

## Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century

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### Abstract

The drafting and implementation of a new constitution ranks high on the public agenda in contemporary Kenya. The party leaders who formed the government of national unity in early 2008 agreed to produce a new constitution that would meet the aspirations and needs of Kenya's varied peoples and regions and facilitate national development in an equitable manner. Nevertheless, the completion of a new constitution is likely to prove a daunting task if past experience of constitution-making is any guide. This article offers significant perspectives as to potential difficulties in the process of developing a new constitution through a study of twentieth century examples. Four problems are examined which helped to stall or derail the process of constitution-making: the failure of Kenya's political elite to reach consensus, the inability of outside experts to move the process to a successful conclusion, the lack of majority support for *majimbo* or *utaguzi* schemes, and the failure to thoroughly incorporate democratic principles. These issues remain relevant at the end of the first decade of the new century and will likely prove difficult to surmount in the quest to bring a new constitutional dispensation to Kenya.

**Key words:** Constitution; Federalism (Majimbo); KANU; KADU; Tom Mboya

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## Introduction

The challenge of drafting and implementing a new constitution ranks high on the agenda of current government leaders in Kenya. The need for a new constitution has been recognized for the past two decades, but various issues and roadblocks have held back the process of constitution-making. The efforts that culminated in the 2005 referendum seemingly left Kenya at a dead end. However, the election campaign of 2007 and its bloody aftermath highlighted the need for a new constitution. The party leaders who formed the coalition government of national unity in early 2008 gave a commitment to produce a new constitution. As a result, a committee of experts was charged to draft a new constitution.

Some progress has been made in this new constitution-making initiative as a draft constitution was published for public debate in November 2009. Nevertheless, it is far too early to be optimistic that the outcome will be a new and efficient governing document that will meet the nation's current and future needs.<sup>1</sup> The difficulties and tensions that beset the current government a year and a half after its formation suggest that the current initiative faces formidable obstacles. Yet the fact that the process has gotten underway gives grounds for some hope. This hope may be disappointed, however, if those charged with constitution-making continue to ignore or fail to understand the lessons of the past.

This article seeks, therefore, to look to the past as a means of provide some valuable perspectives as to why efforts to craft a new constitution in the twenty-first century have yet to bear fruit. The lessons of the 1950s and 1960s offer important perspectives which should not be ignored. The two decades witnessed the inauguration of the Lyttleton (1954) and Lennox-Boyd (1957) constitutions as well as the constitution implemented as a result of the 1960 Lancaster House Conference (Lancaster House I). In 1963, the self government constitution was inaugurated on *Madaraka* Day (June 1) while December 12 witnessed the coming into force of the independence constitution.

In examining these colonial era constitutions, the article will highlight problems of constitution-making that have continued to stall the process. Four issues, in particular, will be addressed. These include the failure of Kenya's political elite to reach consensus on constitutional goals and the means to attain them, including the inability to compromise. A second focus will be the role of outside experts in the constitution-making. Despite hopes to the contrary, foreign constitutional experts provided negligible impact on these twentieth century constitutions. Thirdly, *majimbo* and *utaguzi*, while not lacking in support among Kenya's political elite, have never enjoyed the support of an overwhelming majority of the population. Insistence on such principles as crucial to constitution-making seemingly flies in the face of democratic norms. Finally, a key element in the lack of success of past efforts to provide Kenya with a workable constitution that would stand the test of time was the failure to implement key elements of democratic governance.

## Lack of Consensus

The ability to reach consensus on a constitutional model has historically never been easy or quick to achieve. Nevertheless, agreement among political leaders as to constitutional forms and goals has always been of critical significance in constitution-making efforts in the twentieth

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<sup>1</sup> Committee of Experts on Constitutional Review, "Harmonised Draft Constitution of Kenya," 17 November 2009.

century or earlier. For Kenya, the experience of the twentieth century indicates a lack of consensus as to the goal of constitution-making and the specifics of constitutions.

Looking at the 1950s, to start, the model set forth by the British government in 1951 for future constitutional development clearly laid down the achievement of consensus as a key ingredient in the process. Secretary of State (SofS) for the Colonies James Griffiths made this clear in announcing British policy and plans in May of that year. He proclaimed that decisions as to Kenya's future constitutions would rest on firm foundations if they were based on agreement among the leaders of Kenya's racial groups (Africans, Arabs, Asians, and Europeans). He thus proposed the establishment of a body where all Kenya's people would be represented; it would consult and make constitutional recommendations to the colonial state and ultimately to the British government. An independent chairman from outside the colony would be appointed, and the SofS was prepared to obtain the services of a constitutional expert to advise on technical questions, if the delegates desired. The consultative body, Griffiths hoped, would be able to reach agreement that could be reflected in a new constitution that could be brought into force either in 1956 or an earlier date, if there was general agreement to do so.<sup>2</sup>

While agreement by all Kenya's racially defined political groups was thus the goal set out at the start of the 1950s, it proved impossible to achieve. The declaration of the State of Emergency in October of 1952 and the subsequent outbreak of the Mau Mau rebellion caused the Kenya and British governments to drop the idea of a multi-racial conference or any kind of inter-racial negotiation. For example, then SofS Oliver Lyttleton told African Legislative Council (LegCo) members in October 1952 that it would not do any good to call together a constitutional body "which meets to disagree."<sup>3</sup> In March of 1953, following notable reverses for the security forces of the colonial state, Lyttleton agreed with governor Sir Evelyn Baring that while no constitutional changes should be undertaken without the concurrence of representatives of all Kenya's racial groups, it did not seem "practicable during the emergency to hold talks of the nature contemplated in the Griffiths' agreement."<sup>4</sup>

The British and Kenya governments revised this assessment during the following year as the problems facing them as a result of the on-going insurgency called for constitutional reform. Nevertheless, the history of the 1954 Lyttleton and 1957 Lennox-Boyd constitutions was marked by an absence of consensus among Kenya's racially defined political elite. This lack of consensus and the likelihood that Kenya's political leaders would not be able to agree caused Baring and the SofS for whom the constitutions were named to work out in advance what they wished to see implemented. There was no real attempt to promote negotiations among the leaders of political groups in Nairobi. Negotiations involving Kenya's political elite therefore proved to be a matter of the SofS imposing the plans on them. In both instances, the Colonial Office (CO) and Baring concluded, in advance, that the assent of some racial leaders was more significant than others. In both 1954 and 1957, the European political leaders as well as those representing the Asian population had to be brought on board. African agreement was not

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<sup>2</sup> Great Britain, *Parliamentary Debates* (Commons), 5<sup>th</sup> Ser., 488 (31 May 1951): 408-09.

<sup>3</sup> Verbatim Report of Meeting of SofS with African Representative Members on 30 October 1952, British National Archives (BNA): CO 822/460.

<sup>4</sup> Baring to SofS, secret and personal, 24 February 1953 and Lyttleton to Baring, secret and personal, 5 March 1953, BNA: CO 822/598.

deemed critical. Thus in neither 1954 nor 1957 was the assent of African LegCo members obtained, but the colonial rulers went ahead to impose the constitutions.

In both instances, this strategy of non-negotiated, imposed constitutions proved unsuccessful. African opposition and refusal to accept the Lyttleton and Lennox-Boyd constitutions doomed both to a much shorter life than their planners had hoped. With the breakdown of the Lennox-Boyd constitution and the multi-racial philosophy upon which it was based in 1959, a different path for constitutional change was set. The SofS's acceptance of the need for a London constitutional conference where all Kenya's political elite would meet to address the colony's constitutional future seemed to promise a return to the Griffiths' policy set out at the start of the decade.

With the start of the first Lancaster House constitutional conference in London in early 1960, hopes of a negotiated constitutional agreement quickly evaporated. There was, unlike in 1954 and 1957, some negotiation between the largely racially defined political groups represented at the conference. However, this inter-racial bargaining produced no bargain.<sup>5</sup> Failure to achieve a comprehensive agreement for a new constitution caused SofS Iain Macleod to impose a new constitution. In a major departure from the 1950s, however, the SofS now viewed African agreement to his plan as most significant. The all European United Party delegation refused to accept the new plan which provided for an African majority in a reconstituted LegCo, but Macleod did not let this European opposition stand in his way.<sup>6</sup>

Although some of the European delegates (those representing the New Kenya Party) accepted Macleod's imposition, the lack of agreement among the political elite over Kenya's constitutional future continued to characterize the post-Lancaster House political arena. The new constitution was implemented in April of 1961, but by that time, demands for constitutional change had become overwhelming. Yet the implementation demonstrated divisions among the political elite. That divided elite, now predominantly African, found organizational focus in two political parties, the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). Moreover, events from April to September moved the elite far apart in terms of a desired constitutional framework for a now soon to be independent Kenya.

These divisions, which initially emerged in the attitudes of the leaders to the two parties to the formation of a government under the terms of the Lancaster House constitution, manifested themselves in bitter disputes in and outside the LegCo following KADU's decision to form a government in April. The division became clear with regard to constitutional issues at the close of the Nairobi talks (September-October 1961) held under the chairmanship of the governor. The aim of the talks was to achieve agreement on the constitutional means of moving to self government and independence, among other things, but the talks broke down in October when KADU leaders interjected their new constitutional vision of regionalism or *majimbo* at the talks. KADU leaders insisted that specific principles associated with their new regionalist ideal must guide future constitution-making. This principle was rejected by KANU leaders, thus setting the stage for a long and controversial struggle over the future shape of the independence constitution at the second Lancaster House conference in early 1962.

There, for the first time, there was extensive negotiation involving the leaders of Kenya's political elite and the British government, led by now SofS Reginald Maudling. Nevertheless, the interchange of views that took place in plenary sessions and the various committees set up at

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<sup>6</sup> Record of Meeting Between the SofS and United Party on 15 February 1960, BNA: CO 822/2359 and Macleod to Macmillan, 16 February 1960, BNA: PREM 11/3031.

the behest of the CO to facilitate agreement on a constitution produced no agreement whatsoever. This was largely the result of the stance of the KADU delegation. Its leader, Ronald Ngala, adamantly refused any agreement unless KADU's basic principle was accepted: that Kenya should have a federal or *majimbo* constitution. KADU's intransigence irritated and frustrated the KANU leadership and Maudling, but Ngala and company refused to budge. Moreover, KADU kept secret its detailed plan for a *majimbo* constitution, not revealing the whole of the party's constitutional model until more than three weeks of the conference had passed. In the end, Maudling and his advisors squeezed out of Jomo Kenyatta and his KANU colleagues acceptance of a two house parliament and the creation of "other governing authorities" for future regions. Building on that acceptance, Maudling produced a constitutional framework that both delegations reluctantly accepted.

For KANU, the acceptance of the framework reflected, according to party vice president Jaramogi Oginga Odinga, a desire to move quickly to self government and independence. When the party won power through the ballot box, it would be free to change the constitution to the unitary form it desired.<sup>7</sup> For KADU, acceptance of the framework owed much to the formula for constitutional amendments included in the framework by the British.<sup>8</sup> Even then, more of the KADU delegation refused to sign the framework agreement than did the KANU delegates.

A key element accepted at Lancaster House II was that a constitution based on the framework would be worked out by a coalition government with equal numbers of KANU and KADU ministers. Given the lack agreement at Lancaster House this was a daunting prospect. KADU and KANU ministers remained divided over the details of the constitution, and it took a year (April 1962 to April 1963) to finalize the constitutional document that came into effect on 1 June 1963 (but was never completely implemented). Here, as in earlier episodes of constitution-making, the intervention of the British CO was critical. Maudling soon recognized that disagreement between the parties and among political leaders was likely to make the achievement of a constitution by consensus very difficult, if not impossible. Thus when he visited Kenya in July of 1962 to try to speed up the process of constitution-making, he forced the leaders of both parties to agree on a way to overcome disagreements as to specifics of the constitution. This was that if the two parties could not agree, the SofS would impose a decision which KANU and KADU leaders would accept as final.<sup>9</sup> That decision provided the basis for finalizing the most controversial aspects of the self government constitution. Maudling's successor, Duncan Sandys, gave final decisions on twenty-five constitutional matters in dispute when he visited Nairobi in March of 1963.<sup>10</sup>

The fact that many significant aspects of the constitution were decided by the SofS pointed to future problems in the achievement of a consensus as to what should constitute the independence constitution. Potential problems became real as soon as KANU took control of the

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<sup>7</sup> Oginga Odinga, *Not Yet Uhuru* (Nairobi: Heinemann, 1967), 229.

<sup>9</sup> Extract from Minutes of the SofS's Sixth Meeting with Ministers of the Kenya Government, 9 July 1962, BNA: CO 822/2239.

<sup>10</sup> These were formally announced on 8 March. Included in the SofS's decisions was his edict that each region should have control of its own civil service. *East African Standard (EAS)*, 9 March 1963 and *Daily Nation (DN)*, 9 March 1963. Decisions of SofS on Points Referred to Him for Settlement, BNA: CO 822/3216.

government apparatus created by the new constitution following victory in the 1963 House of Representatives and Senate elections. KANU ministers quickly set a goal of changing the constitution in significant ways so as to eliminate *majimbo*. They were not successful in their initial attempts to change the constitution since KADU leaders were strongly opposed and the British government reluctant to make wholesale changes. This left the KANU government's demands for changes in the self government constitution to be considered at the third Lancaster House constitutional conference that opened in London in September 1963.

The Kenya government was represented at Lancaster House III by a strong ministerial delegation led by Prime Minister Kenyatta while the opposition delegation, much smaller in numbers, was led by Ngala and Masinde Muliro, KADU's vice president. The conference opened on 25 September, and when it came time to consider the significant changes in the self government constitution demanded by the Kenyatta government, SofS Sandys and his advisers decided not to hold further plenary or committee sessions after the seventh plenary session on 30 September.<sup>11</sup> Instead, Sandys and Governor Malcolm MacDonald met separately with the government and opposition delegations to try to negotiate agreement regarding the constitutional changes demanded by the Kenya government.

In all, the KANU ministers called for more than twenty changes. Most controversial were the demands for a change to a single civil service commission for both regions and central government (rather than the eight called for in the self government constitution), complete central government control over the police, that executive authority of the regions be vested in civil secretaries (the post created in the constitution to replace provincial commissioners), and that in terms of the executive Kenya should become a monarchy at independence (KADU favored a republic).<sup>12</sup> In a separate paper, the Kenya government put forward its proposal for changing the requirements for constitutional amendments. These would now require 65% in both houses of parliament with the amendment being submitted to a national referendum if the bill did not receive the 65% in both houses.<sup>13</sup>

The KADU delegation strongly opposed the latter change as well as the proposed amendments relating to the police, civil service commissions, and executive authority. Despite the efforts of Sandys and MacDonald, no agreement proved possible as the conference moved well into October. Both KADU and KANU delegations threatened to abandon the talks and return to Kenya. In the end, the threat of the latter proved most influential in forcing the British to come down on the side of the Kenya government. The result was another imposed constitution which left KADU leaders most dissatisfied. The independence constitution provided for a single public service commission and gave the central government control over the police. In terms of amendments, the SofS now decided that while basic rights of the individual, the judiciary, tribal authorities, districts, the senate, and the structure of regions should remain with

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<sup>11</sup> Record of Seventh Meeting Held on 30 September 1963 at 10:30 am, BNA: CO 822/3138.

<sup>12</sup> K.I.C. (63) 2, Amendments to be Made to the Present Constitution. Memorandum by the Government of Kenya, 25 September 1963, BNA: CAB 133/215.

<sup>13</sup> K.I.C. (63) 3, Future Amendments of the Independence Constitution. Memorandum by the Government of Kenya, 25 September 1963, BNA: CAB 133/215.

the 75%/90% majorities for amendment, all other amendments would require 75% in both houses. Significantly, this applied to the powers of regional assemblies. The independence constitution also provided for the option of a national referendum which required approval by 65% of the votes cast.<sup>14</sup>

This final constitution of the colonial era thus had in common with earlier constitutions that it was imposed by the colonial power. After long discussions, KADU dropped its refusal to accept the new constitution. This was not because of agreement with many of the changes that resulted from the conference. Rather, it was a product of a now divided party leadership and the fact that some of the amendments opposed by the KADU delegation were not implemented by Britain (e.g. executive authority in the regions was vested in the regional assembly's finance and establishment committee rather than in the civil secretary). Most important was the promise made by Kenyatta to quickly implement the constitution; the latter had been a major demand made by KADU prior to and during the conference. The prime minister promised to transfer all departments and services that were constitutionally mandated regional services to the regions (with the exception of education) by 1 December 1963. The necessary funds would also be transferred from the center.<sup>15</sup> On 19 October; Kenyatta told the SofS that he accepted the amendments on behalf of his government. He and his colleagues would make no further amendments, he pledged, except in so far as these were shown to be "absolutely necessary" in light of subsequent experience.<sup>16</sup>

The failure to agree that marked Lancaster House III thus constituted a continuation of what had characterized constitutional talks since 1951. Kenya's political elite not only failed to agree. More often than not, they refused to even enter meaningful negotiations, bargain, or compromise. In this instance, the failure of the Kenya government to compromise, even from a position of strength, set a most unhappy precedent for independent Kenya.

### **Failure of Expert Assistance**

The lack of success in constitutional negotiations during the pre-independence years also owed much to the failure of non-Kenyan experts to move the process to any kind of agreement. Two examples illustrate this point as constitutional advisers appointed by the CO were not very helpful to the process of consensus building at the first Lancaster House conference in 1960 and the second conference of 1962.

Prior to Lancaster House I, the CO tapped Professor W. J. M. Mackenzie, a political scientist from Manchester University, as constitutional adviser. Besides offering advice to the CO, Professor Mackenzie paid two visits to Kenya during the second half of 1959 and met with leaders of all the racially defined political groups. His visits and advice certainly helped the CO prepare for the conference. His suggestions, for example, set the agenda for the conference.<sup>17</sup> However; his interaction with the Kenya political leaders did nothing to bring them to agreement as to Kenya's constitutional future.

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<sup>14</sup> Great Britain, *Kenya Independence Conference 1963*, Cmd 2156 (London: HMSO, 1963), 19-22.

<sup>16</sup> Kenyatta to Sandys, 19 October 1963, BNA: CO 822/3139. This, like the other letter of 19 October, proved to be a worthless promise.

At the conference itself, Mackenzie circulated papers setting out possible plans for the franchise and legislature under a new constitutional arrangement, but these failed to draw support from the two most important groups at the conference: the African Elected Member (AEM) delegation and the New Kenya Party (NKP) led by Michael Blundell.<sup>18</sup> The NKP delegates and the AEM leaders did later meet and attempt to strike agreement of these matters, but Professor Mackenzie played no part in bringing them together or in the talks themselves. These eventually produced no agreement. In the end, Macleod imposed a settlement at the conference that was accepted by the AEMs and the NKP after a good bit of arm twisting and clever dealing by the SofS. Mackenzie played only a small part in the new constitution as Macleod and his CO advisers drafted and pushed through the plan that provided a breakthrough to a LegCo that promised to have an African majority.

Nevertheless, Professor Mackenzie can be credited with one success at the first Lancaster House conference. That was in his efforts to make sure that federalism, or *majimbo*, was not a part of discussions. He recognized that the United Party had made devolution of power to local government bodies a part of its constitutional plan following its formation in August 1959. This was largely an initiative associated with former members of the Progressive Local Government Party (PLGP), successor to the Federal Independence Party (FIP), who formed a backbone of the United Party. Mackenzie urged party leaders and the officials at the CO to avoid discussion of an *utaguzi* system for Kenya as it was likely to raise emotions on all sides and provoke strong opposition from African and Asian delegates.<sup>19</sup>

While the United Party leaders actually had little enthusiasm for *utaguzi* by the time the conference started, Mackenzie's main success was in convincing the leadership of the NKP, particularly Blundell and Wilfred Havelock, that the issue should not be raised. This was significant because some NKP leaders had toyed with such ideas in late 1958 and early 1959. Havelock devised at least three schemes for devolution during that period. The last, completed in January of 1959, was actually submitted to the CO.<sup>20</sup> By the end of 1959, however, Mackenzie's negative attitude convinced Blundell and Havelock that they should not support any form of federalism or devolution.<sup>21</sup>

Professor Mackenzie's opposition to federalism for Kenya's future meant that the CO did not consider him when seeking a constitutional adviser for the second Lancaster House

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<sup>18</sup> SofS to Officer Administering Government, Kenya, telegram, 2 February 1960, BNA: CO 822/2354. *EAS*, 3 February 1960.

<sup>19</sup> Secret Memo, enclosure in Mackenzie to J. F. Buist (East African Department of the CO), 29 September 1959, BNA: CO 822/1474.

<sup>20</sup> Wilfred Havelock, Adjustment to the Constitution, 12 January 1959, BNA: CO 822/1861 and Papers of Sir Wilfred Havelock (Havelock Papers), KNA: MSS 12/11.

<sup>21</sup> Mackenzie told Blundell, for example, that devolution or provincial autonomy for the white highlands would never work as Europeans hoped. There were far more Africans resident there than Europeans. Blundell to Havelock, 25 September 1959, Papers of Sir Michael Blundell (Blundell Papers), Box 5/4, Bodleian Library of Commonwealth and African Studies at Rhodes House, Oxford (RH), Mss. Afr. s 746. Havelock to Mackenzie, secret, 27 October 1959, Havelock Papers, KNA: MSS 12/12.

conference. Instead the SofS turned to a former colonial civil servant then serving as legal officer for the Commonwealth Relations Office, Sir Ralph Hone. Hone, a former attorney general of Uganda, had considerable experience with constitutions, notably the federal system established in Malaya. He spent parts of December 1961 and January 1962 in Kenya, and attended Lancaster House II as CO adviser.

Hone proved less successful than Mackenzie in bringing the main parties to any form of agreement either before or after the start of the conference. From his arrival in Nairobi, his lack of sympathy for KADU's *majimbo* ideal was apparent. After an initial submission on 11 December, KADU leaders had nothing to do with Hone thereafter.<sup>22</sup> KADU hired their own constitutional adviser, Dr. Edward Zellweger, and worked secretly with him to develop the constitutional plan they presented at Lancaster House II. Hone worked more closely with KANU, particularly those allied to Tom Mboya, as the party put in shape its constitutional model. Hone thus had some influence on the KANU plan, but not KADU's. He also sent reports to the CO in January setting out what he thought might be the positions of KADU and KANU at the conference.<sup>23</sup> The hope in London was that these could be used by the CO as a means of finding some common ground between the constitutional plans of the two parties that might lead to agreement.

This never materialized, but Hone's main contribution to the preparations for the conference was in his advice to the CO regarding KANU's likely stance in London. Hone's discussions with Mboya convinced him that the party was deeply divided between moderates and radicals. He reported to London "that the moderate elements under Tom Mboya's leadership supported by the Europeans in the party" were gravely worried over the activities of the radicals led by Jaramogi Oginga Odinga, Paul Ngei, and others on the left of the party who were, Hone concluded, "almost certainly getting considerable financial and other support from Communist sources." What was particularly dangerous about this left wing faction in KANU was that they would likely not abide by the party's official position on land; after independence free land would be found for the landless and poor.<sup>24</sup> This analysis led Hone to recommend to the CO that British strategy at the conference should be to provoke a split in KANU and encourage Mboya, James Gichuru, and the moderates in KANU to join forces with the moderate elements in KADU.<sup>25</sup>

This recommendation was adopted by SofS Maudling prior to the start of the conference as one of the British aims. It helps to explain why KADU's constitutional plan received some sympathy from the CO, which was, it must be emphasized, totally lacking in support for KADU's *majimbo* plan for Kenya's future constitution. That no split in KANU nor union of moderates occurred in London was largely the result of KADU's stubborn and uncooperative tactics at the conference. Hone's contributions at Lancaster House II, slanted to the KANU

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<sup>22</sup> K.A.D.U. Initial Submission to Sir Ralph Hone, 11 December 1961, Blundell Papers, Box 19/4, RH, Mss. Afr. s 746.

<sup>25</sup> Hone, Conference Prospects, nd, enclosure in Griffith-Jones to Monson, secret and personal, 15 January 1962, BNA: CO 822/2238.

position, did nothing to promote consensus or agreement. For example, a compromise plan drafted by Hone dealing with the subject of regional powers in March was a non-starter.<sup>26</sup>

As the constitutional adviser did little to promote agreement, it was left to SofS Maudling to impose a settlement. Rather than a constitution, Maudling prescribed a framework on which a new constitution could be based. He forced both KANU and KADU leaders to agree by offering both parties something that they had advocated. Reflecting the thinking of Prime Minister Macmillan and himself, Maudling made the requirements for amending the constitution very difficult to achieve, as noted earlier in this article. A coalition government, with equal numbers of ministers from KANU and KADU, was given the task of finalizing the constitution. As noted earlier, this proved difficult as the parties remained deeply split over the specifics of a federal constitution for Kenya. Such was the lack of success with a CO appointed constitutional adviser, moreover, that the appointment of such an adviser for the third Lancaster House conference was not seriously considered.

### **Popular Support for *Majimbo*?**

The difficulties encountered in framing a constitution based on the Lancaster House II framework highlighted an essential factor in modern Kenya history: the lack of broad-based, majority support for *majimbo* or *utaguzi*. Such constitutional plans did not lack for advocates during the 1940s, 1950s, and 1960s, just as in the present day. However, the often impassioned advocacy for systems providing for provincial autonomy or devolution of power and responsibility from the central government to local government bodies never had the support of anything close to a majority of Kenya's population. For the 1940s and 1950s schemes, moreover, the European settler advocates were never able to convince a substantial portion of the colony's European population that these were in their best interests.

During the 1946 to 1948 period, for example, the European Electors' Union considered constitutional plans that would have provided self government for the white highlands while leaving the rest Kenya under colonial control. Such provincial autonomy plans were meant to give Europeans the greatest possible measure of control over their own affairs. A key to supporting such a political system was to make sure that the land in the white highlands stayed in European control.<sup>27</sup> The Electors' Union's Kenya Plan, published in 1949 advocated, on the other hand, "the greatest degree of local government autonomy in non-native areas" of the colony under European leadership. Development and control of local government was seen as key to this which was to provide the means for "the greatest possible executive control by the European community."<sup>28</sup>

These ideals failed to win support from the majority of settlers, and the leadership of the colonial state and the CO were far from being in favor of provincial autonomy or devolution. The CO and colonial state had a far different model in mind as the 1950s opened: multi-racialism

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<sup>26</sup> Record of Third Meeting of Sub-Committee on Governing Authorities Held at 10 am on 12 March 1962, BNA: CO 822/2382. *EAS*, 13 March 1962.

<sup>27</sup> Electors Union, Notes on Prospective Self Government for Kenya Colony, 1946, Electors Union Papers, Box 32/2, RH, Mss. Afr. s 596 and ELECTORS' UNION, Final Report of the Constitutional advance Sub-Committee, Confidential, 1948, Blundell Papers, Box 22/1, RH, Mss. Afr. s 746.

<sup>28</sup> Electors' Union, *Kenya Plan* (Nairobi: East African Standard, 1949), 13.

under a unitary system of government. *Majimbo* ideals remained the property of a small minority among the European population. Influential voices of political leaders such as Earnest Vasey, Blundell, and Havelock were ranged against it.<sup>29</sup>

Nevertheless, the 1950s brought further calls for provincial autonomy from a minority of Europeans. This was a product of continuing European fears for the future brought about by the Mau Mau rebellion and a strong opposition from the *majimbo* advocates to the ideals on which the policy of multi-racialism was based: inter-racial sharing of political power in the future. The leaders of the White Highlands Party were the advocates of federalism. Farmers in the Londiani and Fort Ternan areas of western Kenya, such as B. P. Roberts and A. T. Culwick, continued their advocacy following the party's merger with the Kenya Empire Party in February of 1954 to form the FIP. The leader of the Kenya Empire Party (later chairman of the FIP), Nairobi construction firm owner L. E. Vigar, was not an enthusiast for provincial autonomy, and this proved a source of weakness for the party. However, Roberts used Vigar's weekly magazine, then called *Comment*, to promote federal ideas and to appeal to Europeans.

As a party wedded to segregation and white supremacy, the FIP made no attempt to gain support from African or Asian inhabitants of Kenya. Right from the first, the party's federalist message was heavily laden with anti-Asian rhetoric. At the time of its formation, the party leaders had not worked out a plan for provincial autonomy in any kind of detail. They maintained, nevertheless, that provincial autonomy would appeal to the African population in particular. Africans, Culwick and Roberts maintained, did not want to be governed by Europeans or to utilize western political forms. The African population would be happy if they were organized into provinces on "a tribal basis" with African customary law combined with government "by their own councils" assisted and controlled by European officials appointed by the British government. The European, on the other hand, was "immediately capable of governing his own area."<sup>30</sup>

Culwick, Roberts and friends eventually did work out a provincial autonomy scheme in more detail. In both 1954 and 1955, the FIP produced a federal framework for Kenya's future as part of party policy. The 1954 plan called for separate governments for Africans and Europeans. The former was essential, it was asserted, as African political systems demanded "political forms which are not satisfactory to Europeans."<sup>31</sup> The following year, the FIP published a more detailed scheme in the form of a pamphlet emphasizing separate development and justified by crude racist statements.<sup>32</sup>

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<sup>29</sup>No one was more outspoken in opposition to provincial autonomy and those who advocated it than M. F. Hill, Editor of the *Kenya Weekly News (KWN)*.

<sup>30</sup>KWN, 26 March 1954. L. E. Vigar, "What is Truth?" *Comment*, 1 April 1954; L. E. Vigar, "Whither Kenya?" *Comment*, 27 May 1954. L. E. Vigar, "The Federal Independence Party," *Kenya Comment*, 21 November 1958.

<sup>31</sup>Plan for Constitutional Development of Kenya, copy in BNA: CO 822/1200. Extract from Kenya Special Branch Headquarters Fortnightly Intelligence Summary, No. 19/54 for the Period 8 to 21 September 1954, BNA: CO 822/844. *Comment*, 2 September 1954.

<sup>32</sup>Right at the start of the pamphlet the party stated its first principle. This was: "We will never accept the principle of the Asian having any part in the governance of either the African or

The FIP leadership claimed, however, that its stance did enjoy considerable backing among Europeans living in Kenya. Pressured by its opponents to prove this claim, the party sought to use the 1956 European election as a means to demonstrate the FIP appeal. Party leader Roberts stood against the leader of the European elected members in the LegCo, Blundell, and Vigar opposed Blundell ally Norman Harris for the Nairobi South seat.

Party policy set out in 1955 was amplified by an expanded plan for provincial autonomy in the form of a new pamphlet. The white electorate was told “Your Future Depends... On the General Election of 1956.” The party’s federalism was designed to support certain core principles: that the white highlands were to be “irrefutably for European settlement,” the halting of Asian immigration to Kenya, racially segregated schools, and total opposition to racial intermarriage.<sup>33</sup>

In the election European voters failed to support the FIP position. The party won no seats in LegCo and but 21% of votes cast.<sup>34</sup> Clearly there was little support for provincial autonomy among Kenyans. To make things worse for the FIP, the party split soon after the election. Roberts and his allies sought the expulsion of Vigar, and the latter withdrew together with his supporters to form the Reform Party. This new party called for continued white supremacy but made no reference to *majimbo* in its program.<sup>35</sup>

Beset by these difficulties, FIP leaders decided on a change of course during 1957. Their failure in the election convinced Roberts, Culwick and their colleagues that they must make a direct approach to the CO since it seemed that “everything done by the Kenya Government was devised on some desk in Whitehall” and then sent to Kenya for implementation. Thus Major F. W. Day, a coffee farmer and rancher, visited the CO in April to plead the FIP case. He met with W. A. C. Mathieson of the East African Department. Mathieson suggested to Day that what he and the FIP really wanted was not a self governing province in the white highlands but “a European county in the highlands with a county council with full powers over education and other social services and such matters as agricultural practices and extension services with a government at the center controlled by civil service officials.”<sup>36</sup> The second reason for the FIP change was the result of the first African elections which had seen eight African members join the LegCo in March and adopt a united nationalist stance.

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the European.” FIP, *Policy and Constitutional Principles* (Nairobi: W. Boyd & Co., 1955), 2. Extract from Kenya Special Branch Monthly Intelligence Summary No 8/55, BNA: CO 822/844.

<sup>33</sup> FIP, “Your Future Depends... On the General Election of 1956,” copy in BNA: CO 822/1860. Extract from Kenya Special Branch Headquarters Intelligence Summary No. 4/56 for April and May 1956, BNA: CO 822/844.

<sup>34</sup> *KWN*, 5 October 1956; “The Election Results,” *New Comment*, 5 October 1956. Baring to Lennox-Boyd, secret and personal, 8 October 1956, BNA: CO 822/1201.

<sup>35</sup> Extract from Kenya Special Branch Headquarters Monthly Intelligence Summary No 10 for the period 1 to 30 October 1956 and No 11 for the Period 1 to 30 November 1956, BNA: CO 822/844.

<sup>36</sup> Mathieson to Baring, confidential, 26 April 1957, BNA: CO 822/1860.

Day worked with Roberts, Culwick and western Kenya farmer A. E. C. Prescott to put a new plan before the Kenya public; the emphasis was now *utaguzi*. It was ready by late June and struck a very anti-African tone from start to finish. The FIP thinkers claimed that most Africans were “still very primitive” while the FIP plan would insure that “civilized modes of life shall spread.”<sup>37</sup> As far as the constitutional future was concerned, this should now rest on the development of local government so as to decentralize administration as much as possible. However, only the European dominated local government bodies were then viewed as capable of running their areas efficiently. FIP leaders believed that Africans would be incapable of doing the same in the African areas of the colony. Thus the colonial administrative system would continue.<sup>38</sup>

FIP leaders moved further to develop their devolution plan in 1958. The party identified the extension of powers for county councils in European settled areas and African District Councils in the African land units as the basis for its revised policy.<sup>39</sup> The change in policy was accompanied by a change in name. A party conference at Nakuru in May authorized a change from FIP to the PGLP.<sup>40</sup> A month later, the new party published its constitutional blueprint in the form of a pamphlet titled *Kenya Constitution*. It had much in common with the 1957 plan and called for the “rapid development of local government and Local Financial Control in all areas to the fullest extent possible with sound administration.”<sup>41</sup>

Despite the change of name and policy emphasis, neither the CO nor the majority of Kenyans supported the PLGP plan. British policy for future constitutional change had been set out in the Lennox-Boyd constitution. Any alteration in the constitution had to command “reasonable support among all races.” The PLGP’s *utaguzi* plan did not. It would be very costly as many services provided by government would be duplicated.<sup>42</sup> There was never any possibility that the new plan would be considered for Kenya’s future as SofS Lennox-Boyd told Major Day.<sup>43</sup>

Nevertheless, the changing Kenya political scene that marked 1959 meant that *utaguzi* ideals would continue to be voiced by the PLGP enthusiasts. The April announcement that a constitutional conference would be held to plot Kenya’s constitutional future helped produce a realignment among European politicians. Thus the NKP emerged as a multi-racial party under European leadership. The PLGP leaders opposed the party and its goal of power sharing among the racial groups, and they made common cause with Group Captain L. R. Briggs and his allies in forming the United Party (UP) in August of 1959. While Briggs became party leader, the PLGP stalwart Roberts was deputy leader and Culwick chairman.

These PLGP enthusiasts played an influential role as the UP quickly put before the Kenya public its constitutional plan. An August pamphlet was marked by strong opposition to

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<sup>37</sup>A. T. Culwick, F. W. Day, A. E. C. Prescott and B. P. Roberts, The Kenya Constitution, 25 June 1957, enclosure in Baring to Lennox-Boyd, confidential, 5 July 1957, BNA: CO 822/1860. B. P. Roberts, “A Right Wing Viewpoint,” *New Comment*, 7 June 1957 and Michael Levien, “The F.I.P. Takes Stock,” *New Comment*, 5 July 1957.

<sup>38</sup>The Kenya Constitution.

<sup>41</sup>PLGP, *Kenya Constitution* (Nakuru: Nakuru Press, Ltd., 1958), 1.

<sup>43</sup>Note of Meeting of Major Day with the SofS, 11 September 1958, BNA: CO 822/1860.

racial integration and a call for Kenya to be divided into local government units based on racial and tribal division.<sup>44</sup> Local government devolution was to provide each racial or tribal group full scope to develop along lines fitted to their own ideas. The central government was to rest in British hands, but there would be no legislative branch as the UP called for the abolition of the LegCo.<sup>45</sup>

By the time the first Lancaster House conference began in January 1960, the UP had lost most of its enthusiasm for devolution. Party leaders failed to raise the issue at the conference and, as noted earlier, Professor Mackenzie worked to keep the issue from being considered. The UP leaders rather sought to gain support from Kenya's European population by pointing to what they claimed was a sell out by Britain. The change in policy that opened the white highlands to farmers of other races was an issue that Briggs and others emphasized. The UP now championed the mixed farmer who wished to sell his farm and depart from the colony. This drew considerable support from the European farming community after the conclusion of Lancaster House I as most felt, in the words of an intelligence assessment, "that their future in Kenya was bleak and the sooner they leave the better...."<sup>46</sup> *Majimbo/utaguzi* schemes had little appeal in these circumstances.

Despite a lack of support from the European settler population and the negative attitude of the CO, federal schemes were far from dead. The second half of 1961 witnessed a new approach to *majimbo*, this time from KADU. Just as with the European-inspired schemes of the 1950s, the KADU plan was defensive in nature and based upon concerns over ownership of land. KADU leaders recognized the party's minority status in Kenya as the 1961 election had demonstrated. The party had nevertheless taken the lead in forming a government following that election in the hope that this would provide the opportunity for KADU to lead Kenya to independence. When it became clear that the British government would not agree to this, KADU leaders turned strongly to embrace the concept of regionalism.

This meant a constitution that provided for regional assemblies with power over land as well as responsibility for various government functions (education, health care). The party also made the creation of a democratic and non-authoritarian system for Kenya a key characteristic of its constitutional model. Such a model, it was assumed, would provide opportunities for leadership roles and patronage opportunities for party leaders. It was the second of these aims that clearly distinguished the KADU plan from those propounded by the FIP and its successors in the 1950s. KADU called for an independent republic with a two house parliament and executive which aimed at power sharing (e.g. the cabinet had to include a minister from each region). In particular, KADU's plan called for a head of state who was to be elected annually by the council of ministers. Such a leader could only serve two consecutive terms.<sup>47</sup>

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<sup>45</sup>Ibid., 9-11. Culwick later claimed that he personally drafted the UP scheme. A. T. Culwick, *Britannia Waives the Rules* (Capetown: Nasionale Boekhandel, 1963), 66. The UP's desire to do away with the LegCo drew criticism at the time, and long after the party disappeared this aspect of its plan remains fairly well known.

<sup>46</sup>Extract from Kenya Intelligence Committee Appreciation No 10/60, BNA: CO 822/2107. See also Rift Valley Provincial Intelligence Summary for June 1960, BNA: CO 822/2059.

<sup>47</sup>K.C.C. (62) 16, Memorandum by the KADU Parliamentary Group: Further Constitutional Proposals, confidential, 20 February 1962, BNA: CO 822/2242 and KNA: GO/1/1/12.

KADU tried to achieve acceptance of its regionalism or *majimbo* scheme at Lancaster House II. The party gained some success due to its unity and stubborn tactics. Led brilliantly by Ronald Ngala, the KADU delegation refused to even discuss detailed constitutional issues unless the KANU and British delegations accepted the party's demand for regional assemblies with powers and responsibilities. Eventually the party convinced the British, though not KANU, that six regional assemblies should be created as a basic part of the new constitution as well as a bicameral legislature. Nevertheless, SofS Reginald Maudling insisted that Kenya must have a strong central government, based on the British model of an executive branch, rather than that advocated by KADU. The outcome of Lancaster House II thus represented only a partial victory for KADU. Moreover, KADU gained less than what leaders had hoped for in the self government constitution that was finalized in the end by SofS Sandys when KADU and KANU ministers could not agree on all constitutional issues.<sup>48</sup> Party leaders still had to confront their minority status for the coming universal suffrage elections.

The development of a constitution for self government did not change the reality that a majority of Kenyans in 1962-63 did not support *majimbo*. This fact was graphically demonstrated by the 1963 House of Representatives election. By the time the electoral campaign got under way, KADU's chances of winning a majority in the lower house were slim. The party put forward 59 candidates for the 117 seats; KANU nominated 91 candidates for House of Representatives constituencies. This meant that since KADU could not likely gain a majority and form a cabinet, the party adopted a defensive strategy. A key to this was winning sufficient seats in the lower house and in the Senate to be able to block major changes in the self government constitution. For the upper house, KADU put forward 24 candidates to KANU's 28.<sup>49</sup>

Right from the first KADU made defense of *majimbo* a central plan in its electoral platform. The party manifesto reminded voters that KADU had struggled hard to achieve a regional constitution while suggesting that KANU leaders wished to change the constitution if they won power.<sup>50</sup> KANU, on the other hand, made no mention of the constitution or *majimbo* in its manifesto.<sup>51</sup> KANU's silence on the issue changed, however, as the campaign began to pick up steam. Party general secretary Mboya issued several statements claiming that the constitution was not permanent and would be changed following a KANU victory in the elections. Mboya refused to admit that his party had agreed to the self government constitution

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<sup>49</sup> Kenya Special Branch, The General Election-1963, secret, 6 May 1963, BNA: CO 822/3166. Another huge advantage was in the external funding KANU received. According to a Special Branch estimate, this amounted to more than £150,000 from foreign sources. KADU obtained little or nothing from such sources. Kenya Special Branch, An Appreciation of the Kenya General Election and the Newly Formed Government, secret, 11 June 1963, BNA: CO 822/3061.

<sup>50</sup> KADU, *Uhuru na Majimbo Sasa!* (Nairobi: 1963), 1. *EAS*, 25 April 1963.

<sup>51</sup> KANU, *What a KANU Government Offers You* (Nairobi: 1963). *EAS*, 19 April 1963.

and insinuated that electoral success would give KANU the right to make amendments that would remove regionalism.<sup>52</sup>

The outcome of the House of Representatives poll gave Mboya and KANU reason to claim a mandate for constitutional change and that the majority of voters were anti-*majimbo*. Kenyatta as leader of KANU thus formed Kenya's self governing cabinet. In the end, KANU held 72 seats in the lower house to KADU's 32; the African Peoples Party (APP) held 8.<sup>53</sup> In the Senate vote, KADU's defensive strategy paid off as the party and its APP ally won 17 seats and KANU 21.<sup>54</sup>

Almost as soon as the new government took office on *Madaraka Day* (1 June 1963), Mboya, Kenyatta, and other party leaders launched Kenya's first change the constitution campaign. For example, Mboya traveled to London in June to impress upon SofS Sandys the need to amend the constitution and to press for a date for independence to be set. He was successful with the latter initiative, but not the former. Odinga, as Minister of Home Affairs, undertook two initiatives in June and July aimed at significantly reducing the powers and responsibilities of the regional assemblies set up under the self government constitution. Neither was successful, but these and other attempts to change the constitution prior to the third Lancaster House constitutional conference, which KADU leaders strongly opposed, pointed to difficulties in obtaining agreement on the independence constitution.

As noted earlier in the article, no consensus was possible at Lancaster House III. Faced with threats by Kenyatta and his ministers to abandon the talks, return to Nairobi, and declare Kenya independent, Sandys gave in and made several changes in the self government constitution. This, in retrospect, was clearly the first step in the dismantling of *majimbo*. The British decision to accede to some of the KANU demands represented the CO's view that KANU represented an overwhelming majority of Kenya's voters. Britain's decolonization plans had always emphasized the need for a regime friendly to British interests and able to provide stability and safety for British economic interests in Kenya. It was clear by October that the Kenyatta government was committed to doing just that. It was soon clear also that the new government would stand with the west in the cold war, another important goal of British decolonization policy so far as Kenya was concerned.<sup>55</sup>

### **Failure to Entrench Democracy**

A final characteristic of the constitutions that marked the 1950s and early 1960s was the failure to implement a democratic system. Until the 1963 elections, there was nothing like a representative system of government. Elections were held on a communal basis prior to 1961 when the first common roll election was carried out, though there was a far less than universal

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<sup>52</sup>For example, *EAS*, 15 May 1963.

<sup>53</sup>An Appraisal of the Kenya General Election and ...., BNA: CO 822/3061. The APP was a party, led by Paul Ngei, that broke away from KANU. Ngei formed an electoral alliance with KADU.

<sup>54</sup>*Ibid.* Three Senate seats, all in the Northeastern Region, were not filled as the Somali resident there boycotted the 1963 elections.

<sup>55</sup>Kenyatta had already made his famous forget and forgive speech to European settlers. *EAS*, 13 August 1963; *DN*, 13 August 1963.

suffrage associated with the poll. Neither did the constitutional framework provide for responsible government as, until 1961, the majority of ministerial positions in the executive were held by civil servants. Thus both the legislative and executive branches in the late colonial constitutional order could not meet many of the basic criteria associated with democracy.

For the executive branch, a key characteristic after 1954 was an increase in the number of non-official ministers. Following the implementation of the Lyttleton Constitution there were eight. The holders of portfolios were racially determined so as to fulfill the aim of Britain in establishing a multi-racial executive. The makeup of the council of ministers did little to reflect the colony's population. The great majority of the population was African, but only a single African served as a minister between 1954 and 1961. The 1954 constitution provided for five European settlers as ministers, on the other hand. The pre-1963 constitutions presented another non-democratic feature in addition to the number of portfolios for each racial group. The two most important and critical portfolios, finance and agriculture, were always held by European settlers. Only in 1962 was a non-European placed in charge of finance while the tradition of a European farmer serving as minister in charge of agriculture continued until the 1969 election. After 1962, moreover, another non-democratic factor entered into the executive as far as the ministry of finance was concerned. The portfolio was treated as the exclusive preserve of a single ethnic community: the Kikuyu. During the Kenyatta era, as during the Kibaki presidency, only Kikuyu (and Meru in the case of Kibaki's first government) were favored with this significant post. Daniel arap Moi departed from the practice during his long presidency, but most of the men who served in the post were Kikuyu.

Also significant with regard to the executive was the lack of accountability to the legislature that marked the period prior to 1963. Under the Lyttleton, Lennox-Boyd, and Lancaster House I constitutions, the governor had the power to nominate unofficial members of the LegCo. This meant in practice that the council of ministers could never lose a significant vote in the legislature and, even more important, a vote of no confidence in the executive could never succeed as such nominated members (as well as the ex-officio members) had to vote as the government desired. Independent Kenya has continued to experience a lack of accountability by the executive, though for different reasons than noted above.

For the legislative branch, on the other hand, the non-democratic character of the electoral system stands out during the late colonial period as after independence. Until 1963, for example, some racial groups (Asians, Arabs, and Europeans) enjoyed universal suffrage, but Africans did not. Only with the Lennox-Boyd constitution was parity between the European elected members and members of other racial groups altered. Even then there was established parity in numbers of African and European elected members. The Lancaster House I constitution provided reserved seats for Asians and Europeans, but the latter had ten and the former eight in spite of the fact that the Asian population in Kenya was twice as large as that of the European.

Even more significant, the electoral system of colonial Kenya was characterized by rural bias and gerrymandering right from the time of the first elections in 1920. European elections from that date to 1956 were characterized by the over representation of the rural areas and the under-representation of Nairobi. The urban area, particularly after World War II, held more than half the European population, but the majority of European members of LegCo were elected from rural constituencies with less than 2,000 voters.<sup>56</sup> This over representation of rural areas did not change after independence, and it remains a hugely undemocratic feature of the Kenya constitutional order crying out for change today.

An even more critical negation of representative democracy may be noted in the late colonial period in the form of ethnic gerrymandering. This was a factor insisted upon by the colonial state for the first African elections in 1957. The constituencies were arranged and voting qualifications set so as to make sure that at least one Kamba and Kalenjin candidate be elected to LegCo while at the same time making it difficult (e.g. passing a loyalty test) for any Kikuyu candidate to be elected.<sup>57</sup> This was because the latter were seen by the governor to have caused the state of emergency and Mau Mau rebellion while the former ethnic groups provided the bulk of the local security forces that fought the rebels. The election produced just such an outcome as no Kikuyu was elected and Kamba and Kalenjin members took seats. When additional seats for African elected members were created in 1958, ethnic considerations continued to hold sway. In an interesting about face, Governor Baring and the CO now desired a Kikuyu to be in LegCo (elected by loyalists in Central Province of course). Buist at the CO recognized that the recommendation represented an attempt “to reintroduce the Kikuyu to a political position more in accord with their numbers and education, and in particular give their tribe a chance a securing a further elected member, presumably a moderate, as a reward for behaving so far.”<sup>58</sup> Constituencies were structured so as to insure the return of a second Kalenjin and Kamba member as well as a Maasai. On the other hand, the colonial state made certain to structure the constituencies for the 1958 election so that no Luo or Luyia would be elected.<sup>59</sup> This was because Luo members Odinga, Mboya, and Lawrence Oguda together with the Luyia Muliro had distinguished themselves by what the colonialists viewed as radical nationalist demands for constitutional change and a campaign of non-participation in the executive. Here again, ethnic electoral engineering was successful from the perspective of the colonial state.

Unfortunately the ethnic based electoral system, often at odds with concepts of majority rule and democratic governance, has continued to characterize Kenya down to the present. It was embedded in the system of constituencies created for the self government election in 1963 and really never changed. For example, five constituencies were created in the Northeastern Region where the population numbered just over 290,000. The Gusii, with a population of 519,000 received six seats and Embu district with 293,000 inhabitants had two constituencies. Nairobi had only seven seats. Perhaps the classic example came from Western Region where constituencies were created for the Saboat and Maragoli (Logoli). The latter constituency had more than four times the population of what became Mount Elgon constituency.<sup>60</sup>

A fair and balanced system of representation, which took account of the will of the majority while protecting minority rights with the impact of ethnicity kept to a minimum, had

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<sup>57</sup>Governor’s Deputy to SofS, telegram, 20 December 1957, BNA: CO 822/1425.

<sup>59</sup>EAS, 27 March 1958. Odinga, *Not Yet*, 153-54.

<sup>60</sup>Population figures were taken from the 1962 census. For complete detail see Great Britain, *Kenya: Report of the Constituencies Delimitation Commission*, Cmnd. 1921 (London: HMSO, 1963). The commissioners provided a rather brief justification for the ethnic emphasis rather than population. They wrote: “In certain cases strong tribal affinities or a close community of interest have induced us to delimit constituencies well below what might be considered the mean figure for a constituency, having regard to the total population of the country.” *Ibid.*, 3.

thus yet to be achieved at independence. It remains a huge challenge facing constitution makers at the end of the first decade of the 21<sup>st</sup> Century. The composition and selection of an upper house in a bicameral legislature provides one example. The independence constitution's provision of a senator for each district entrenched ethnicity and flew in the face of majority rule.<sup>61</sup>

The history of constitution-making at the end of the colonial era suggests, moreover, that solutions to contentious constitutional issues will not be easy to find. Heeding the lessons of the past is one important way to start. Consensus is crucial, but this must be based on a sincere appreciation of Kenya's problems and needs and a willingness to compromise in order to achieve a viable constitution. A particularly critical problem that requires such appreciation and compromise is the place of *majimbo* or *utaguzi* in a new constitutional order. This is especially when it comes to the shaping of regions, counties and their boundaries. The advice of outside experts can certainly play a positive role as well, but such experts are not likely to provide the critical support to move constitution-making to a successful conclusion. Popular will and agency must find its voice and exercise influence as never before if success is to be attained in this critical endeavor.

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<sup>61</sup>For example, the Somali were to have three senators, the same number as the Luo and more than the Gusii, Embu, or Meru. KADU's proposal at Lancaster House II called for seven members of the upper house from each of the six regions the party projected. The members were to be elected by the regional assemblies sitting as electoral colleges.

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