative of how, within Bonapartist politics and its consequent factionalism and patron-client networks, some ambitious official or an overzealous state informer hoping for promotion or other 'trickle-down' from a patron, can trigger the process of political justice.

The words allegedly uttered by Kikuyu are in an objective legal sense, innocuous, but posited in the context of the personalistic struggles of Kenyan politics, signify, at least symbolically, some level of political defiance. In this sense Kikuyu's crime was not sedition *per se* but rather the personality line-up of his shadow cabinet specifically, Kibaki and Ngei.

It was commonplace that there was a power struggle between Njonjo and Kibaki at the time of the incident. This struggle has characterized the post-Kenyatta era factionalism in national politics. Most analyses of the struggle give Njonjo an edge, not because he has any popular political constituency but rather, because of his manipulative, consistent and generally skilful control of state institutions and bureaucracy and his links with the dominant Western capitalist interests in Kenya. Such control comprised at the time of the case, the fact that he was Minister of Home and Constitutional Affairs, which portfolio included the police, prisons and judicial institutions. In the material period, the mutual dislike between Njonjo and Paul Ngei, a pro-Kibaki Cabinet Minister was also widely publicised. Kikuyu's shadow cabinet, thus positioned him against the more powerful faction in the struggle.

In personalistic politics one may reasonably speculate that some police or their informer, anxious to catch the eye of their patron and one of the personalities conspicuous by his absence in Kikuyu's shadow cabinet, Njonjo, reported the incidents and or initiated the prosecution. This process was in all likelihood initiated without Njonjo's knowledge or support because within a patron-client network good initiative usually meets with high rewards. On the face of it, there was, at least technically, a case for sedition. This zealous initiative must have however been tampered with a more objective legal advice from the Attorney-General's Chambers witnessed in the institution of the lesser alternative charge. Kikuyu was therefore at worst, a loquacious dreamer, caught in his reverie in the cross-fire of personalistic politics.

Finally, it may be of some significance that Kikuyu's prosecution coincided in time with the Muthemba one. In personalistic power struggles in Kenyan politics, the fact that Kibaki was featuring in a sedition trial diverted, or balanced local political speculation on the treason trial featuring Njonjo. The Muthemba case is analysed below.

46 *Id.* p. 3.

3. Republic v. Chelegat Mutai

Chelegat Mutai was charged with making false mileage claims against the National Assembly amounting to K. Shs. 99,000/-. She was at the material time the MP for Eldoret North. She was released on bail pending trial. She however jumped the bail and fled to Tanzania where she was subsequently given asylum.⁴⁷ The case therefore never came for trial and our brief examination is limited to its political background.

Though not a vocal critic of government at the time of her case, Mutai had a history of political radicalism dating back to her activities as a student leader at the University of Nairobi in early 1970s. She was also known to be sympathetic and close to MPs critical of government policies, including the former member of Kitutu East, George Anyona whose cases are examined below.

That making false mileage claim is a crime is not in debate. What is debatable are the motives for preferring the charge against Mutai. It is known that the Mutai prosecution was the first of an intended prosecution of seven MPs on similar charges. They were Kogi wa Wamwere (Nakuru North), Abuya Abuya (Kitutu East), Wasike Ndombi (Lurambi South), James Orenge (Ugenya), Onyango Midika (Nyando) and Lawrence Sifuna (Bungoma South).⁴⁸ It is politically very significant that all the seven were consistent critics of government policies from the left, who were increasingly establishing a popular national constituency by addressing issues such as land ownership, inflation and unemployment in a parliament otherwise dominated by petty personalistic squabbles and a choir-like uncritical and dogmatic subservience to everything and anything government. The intended prosecutions smacked from the outset, of political selectivity. The legal merits of the cases notwithstanding, this selectivity strongly suggests a political motive in the prosecutions aimed at silencing the MPs by criminalizing their political platform rather than a law-enforcement one. Mutai's flight to Tanzania, among other developments, stemmed the state's intention, at least in the short-term.

Mutai gave an international press conference in which she claimed that she had fled to escape political repression and that the charge against her was fictitious.⁴⁹ Tanzania's decision to grant her political asylum by refusing to extradite her to Kenya indicates that the Tanzania government, was at least, satisfied as to the political nature of her prosecution. These two factors made the incident a great diplomatic embarrassment for the Kenyan government, to the extent that they tarnished its claimed international image as democratic and open. This embarrassment probably explains why the intended prosecutions were thereafter suspended.

47 See generally O. Ooko-Ombaka »The Mutai Case and the Law of Asylum and Extradition: A Comment« *Sunday News*: Dar es Salaam p. 7 (Feb. 28. 1982).

48 *Weekly Review*, Nairobi: pp. 5-6 (Sep. 25. 1981).

49 *Weekly Review* Nairobi p. 8 (Feb. 12. 1982).

Direct Attack on Established Constitutional Order

Sedition and treason are the two major legal characterizations of direct attacks on the established constitutional order in the Law of Kenya. For purposes of this study, the only treason trial in the post-colonial Kenya is analysed with a view to demonstrating how a fraction of the ruling class tried, unsuccessfully, to resort to political justice to dislodge a dominant personality in a rival fraction by virtue of his alleged implication in treasonable activity. The case in point is **Republic v. Andrew Mungai Muthemba and Dickson Kamau s/o Muiruri**.⁵⁰

Muthemba was charged with treason contrary to section 40 of the **Penal Code** in that between 15th day of December 1980 and 23rd February, 1981 in Kenya, being a person owing allegiance to the Republic of Kenya, he compassed, imagined, or intended to depose by unlawful means the President His Excellency Hon. Daniel Arap T. Moi from his position as President of the Republic of Kenya, and expressed, uttered or declared such compassings, imaginations, or intentions by overt acts, including attempting to obtain explosives and other military equipment. Kamau was charged with concealment of treason contrary to section 42 of the **Penal Code**.

One of the most dramatic pieces of evidence adduced by the prosecution to prove the overt acts was an alleged statement by Muthemba to the effect that Moi had to go and that »Njonjo is the right man« to replace him.

In acquitting and discharging both the accused, Judge A. H. Simpson based his judgment on the reasoning that the overt acts had not been satisfactorily proved. He took strong exception to the Special Branch's (the investigative department of state handling political intelligence, hereinafter S.B.) handling of the investigation, pointedly accusing it of dishonesty and ineptitude and transparency in »their attempt to involve Mr. Njonjo«.⁵¹ Going out of his way to exonerate Njonjo, Judge Simpson ruled that »there is not a shred of acceptable evidence in the whole of this case adverse to the well deserved reputation of Mr. Njonjo«.⁵² The point to be noted is that the case became not a trial of Muthemba and Kamau but a political exoneration of Njonjo.

The fact that the case was dismissed on technical and evidentiary grounds may well stand to legal analysis. What is important for the present analysis is its political background.

At the time of the trial, Njonjo was the Minister for Home and Constitutional Affairs whose portfolio included the Criminal Investigation Department (C.I.D.) and judicial affairs. He had a few years earlier resigned his civil service post of Attorney-General, joining electoral politics as the unopposed member for Kikuyu constituency. He was promptly appointed to his cabinet post. James Karugu, a less flamboyant but a technocratically more respected lawyer, succeeded Njonjo as the Attorney-General, the Chief

⁵⁰ Criminal Case No. 25 of 1981. High Court.

⁵¹ Unreported judgment, **Republic v. Muthemba and Kamau** p. 23.

⁵² *Id.*

Public Prosecutor, a succession which no doubt had his predecessor's blessing. Karugu however, quickly de-politicised the office by his personal style. He established a professional independence of the office, at least in the technocratic sense, from the political process. Most observers argue that these changes did not, at least in an objective sense, please Njonjo. They argue that like any other politician in a context of personalistic politics, Njonjo needed to retain some political control of the Attorney-General. It is under these circumstances, that the treason trial was instituted.

There was room for an institutional conflict between the S.B. and the C.I.D. The former department was under the Office of the President while the latter was under Njonjo's Ministry. The major investigatory and analytical work in a political trial would lie with the S.B. while the major prosecuting responsibility would be with the C.I.D. In the C.I.D. personalistic context of power, this institutional division of labour would easily degenerate into personal political struggle perceived in terms of Njonjo (C.I.D.) versus his factional rivals (S.B.).

In the present case, the requisite political intelligence was presumably fed by the S.B. to the Attorney-General and the C.I.D. The Attorney-General then presumably decided to go ahead and prosecute the case without getting political clearance from the Minister of Home and Constitutional Affairs, since the latter was implicated in the case.

Given the Executive appointment of the judiciary in Kenya and Njonjo's status in the Executive generally and political influence in the judiciary in particular, and given the further fact that Karugu's decision to prosecute would be seen, rightly or wrongly within the patron-client networks in government as a political double-crossing of Njonjo, it was to be expected that the trial would be perceived as putting Njonjo's political future in the dock. With the constellation and alignment of forces already outlined, the Judge's conclusion that the »prosecution was instituted without adequate investigation . . . (and) . . . was . . . ill – advised« was pointed criticism of the Chief Public Prosecutor, whose subsequent resignation was clearly connected to the episode.⁵³

As far as political justice goes, the trial, indicates an unsuccessful attempt by one class faction to challenge the dominance of another. Since the attempt failed and in fact resulted in the loss of a professionally independent Attorney-General, it in the final analysis, only bolstered and consolidated the power of the dominant faction.

Political Prosecutions

The forms of attack on established constitutional order examined above, that is, sedition and treason are unconstitutional. There are, however, forms of attack on the established order which are constitutional. These include the formation of an opposition party within the constitutional framework, or the use of constitutional guarantees of freedoms of

53 *Id.* p. 24.

speech, conscience, assembly etc. We are here concerned with the use of political justice to combat the second forms of attack. Kirchheimer characterises this level of political justice »the twilight zone between prevention of future revolutionary action (sedition, treason, O.O) and violation of free-speech – and assembly guarantees«. ⁵⁴ It is »an effort to advance the defence line of the established order.« ⁵⁵ It may be termed preventative repression.

The State may advance the defence line in two simultaneous or alternative ways. The first way is through an **en bloc** legislative act empowering it to deal summarily and administratively with political opposition without the legitimacy or the juridicity of the act being questioned either in the Legislature or the Judiciary. The second way is to invoke the judicial process by instituting a political prosecution. Such prosecutions are »invariably handled as if they implied sedition or treason«. ⁵⁶ Kenya governments have used both methods to bolster up and consolidate their rule. A brief examination of both methods follow.

Section 83 of the Constitution and **The Preservation of Public Security Act** empower the President to institute preventative detention on security grounds. ⁵⁷ This legislative power was widely used by the Kenyatta government to detain political opponents. On coming to power, Moi released all political detainees and promised never to resort to the practice except in exceptional circumstances. In the wake of mounting criticisms of government policies in early 1982, the President warned that he was fully prepared to invoke the draconian powers he has under the law to curtail constitutional rights.

There are two major observations to be made with respect to the difference in the use of detention under the Kenyatta and Moi presidencies. The first is that in an attempt to establish an independent base of leadership, Moi badly needed populist measures to bolster up his succession. Preventative repression is by its very nature undemocratic. The Kenyatta detentions were therefore extremely unpopular. Internationally, they marred Kenya's liberal-democratic claims and were widely and regularly criticised by Amnesty International and other human rights groups. By releasing the Kenyatta detainees and promising not to resort to detentions, Moi captured a domestic populist constituency and signalled a desire to build a more open political society to international allies.

The second factor to be noted, and this is crucial for the present analysis, is the fact that the mere fact of invoking detention is recognition of the **political** status of the detainee. The act draws a clear distinction between criminal and political activity, implicitly accepting the latter as warranting special consideration. By closing the possibility of detention, as a means for dealing with political opposition, the Moi government has to that extent limited its repressive options for handling such opposition, given the fact, as already posited, that its political base and legitimacy are shallow and thus its inability or unwill-

⁵⁴ *Supra* n. 12 p. 414.

⁵⁵ *Id.*

⁵⁶ *Supra* n. 12 p. 415.

⁵⁷ Cap. 57 **The Laws of Kenya.**

lingness to practice politics (open debates, party politics, etc.). It is precisely under such circumstances that resort to criminal law to resolve questions of political power has increased in the post-Kenyatta era.

The second method open to government to deal with constitutional opposition is that of political prosecutions. Kirchheimer argues that for prosecutions to succeed on this level it must prefabricate an alternative reality.⁵⁸ There is, prefabrication because it must be before trial stage, basing its case on the alleged deviationist doctrine of the accused, project fictitious happenings of a dire future. The alternative reality is necessary because the trial's aim is to show that but for official intervention, the accused would have succeeded in executing his programme. For the prosecution to succeed, some measure of collaboration is necessary from the accused in that he needs to admit to enough evidence so that the prosecution may substantiate the prefabricated reality. Such admission allows the prosecution to construe »from actual activities of former periods, interpreted in the light of the existing situation, and from concretization of the projected plans-a picture of what would have happened if the defendant had been victorious«.⁵⁹

There have been no recent successful prosecutions of this type in Kenya. The state entered **nolle prosequi** in both the **Anyona** and **Kihoro** cases where both the accused had been charged with possession of seditious literature contrary to section 57 of the **Penal Code**.⁶⁰ What necessitated the **nolle prosequi** in these cases is most likely the refusal of the accused to collaborate and thus help the prosecution prefabricate alternative realities. Moreover by its very nature, political prosecution requires considerable coordination of the various state organs, the C.I.D. and S.B. As already indicated, these organs may not necessarily respond in the same degree to political pressure due to political factionalism among other things. All these factors make this method of preventative repression too elaborate and unpredictable, hence their paucity in Kenya.

As we go to press, Wang'undu Kariuki, a journalist who unsuccessfully contested the Nyeri seat vacated by reason of Kanja's imprisonment, has been arrested and charged with possession of seditious literature under section 57 of the **Penal Code**. It remains to be seen whether the state has perfected its preventative repressive capabilities to convincingly prefabricate an alternative reality so as to get a conviction.

Finally on political prosecution, it is to be noted that was there to be a full dress political trial, the government would have to face the unpleasant possibility of an accused using the dock to politic, the very process his arrest is meant to negate.

58 *Supra* n. 12 pp. 415-516.

59 *Supra* n. 12 p. 417.

60 Criminal Case No. 2452/81 (Resident Magistrate) and 1493/81 respectively.

Administrative and Judicial Disenfranchisement

Established powerholders within the ruling party KANU have in recent years, increasingly intervened in the electoral process, through technical administrative measures and a whole battery of nebulous practices generally termed 'clearance of candidates' to preempt or influence the electoral process within the party, local authorities and the national parliament. The aim of such interventions have been to bar candidates perceived by these powerholders to be adverse to government politics of neocolonialism, and thus ensure either the election, or more usually unopposed 'election' of pro-government candidates, clients and cronies of patrons, and of course, the incumbent patrons.

In most instances, the administrative interventions are in clear contravention of the KANU constitution. 'Clearance' is a practice that has evolved without any constitutional basis in the Party and with far reaching implications for the democratic process in a **de facto** one-party state. Its constitutionality *vis a vis* the Constitution and the electoral laws of the country is highly questionable.

Section 34(d) of the Constitution provides that a person is qualified to be elected as an MP if 'he is nominated in a manner prescribed by or under an Act of Parliament, by a political party'. **The National Assembly and Presidential Elections Act** provides for preliminary elections to be held by a political party, preparatory to a parliamentary election.⁶¹ Since Kenya is a **de facto** one party state (KANU), all candidates for parliamentary elections have to be members of KANU and the preliminary elections are therefore, for all practical purposes, the real elections, parliamentary elections being purely formal. Section 17(b) of the **National Assembly and Presidential Elections Act** stipulates that no person is to be nominated by a political party at preliminary elections unless:

He has qualified under, and has complied with any provisions of the constitution or rules of the political party concerned relating to members of that party who wish to stand as candidate at preliminary elections.

The KANU constitution stipulates that any member of the party wishing to stand for parliamentary elections must apply in prescribed form to the President of the Party giving details of membership. The only members barred from presenting themselves for such elections are members not fully paid up; members who have been members of other political party within the period of six months immediately preceding the day of nomination; formerly detained members of KPU unless they have been members of KANU for three years since their release and have since identified themselves with the policies of KANU; and employees of the government, government corporations and local authorities who would not have resigned their appointments two months preceding nominations. Persons qualified to stand are required to sign a loyalty pledge to the President and the Party and to the country's Constitution and to deposit with the National Treasurer of the Party, the sum of one thousand shillings non-refundable fee.⁶²

61 Cap. 7 **Laws of Kenya**, sections 2 and 17.

62 The Constitution of Kenya African National Union, S. 20(b) (1974 Revised Ed.).

The Party constitution and rules as such, do not have provisions on 'clearance' nor have any administrative criteria evolved in the practice of the party to provide any guidelines as to the rules followed in the process. Its only rationale and justification is that it is a reactionary protective shield, held by the political hierarchy to protect themselves and unpopular leaders from the democratic verdict of the electorate. Be that as it may, given the fact that under the electoral laws a candidate needs a party's nomination, 'clearance' has become an important mechanism for Kenya's rulers to consolidate their incumbency.

Under the circumstances, individuals on the receiving end of 'clearance' have instituted civil suits in attempts to restore their democratic rights enshrined in the Constitution and the electoral laws, and indeed the KANU constitution, to challenge the mechanizations of the powerholders. Conversely, incumbent powerholders or aspiring cronies of the powerholders have invoked judicial and administrative procedures to pre-empt the democratic process and thereby ensure their continued rule or unopposed 'election'. The use of these judicial and administrative measures constitute the final level of political justice analysed in the study. The Anyona and Bondo cases present themselves as illustrative of an attempt by an adversary of the powerholders to challenge 'clearance' judicially and a resort to the judicial process by a crony of the powerholders to thwart the democratic process.

1. George Moseti Anyona v. Zachary Onyonka and Others

Anyona was, down to 1975 when he was detained by Kenyatta, the popularly elected MP for Kitutu East and the Vice-Chairman of KANU, Kisii branch. What was particularly disturbing about his detention and those of two MPs immediately preceding his (Shikuku and Seroney) was the fact that they were detained for statements made in parliament as elected leaders in clear and flagrant derogation of parliamentary privilege Anyona was picked up in course of a parliamentary debate during which, in a well researched presentation, he accused Njonjo, then Attorney-General and the British High Commissioner of interfering with procurement procedures for the purchase of locomotives and rolling stock for Kenya Railways. Evidently, there were several tenders and although the British tender was not the lowest, the reason for the interference, Anyona implied, was to force the award of the contract to Britain.

As an MP, Anyona was active in debate, articulate in argument and consistent in criticism of government policies. His ideological leaning was socialist and resolutely opposed to capitalistic direction of the national economy and Western control of its economic policy, arguing that these policies were contrary to the interests of Kenyan peoples.

When Moi came to power in 1978, he released all the Kenyatta detainees. Anyona thus became a beneficiary of the general amnesty. Soon thereafter, General Elections were announced for 1979 by the new government. It was generally known that Anyona intended to contest the Kitutu East seat. It is this political background and the preparations

for the elections which contextualize the suit to be examined. What were the facts of the suit?

On 4th October 1979, the **Daily Nation**, a Nairobi daily, reported that Onyonka, a ranking cabinet minister in both the Kenyatta and Moi governments and chairman of KANU, Kisii branch, had telephoned claiming that Anyona had been suspended by the Kisii KANU Branch Executive Committee on 3rd October 1979 from Vice-Chairmanship. Onyonka also informed the **Nation** that KANU Governing Council had been informed of the suspension. In the meantime the nomination day for preliminary and national parliamentary elections had been announced by the Supervisor of Elections as 18th October 1979.⁶³

The KANU Governing Council met on 4th October in Nairobi. The Council resolved that Moi who had been President through the operation of the Constitution since Kenyatta's death be elected unopposed.⁶⁴ It then proceeded to consider the question of 'clearance' of former K.P.U. members who had been recently released from detention by Moi for the forthcoming election. »After lengthy discussions« it decided that O. Odinga, A. Oneko, T. Odongo, L. Obok, Makanyengo, G. Mwaganda, T. Chemule, A. Gured, K. Maitha J. Masoi »not be allowed to stand for the elections«.⁶⁵ All other non-KPU former detainees were to be allowed to stand »other than Mr. George Anyona who had been rejected by Kisii Branch«.⁶⁶

Section 22(b) of the KANU constitution empowers the District or Branch Executive Committee to suspend any member or officer. Such suspension is to be reported to the National Executive Committee which has to ratify, or set the suspension aside. If it ratifies the suspension, the matter is to be placed before the National Governing Council whose decision becomes final. Section 8(2)(vi) of the KANU Constitution entitles a suspended member to appear before the Governing Council. Anyona's alleged suspension was reported directly to the Governing Council, thereby by-passing the National Executive Committee. He was not given a chance to appear before the Council.

Anyona sued Onyonka and the Registrar of Societies, together with the Returning Officer, Kitutu East on the following grounds and prayers:

- (a) That the 1st. defendant lacked the mandate of the District Executive Committee of the Kisii KANU Branch in alleging that it had suspended Anyona from Vice-Chairmanship and that he had acted falsely and maliciously in so informing the Governing Council. The District Executive Committee had held no proper and lawful meeting;
- (b) That a declaration be made that: (i) he was a person duly qualified, under the Constitution; the election laws and had complied with provisions of the KANU constitution relating to members who wish to stand for elections (ii) the 1st defendant acted ultra-vires his powers and authority (iii) he was still the Vice-Chairman of Kisii KANU Branch (iv) it

63 GN. 2952 of 1979.

64 Minutes of the KANU Governing Council Held on 4th October, 1979 at Parliament Buildings, 10.50 A.M. Item III.

65 Id. Item V.

66 Id.

- was a gross violation of his constitutional and human rights and democratic process not to be allowed to contest the elections;
- (c) An order issue against the 2nd defendant to accept his nomination papers on nomination day.

The court gave its ruling on 17th October 1979, a day before the nomination day. Judge Hancox dismissed the entire application basing his decision primarily on the argument that for Anyona to succeed, he needed to establish a **prima facie** case that the Returning Officer would not accept his nomination papers on nomination day. »No one has ever suggested that the Plaintiff cannot present his nomination papers. It is what happens on their presentation to the Returning Officer that is in issue.«⁶⁷ In any event, the Judge continued, were the Returning Officer to either reject the nomination papers or exercise his discretion wrongly, this could amount to an election offence under section 9(c) of **The Election Offences Act**.⁶⁸ Under such circumstances, the proper remedy for Anyona would be to bring an election petition under sections 19 and 20 of **The National Assembly and Presidential Elections Act** whereby corrupt practices, which includes, by definition, election offences, can if proved, be sufficient to enable the election court to declare the election for the constituency concerned null and void.⁶⁹

The legal arguments advanced by the Judge may well be defended. They however totally ignore the political reality of the situation. This reality, in Anyona's case dictated that without clearance, he would **not** be allowed to stand for election. Any Kenyan, from a casual observation of the political geography would have **predicted** that fact. In other words, a **prima facie** case had been irrefutably established by political reality. Only a judge could take consolation in **legal** arguments to deny the fact that the political hierarchy had become so politically desperate as to go against its own rules. Only a judge not wishing to address the real issue, Democracy, and the **raison d'être** of electoral laws, could see the election petition as the right remedy in the case. In the result, the Court's ruling objectively sided with the powerholders and Anyona's attempt failed. Or did it?

On 18th October 1979, the election day, Anyona presented his nomination papers, meticulously in order as required by all relevant laws. The same were duly and meticulously denied by the government official, the Returning Officer in contravention of electoral laws. In the event, Anyona did not **personally** run for the seat. He threw his unquestioned political clout in Kitutu East behind the most progressive candidate in the contest, Abuya Abuya who easily won the seat, and has since then become one of the most persistent critics of government policies. Anyona may have lost the legal battle, but KANU lost the political war. Since a candidate he supports was elected MP for Kitutu East, Anyona did not make an election petition. The non-interlocutory aspects of his original suit are still **sub judice** and the following developments taking place after the interlocutory hearing and which can be verified in public documents are not intended to be opinions

67 Unreported Ruling *Anyona v. Onyonka* p. 5.

68 Cap. 66 **The Laws of Kenya**.

69 *Supra* n. 67 p. 7.

on the merits of the case. They are however crucial to putting the whole episode in context.

On 23rd February 1981, D. J. Coward, the Registrar General responding to Anyona's repeated request for clarification and confirmation of who the legitimate officers of the Kisii KANU Branch were in light of his alleged suspension, replied: »I cannot trace any notice of change of officers of the above branch of KANU as having been submitted after the the notice dated 31st January, 1977 was filed. This notice, of course, shows you as the Vice-Chairman of the Branch.«⁷⁰

On 26th February 1981, Onyonka filed returns for the Kisii KANU Branch including the change of officers for 1979 in which he stated that Anyona was still under suspension. The notice stated that he was suspended on 2nd October 1979. These returns were found incomplete and Onyonka was required to file complete returns. This he did on 31st March 1981. On this latest notice, the date of the meeting which allegedly suspended Anyona was given as 4th October 1979. This discrepancy is to be read in light of the fact that the original press announcement by Onyonka, gave the date of the meeting as 3rd February 1979, and raises the question as to the actual date or fact of the material meeting. Moreover, on 22nd March 1981 the KANU District Executive Committee, Kisii, held a meeting at Kissii Municipal Hall at which Onyonka attempted to remove Anyona from the meeting on grounds of his alleged suspension. Onyonka was overruled by members present and the meeting ended in disruption.

2. The Bondo Constituency Application

Bondo is probably one of the most controversial constituencies in Kenya because it is the home of the most controversial politician in independent Kenya, Oginga Odinga. Odinga was one of the founding members of KANU. His role in the nationalist struggle is well documented and his campaign for the release of Kenyatta to head the incipient party in the eve of independence is well known. It is in acknowledgement of this history that he became the first Vice-President of the independent country under Kenyatta and the MP for Bondo.

In mid-sixties, policy and ideological differences began to register in the political debates in the country with respect to the political and economic strategies the government was adopting for the country's development. There were those nationalists in KANU who increasingly felt that the party was fast departing from its manifesto and nationalist origin and turning into a party of patrons far removed from the Kenyan masses. They argued that the nationalist consensus heralding independence in 1963 had been based on the political understanding that the inherited colonial economy was going to be **transformed** to benefit these masses. Contrary to this understanding, the government was maintaining colonial structures and policies with the result that independence was compromised and the underdevelopment of the national economy in favour of metropolitan accumulation

70 Ref. No. SOC/3645.

erected under colonialism was continued. Odinga became the personality magnet around which this critique of the Kenyatta KANU government clustered.

The ideological chasm separating KANU mainstream politics and the Odinga cluster, culminated in Odinga's resignation from the Vice-Presidency of the country and the formation of KPU in 1966, an opposition party which he headed. The year after, Odinga published his autobiography **Not Yet Uhuru** (Not Yet Independent), whose basic theme was that KANU had betrayed the nationalist mandate as a result of which Kenya had become a new colony.⁷¹

KPU had a short life-span. In three years of its existence, it posed a serious **ideological** threat to the government from the left, but never a serious political challenge, since its politicking and membership recruitment were seriously impeded by government repression. In any event, the challenge it posed was serious enough for the government to proscribe it in 1969 and detain its leaders, Odinga included. On his release from detention in the eve of Kenyatta's death, Odinga rejoined KANU. His attempt to rejoin electoral politics from his Bondo constituency in the 1979 elections have been blocked since KANU has refused to 'clear' him.⁷² It is against this background that the Bondo by-election 1981 is to be understood.

On April 1 1981, the Speaker of the National Assembly gazetted the Bondo parliamentary seat vacant by reason of the resignation of the then MP, Ougo.⁷³ After being barred from contesting the 1979 elections, Odinga had given support to Ougo, thus ensuring the latter's election over Omamo, the pro-government incumbent who had been elected to the seat following Odinga's detention. It was not surprising therefore, that Ougo's resignation speech indicated that he was resigning to give Odinga a chance to contest the seat. That was not to be.

KANU once again denied Odinga 'clearance'. Omamo presented himself for the preliminary elections which had been set for 16th May 1981.⁷⁴ Gordon Jalang'o Anyango, a little known personality in Kenyan politics also presented himself to contest the seat. In Bondo, Omamo was regarded as a pro-government man who had been, and was once again being used by the political hierarchy to fight Odinga the unquestioned popular leader of the constituency. He was, and still is the treasurer of KANU, Siaya Branch. A treasurer has a lot of power in KANU by virtue of the fact that he controls membership recruitment in issuing membership receipts. To the extent that Omamo was perceived as a pro-government candidate, Anyango was perceived as an Odinga's man. His election in an open democratic contest was almost a foregone conclusion not necessarily on a positive vote, but certainly on protest votes against Omamo, and a government which had denied the Bondo people their democratic right of choosing their own leader. It is against this imminent political development that the fight was removed by KANU from the po-

71 Odinga, O. **Not Yet Uhuru** London: Heinemann (1967).

72 See *supra* no. 64 item V.

73 **The Kenya Gazette** Notice No. 1138 (10th April 1981).

74 *Id.* Notice No. 1140.

litical arena where it was sure to lose, to the administrative and judicial institutions where, through its control and manipulation of state machinery, it was confident to 'win', the democratic process notwithstanding. How was this 'victory' scored?

On nomination day, Omamo presented his nomination papers which were duly accepted and subsequently certified as being in order and complete in accordance with election laws by the Returning Officer. Anyango's nomination papers were at first rejected by the Returning Officer as incomplete but thereafter also accepted as complete as required by the relevant laws. It is to be noted that one of the reasons Anyango's papers were rejected at first had something to do with the certification of members nominating him, a process controlled by Omamo, the treasurer of the Party Branch. Omamo thereafter on 27th April 1981 applied to the High Court for an order of certiorari to quash Anyango's nomination and order of mandamus, to direct the Returning Officer to certify to the Supervisor of Elections that only he, Omamo stood validly nominated.⁷⁵ The main ground on which the said reliefs were sought was that the Returning Officer had no power to alter his decision already made that Anyango's papers were invalid having once made a decision that the said papers were not valid in accordance with regulation 18(1) of **Parliamentary and Presidential Elections Regulations**.

Regulation 18(1) stipulates that:

Where a nomination paper . . . has been delivered to the returning officer, but not otherwise, a nominating paper shall be deemed valid, and the candidate named therein to stand validly nominated for the election concerned, unless and until the returning officer decides otherwise or until proof is given, to the **satisfaction of the returning officer** of the death of the candidate or the candidate withdraws his candidature . . . (emphasis supplied)

There being only two candidates for the seat, if Omamo succeeded in his application, he would be the next unopposed MP for Bondo.

The High Court presided over by the Chief Justice ruling in favour of Omamo's application, substantively agreed with Omamo's contention that the Returning Officer had no power to alter his decision under regulation 18(1). The author has not had the benefit of reading the ruling due to alarming delays in processing judgments in the High Court registry. This delay seems to be particularly prolonged in political decisions! A full legal analysis of the ruling is not possible under the circumstances. Two comments may however be made on the facts available.

The first is that the language used in regulation 18(1) gives the Returning Officer some discretion (see the underscored words above). In a situation where the fundamental democratic rights of a candidate to stand for elections and of a people to elect a representative of their choice is at stake, the High Court's interpretation of regulation 18(1) seems to us clearly wrong.

The second comment relates to the political implications of the ruling. The decision is a clear judicial disenfranchisement of the Bondo people. A cynical and bitter joke circulating in the country after the ruling underscores this fact. The joke was that Omamo had

75 Miscellaneous Civil Cause No. 140 of 1981: High Court.

been elected by three votes of Chief Justice Wicks and Judges Hancox and Platt the thousands Bondo votes being spoilt. The High Court ruling, once again highlighted the political influence of the executive in the judicial process. It showed how, faced with the democratic reality of the ballot box, a politically weak ruling group resorts to administrative and judicial manipulation, to bolster its rule. As a measure of political justice, the decision belies the liberal democratic ideology of separation of powers.

In concluding the analysis of the Bondo application an event which took place after the nomination day but before the election day further raises one's suspicions about the whole episode. The Returning Officer on the nomination day, Eliab Gichohi was transferred away from the district by the government in a move which was interpreted by many as disciplinary, to show the executive's displeasure in his handling of the nomination process on the material day. A different Returning Officer was thereafter appointed to administer the formal elections. The Executive was not taking any chances this time.

Conclusion

This analysis proceeded on the hypothesis that the degree of political justice is inversely proportional to the political power and confidence of the ruling class. Setting Kenya's ruling class in its historical context, it was argued that the Kenyatta government was relatively powerful in political terms in that the interplay between personality of the late President and his historical claim to power gave his government political legitimacy and confidence. It therefore **generally** relied on politics to resolve political problems.

It was argued that to the extent that the Moi government lacked any historical claim to power its style of governing was proportionately de-politicized. The personality of the new President and the fragile alliance of fractions of capital over whom he presides interact to produce a relatively insecure and unconfident ruling group. It is in this **relative** weakness that the analysis located the reasons for increased use of political justice.

Through a concrete analysis of the **Kanja, Kikuyu and Mutai** cases, it was established that the objective aim of the prosecution was to criminalize political opposition. Implicit in this argument is the political statement that the political leadership which perceives people like Kanja as a threat to its continued power, dare not, fight politically (e. g. through elections or public debate) since it knows it is likely to lose such a fight. It therefore resorts to fight its adversaries through the coercive apparatuses of state where its control is supreme.

The analysis of the **Muthemba** case argued that it was an unsuccessful attempt to dislodge a key personality in the ruling group by a rival fraction. In this instance, political justice is to be conceptualized as an intra-class weapon. The brief analysis of political prosecutions established that in such circumstances, it is used to advance the defence line of the established order through preventative repression. It was argued that this level of political justice is difficult to achieve because it requires elaborate pre-trial prefabrications and co-ordination between different organs and departments of state.

The study concluded with an examination of the manipulation of electoral regimes to pre-empt the democratic process and thus protect pro-government candidates (Omamo) and frustrate candidates perceived as posing a political threat to the rulers either by virtue of their ideological positions (Anyona) or their political association (Anyango). Objectively, political justice seeks to bolster the ruling group by achieving two results, firstly to repress a particular adversary and secondly to 'educate' the population by creating a »picture of political reality . . . in which the defendant incarnates socially undesirable tendencies . . .«⁷⁶ Has the Kenyan government succeeded in its use of political justice?

In a narrow sense, the repressive aim of political justice has succeeded in that individuals perceived as politically dangerous to the continued rule of the powerholders, have been silenced through imprisonment or »clearance«. Such success is however not only short-term in duration but in the final analysis, illusory. Illusory because in a wider political sense, the prosecutions become morally meaningless in that they neither »educate« the people nor convert them to a »conception of the world« of the rulers to use Gramsci's phrase.⁷⁷ Why this result?

Given the fact that Kenyan society has become increasingly closed to politics, public debate on national issues such as development strategies and foreign policy is rendered impossible. Under the circumstances, there is no national consensus. When the government institutes a political prosecution there is no commonly acknowledged value or ideological structure it is aiming to protect. »In a society with an almost universally acknowledged value structure, a defendant may deny all intention of disloyalty, completely submit to the accepted procedures, and with maximum energy try to prove that he has always kept within the society's bounds«.⁷⁸ If this happens, then the established order triumphs because even if the prosecution loses, its rules and procedures would have been acknowledged as just and legitimate by the adversary.⁷⁹ But in a situation where there is no universal value structure, the defendant may »not only deny the ideals for which the court stands, but negate its very authority«.⁸⁰ This is precisely what Kanja does in his petition to the President, when he states that by reason of its history and composition, the Kenyan judiciary cannot be just to a nationalist. Mutai's flight to Tanzania and her subsequent interview also negates the authority of Kenyan courts.

In situations such as Kanja's and Mutai's, the prosecution loses politically in that its attempts to clothe political repression in judicial garments is exposed. In cases such as **Anyona and Kihoro** of preventative repression, the enterring of a **nolle prosequi** by the state is in political terms, an acknowledgement that it stands to lose more by proceeding

76 *Supra* n. 12 p. 411.

77 See generally Gramsci, A. **Selections from the Prison Notebooks**. Hoare, Q. & Nowell Smith, G. (Eds & trans.) New York: International Publishers (1971). He argues that the hegemony of the ideas of the ruling class rather than the coercive power of the state apparatus, explains the strength of a social order.

78 *Supra* n. 12 p. 425.

79 *Id.*

80 *Id.*

with the prosecution than not. This is because in the absence of a universally accepted, or hegemonic political ideology, and absence of a convincing prefabricated alternative reality, the danger that the political defendant may use the judicial platform to debate political issues and widen his political constituency, is a great threat to the stability of a weak political class.

Finally, cases of 'clearance' while succeeding in stopping the Anyonas and Odingas as individuals from participating in the political process, publicise and win great political sympathy and following for their cause. Such barring of candidates not only dramatises and symbolises the weakness of the political leadership, it also 'educates' the people in exactly the opposite way intended by government. The government intends the people to perceive the Anyonas and Odingas as socially undesirable individuals. The people however, increasingly study the ideological merits of the programmes offered by such individuals *vis à vis* existing programmes presided over by the rulers. Moreover, and this is important, the fact that some of the personalities who have been victims of political justice – Oginga Odinga, Koigi wa Wamwere, George Anyona etc – remain some of the most persistent political critics of government policies not only evokes in the people great admiration for their courage, determination and patriotism, but also underscores the fact that political justice 'forever lacks the element of finality'.⁸¹

In concluding the study of political justice in Kenya, it is pertinent to point out the limitations of the present attempt.

The study has essentially limited its focus to an analysis of court decisions. There is however a whole area of judicial, quasi-judicial and administrative mechanisms in the hands of the Executive which are daily manipulated by powerholders to bolster their rule. Thus the Provincial and District administrative structures and procedures in the hands of Provincial and District administrators chiefs and local authority officials need to be studied from this viewpoint. Such an analysis would cover a wider range of victims of political justice than just MP's.

Secondly, the composition of the judiciary as the interface between the executive and the victims of political justice calls for closer scrutiny. Specifically, the composition of the judiciary, its internal regulation, hierarchy and power structure calls for a detailed analysis. The Kamau-Ojwang study: 'Judges and the Rule of Law in the Framework of Politics: The Kenyan Case' though a good introductory study could be usefully developed by placing it in the theoretical framework suggested in this paper.⁸² The fact, for example, that the composition of the bench in all the political cases studied are of non-African origin needs to be closely examined from the viewpoint of executive influence over the judiciary as do their employment terms (i. e. whether on contract or permanent terms).⁸³

81 *Supra* n. 12 p. 427.

82 Kamau Kuria, G. & Ojwang, J. B. *Pub. L.* p. 254 (Autumn 1979).

83 The Members of the judiciary were Abdullah (**Kanja**, **Kikuyu** cases); Simpson (**Muthemba**); Hancox (**Anyona**, **Bondo**), Wicks (**Bondo**) Platt (**Bondo**).

Finally, it is to be emphasised that political justice, is but one method of political repression available to government. Kirchheimer states that it is important:

to emphasize that the prosecutor in our day is only one of a multiplicity of repressive agencies. He has to take his place with those who take away jobs or, as the case may be, low-cost housing from political unreliaables, who cancel citizenship papers, reject passport applications, and refuse honorable discharges from the armed forces. Yet there has to be some coordination and some focal point in repression, even though it may sometimes seem that there is more competition in political repression than any other line of business. And criminal prosecution, as a result of procedural guarantees and the assurance of fully adversary proceedings is still the one method that sifts its material less with an eye toward the politically desirable than the legally attainable results.⁸⁴

Postscript

Three inter-related developments taking place since completing the research and writing of this paper in April-May 1982 signal an intensification of political justice in Kenya. Detentions are back, thus widening the repressive arsenal of an increasingly politically insecure government; the Constitution was amended in June, making the country a **de jure** one-party state, thus further and formally closing avenues of legitimate political opposition and giving the process of 'clearance' an even more undemocratic stamp; and Wang'odu's sedition case, together with two new ones, have received the Attorney-General's consent for prosecution and therefore setting the ground for the first such post-independence trials.

Of the five people already netted by preventative repression, two warrant brief explanation since they are blatant in the extreme. Khaminwa, a Nairobi attorney was evidently detained because he has and was acting for adversaries of the ruling group including Odinga and Anyona in suits against the government and KANU. Anyona was detained because he favoured and publically defended the idea of the formation of a second political party. He was detained **before** the Constitutional amendment declaring a one-party state.

These developments present a very serious challenge to the basis of the legal system, and the fact that the only major professional organ of the Bar, the Kenya Law Society whose objects **inter alia** include safeguarding the Rule of Law has not as much as raised a finger does not augur well for the future.

84 *Supra* n. 12 p. 423.

ABSTRACTS

Political Justice in Kenya: Prolegomena to an Inquiry into the Use of Legal Procedures for Political Purposes in Post-Kenyatta Era

By *O. Ooko-Ombaka*

This study analyses the use of judicial and administrative procedures by the Moi government to consolidate its succession to power following Kenyatta's death. This is the phenomenon termed political justice.

It is divided into two broad sections. The first section on the political economy of political justice provides the theoretical superstructure of the study. It is argued that the degree of political justice is inversely proportional to the political power and confidence of the ruling class. The increased reliance on judicial and administrative procedures by the Moi government is thus located in its relative weakness. The second section, examines through case law, different levels of political justice, namely: the criminalization of politics, cases involving direct attack on established constitutional order, political prosecutions and the use of judicial procedures to subvert the democratic electoral process. The conclusion evaluates the impact of political justice suggesting lines for possible further research.

Problems of National and Regional Identity in Sudan

By *Abdel Bagi A. G. Babiker*

The question of identification plays a particular role in multi-ethnic African states. Racial, regional and national interests are overlapping and their interaction is influenced by the social position of the different groups within the hierarchy system. The attitude of group members vis-a-vis society is changing as far as moral, traditional and cultural identity is concerned, this being a result of intensified relations with other cultures through the media and of the process of urbanization.

On the national level regional particularities often almost disappear when periphery identity is adapted to center identity. On the other hand regional identity can become stronger by the research for identity.

As a country characterized by a large territory as well as ethnical and ecological plurality Sudan is a good example for such ambiguity. By comparing two ethnical groups in the western part of the country – Fur and Nuba – we can observe how the process of fin-