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HALF A CENTURY OF THE POST-COLONIAL JUDICIARY AND STATE-FORMATION: THE AFRICAN EXPERIENCE

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Underlying my presence here is the idea of bringing together in Nairobi one senior scholar distinguished in the law and another senior scholar steeped in the study of governance. I am grateful to the Chief Justice of Kenya and the Kenya Judiciary for casting me in the role of the political analyst. I will be followed tonight by Professor Robert Martin, a distinguished legal mind from Canada.

I am a guest of Kenya's Chief Justice, supported by his colleagues, especially Judge Joel Ngugi as the central coordinator of these events.

We are also indebted to the University of Nairobi for welcoming us to their campus, especially the use of this massive lecture hall. I am truly impressed by the number of judges, magistrates and other practicing legal minds present in this audience. I recognize old friends, and look forward to cultivating new ones. Bless you all.

My lecture in Nairobi has attracted people from as far afield as Kampala in Uganda and even further from Johannesburg in South Africa. But here there are also friends from the Jomo Kenyatta University of Agriculture and Technology, where I was privileged to serve as Chancellor for six years. I am truly among friends.

Since I last lectured on this campus of the University Nairobi many years ago my dear country of Kenya has elevated me to the status of Commander of the Burning Spear, First Class. On the day of *Mashujaa* (national heroes) I was flattered to have been recognized as a *shujaa* by Kenya's Head of State.

My claims to the legal profession include learning from my Dad who was Chief Kadhi of Kenya, and from one of my sons who is a distinguished Professor of Law at the University of Virginia. I also once served interim as Dean of Law at Makerere University in Uganda from 1969 to 1971. The Rule of Law has been part of my upbringing.

THREE BRANCHES OF GOVERNMENT

Let me begin the lecture with observations about the initial post-Colonial African experience of the three branches of government—the legislative, the executive and the judiciary. As the Colonial era was coming to an end the empowerment of indigenous Africans started with the legislative branch. The legislature on the eve of independence was often referred to as “the Leg.Co,” which was an abbreviation of “the Legislative Council” in British Africa.

The political empowerment of indigenous Africans began with the gradual Africanization of the legislature. The process was gradual, beginning with one or two Nominated Members of Parliament. It took a while before elections for African parliamentarians were gradually implemented.

Those were the days when oratory in the English language had high political value. Kenya’s Tom Mboya became one of the most dazzling orators. He became an international figure. When I met Martin Luther King, Jr. in New York in 1961, and mentioned that I was a Kenyan student, Dr. King immediately started discussing Tom Mboya in friendly terms and with admiration. Martin Luther King was monitored for the company he kept. The FBI was the big brother watching.

In both British and French colonies initial empowerment of Africans started with creating African legislators. The most remarkable aspect of French policy was the admission of colonial Africa into French metropolitan institutions in Paris. Both Léopold Senghor of Senegal and Felix Houphouët-Boigny of the Irovy Coast were parliamentary deputies in France for many years before the independence of their respective countries. The judiciary was more purely colonial.

In Kenya the Africanization of the Executive Branch started when Jaramogi Oginga Odinga struck a blow for democracy in the last days of colonial rule. Odinga was invited to the

Residence of the British Governor of Kenya, Sir Patrick Renison, and offered the leadership of the first African government in Colonial Kenya. The event occurred in Government House (now called State House) in Nairobi in 1960. The British Governor and the Kenyan nationalist were both standing when the offer was made. It seemed to be the chance of a lifetime. It turned out to be Oginga Odinga's last opportunity to become Premier of Kenya on the eve of independence. Oginga Odinga is reported to have responded as follows to the Governor:

If I accept your offer, I will be seen as a traitor to my people. The British cannot elect me leader to my people . . . Kenyatta is around, just here at Lodwar. Release him and allow him to lead us; he is already our choice.

Sir Patrick Renison was temporarily stumped. He then summoned the driver to take Mr. Oginga Odinga back to his native quarters in Nairobi. He was monitored closely.

We now know that Oginga Odinga struck a blow against external selection of African leaders. He had sacrificed what turned out to be his last opportunity to lead Kenya. His incumbency could have transformed the ethnic configurations of post-colonial Kenya. If Oginga Odinga has accepted the Governor's offer, the Jaramogi could have presided over the release of Jomo Kenyatta, and Kenyatta might have become Odinga's Vice President instead of the other way round.

Odinga's first blow in favor of democracy was to reject external selection of African leaders, at enormous cost to his future presidential aspirations.

Oginga Odinga had later prospered under KANU first as Vice-President of the party, then as Minister for Home Affairs (1963–1964) and then as Vice President of Kenya and Minister without portfolio (1965–1966). He had other portfolios, but never became President of Kenya.

The Kenya colonial judiciary had convicted Kenyatta at Kapenguria. The colonial executive later emancipated him.

Jomo Kenyatta was released from detention not long afterwards, in time to lead the Kenya African National Union (KANU) to an electoral victory in 1963. Jomo Kenyatta became Prime Minister of independent Kenya in December of that year.

The 1960s were years of sweeping constitutional change all over Africa. Kenya abolished neo-federalism (*majimbo*) and became more of a unitary state. The office of President was created in Kenya, Tanzania, Uganda and elsewhere—instead of Prime Minister. The one-party state became popular in one African country after another. The motives in most cases were to consolidate the power of those who had won the first post-colonial elections.

But a new concern arose. How was political succession to be implemented? How was power to rotate either by elections or by other means?

Jomo Kenyatta died in office in 1978. In conformity with the Constitution he was succeeded by his Vice-President Daniel arap Moi. This second Kenya President kept on being re-elected without opposition as long as Kenya was a one-party state. Presidential and parliamentary elections became more competitive when the multiparty system was restored, and term limits were instituted.

The elections in 2002 in Kenya defeated KANU for the first time and KANU's Presidential candidate, Uhuru Kenyatta was defeated. Mwai Kibaki triumphed to become the third President of Kenya.

Kenya experimented with a second politician called Kenyatta through the electoral process instead of by hereditary succession. Egypt under Hosni Mubarak had been preparing Gamal Mubarak to succeed his father as President. Libya, under Muammar Gaddafi was preparing his son Seif el Islam to succeed. Both those Egyptian and Libyan plans were sabotaged by the Afro-Arab Uprising of 2011–2012. Is Arab Africa in the process of democratization? The euphoria was premature.

Political dynasties are families who have exerted disproportionate influence on the politics of their societies. If they are very successful they may produce more than one Head of State or Head of Government. But at the very minimum political dynasties have produced political leaders in varied ranks of the political process.

In the United States, the Bush family has rapidly become a political dynasty. That dynasty has so far produced two presidents—George Herbert Bush and George William Bush. It is probable that there will be a third President Bush—President Jeb Bush following his career as Governor of the State of Florida.

The Kennedy family has also been a political dynasty. One brother (JFK) became president; another (Robert) became Senator and then Attorney General, and the third (Edward) had been Senator and would probably have become president but for the tragedy at Chappaquiddick. The American judiciary was minimalist in intervention.

The Odingas in Kenya have also become a dynastic family. Jaramogi Oginga Odinga rose as high as Kenya's Vice-President, and exercised almost equal power as Minister of Home Affairs. But his dream of becoming President of Kenya remained forever elusive—partly because of artificial impediments put in his way by rival political forces.

It has been the politicization of Raila Odinga which has turned the Odinga family into a political dynasty. Raila has become a second Odinga force in Kenya politics. He ran twice for President, but his highest rank was that of Prime Minister.

By a twist of destiny, the Kenyattas have also been evolving a political dynasty. In 2002 Uhuru Kenyatta attempted to become President of Kenya like his father, Mzee Jomo Kenyatta. But Uhuru Kenyatta became for a while a *de facto* leader of the opposition. In 2013 Uhuru was at last elected the fourth post-colonial President of Kenya. Uhuru Kenyatta is also young enough to ascend, in like manner, to the pinnacle of power in the future.

Asia has experienced a phenomenon which might be characterized as *female succession to male martyrdom*. A male leader is assassinated in a country like Sri Lanka (previously Ceylon) and a female relative emerges as a political force to take his place. Mrs. Bandaranaike rose to become future Prime Minister in the wake of the murder of her husband.

In Pakistan, Zulfikar Ali Bhutto was executed as Prime Minister. Over time his daughter Benazir Bhutto became Prime Minister of Pakistan twice.

In Bangladeshi history, Sheikh Mujib Rahman and General Muhammad Zia-ul-Haq were killed. Rahman's daughter and Zia's widow rose to exercise ultimate political leadership in Bangladesh.

In Indonesia, Megawati Sukarnoputri eventually succeeded her father, the late Sukarno, as Indonesia's Head of State.

As indicated, Africa is revealing a pattern of "*male succession to male heroism*" rather than "*female succession to male martyrdom*." This African tendency has included developments in the Democratic Republic of the Congo [DRC]. Assassinated President Laurent Kabila has been succeeded by his son, Major General Joseph Kabila.

In the Republic of Togo, the long presidency of His Excellency Gnassingbé Eyadema was succeeded [by fair means or foul] by the Presidency of his son, Faure Gnassingbé.

Both the DRC and Togo have been cases of interfamilial succession by military means. The rise of Raila Odinga and Uhuru Kenyatta to national prominence in Kenya have been through the forces of democratization rather than through military intervention.

THE JUDICIARY IN TRANSITION

The post-colonial judiciary in post-colonial Africa was the slowest to be Africanized or indigenized among the three branches of government. Sometimes this resulted in the Pan-Africanization of the judiciary. Judges could be hired from other parts of Africa to serve in countries other than their own.

Milton Obote's Uganda hired Sir Udo Udoma from Nigeria to serve as the Chief Justice of Uganda. Julius Nyerere had for a while an open door policy for lawyers from global Africa to practice in Tanzania. The Chief Justice in Dar es Salaam was from the West Indies.

Non-indigenous citizens of East Africa [such as local Europeans or local Asians] rose very high in the legal profession long before indigenous citizens could compete. The Chief Justice of Kenya was for a while a European. Kenya had Indian lawyers like Inamdar going back to the 1940s.

Why were the executive branch and the legislative branch easier to Africanize or indigenize than the judiciary? Legislative and Executive branches always consist of politicians. These politicians could be drawn from almost any area of expertise.

Politicians in Africa have been drawn from the commercial class, from academia especially in the social sciences, from Trade Unions, from among farmers, and indeed from lawyers. In short, Politicians come from diverse backgrounds.

On the other hand, the Judiciary is drawn from lawyers, a more specific expertise. The law itself has a variety of sub-fields, but not as wide a range as that of politicians. Indigenous Africans were much slower to be trained in the law than were local Indians or local Europeans.

But we should bear in mind that some African countries created indigenous African lawyers much earlier than other countries did. British West Africa did so earlier than did British East Africa. French-speaking Africa had fewer lawyers than did Commonwealth Africa.

But even within East Africa alone Uganda in the 1960s had more African lawyers than either Kenya or Tanzania. But a remarkable contradiction developed in Uganda. The Judiciary had been Pan-Africanized with the appointment of a Nigerian as Chief Justice [Sir Udo Udoma].

But did the Chief Justice legitimize *tribalism* within Uganda following the 1966–1967 political upheaval? Sir Udo Udoma helped Milton Obote justify his ouster of President Sir Edward Mutesa. Obote's imposition of a new Constitution in 1967 was also legally legitimized by the Judiciary.

At stake was whether the executive branch at the center under Obote had the Constitutional qualifications to abolish such sub-state kingdoms as the Kabakaship of Buganda and the provincial monarchs of Buyoro, Toro, and Busoga.

After 1966 Uganda demonstrated the paradox of entrusting the Judiciary to a Nigerian Chief Justice—who in turn lent legitimacy to sub-national ethnic confrontations.

But with regard to the abolition of the Uganda monarchies by the 1967 Constitution, Abu Mayanja, a distinguished lawyer, was prophetic about the consequences. He argued that those

who abolished the small kingdoms of others ended up creating a mega-kingdom for themselves. A Uganda without traditional kings could become a Uganda with a super artificial king [Parliament under Obote July 1966–1967].

But on the whole Abu Mayanja regarded the 1962 Constitution on the whole as a liberal achievement worth defending. Hence his careful professional critique of the 1967 alternative Constitution which Obote rushed through Parliament after the crisis of 1966.

Contrary to widespread belief, Abu Mayanja was not detained because of his critique of the 1967 Constitution—a critique which was published in *Transition* Magazine. He was detained because of a *letter* he published in *Transition* accusing the Obote government of nominating new judges on the basis of tribalism. Abu Mayanja pretended that he did not believe the rumors which alleged that the Uganda Judiciary was being tribalized. But it was obvious to the reader of the letter that Abu Mayanja believed those rumors and was in the process of spreading them.

He and Rajat Neogy, the Editor of *Transition*, were promptly detained. I issued at Makerere a statement of public protest. My protest became international news. Obote's Office invited me to attend a particular session of Parliament. I regarded my attendance as a command performance. The executive was about to abuse the legislative branch. I sat in the gallery as Milton Obote denounced me for teaching sedition at Makerere. In a speech in the Main Hall at Makerere I had earlier argued that the people of Ghana were less terrified of their soldiers in the streets than were the people of Uganda of their soldiers. Obote in Parliament used my Uganda-Ghana comparison as an example of sedition. The Executive Branch assumed a judicial role.

Uganda radio that night was full of the President's speech and the attack on "the Professor of Political Science." In those days I was Uganda's only Professor of Political Science. I attended some diplomatic party that night. Obote's speech was the talk of the evening. Chief

Justice Sir Udo Udoma was astonished when I told him I had been summoned by the President's Office to attend the Presidential reprimand. His theory was that Obote summoned me for a public reprimand in order to avoid having to expel me or detain me. Obote was under pressure to be tougher with me. Sir Udo Udoma suggested that the President probably expected me to seek a private audience with him. The next day I asked to see the President, and the request was promptly granted.

I spent several hours at the President's Office. My brief was not a plea for Abu Mayanja and Rajat Neogy as prisoners, but a plea for freedom of expression in Uganda. I genuinely regarded the event as a major step backward in the story of Uganda as an open society. Obote was surprised that I had not gone just to beg for the release of my friends, but to argue that the whole approach of locking up writers and editors for the views they expressed was a major deterioration of the quality of intellectual life in Uganda. The executive was detaining without trial.

I suspect that was the origin of a decision made by the government to ask the Mayor of Kampala to arrange a public debate in the Town Hall between Akena Adoko, Head of Intelligence, and myself about "*The Role of African Intellectuals in the African Revolution.*"

But at my actual meeting with Obote following the detention of Abu Mayanja and Rajat Neogy, Obote explored another idea. Why did I not take over *Transition* and edit it myself? It did not occur to Obote that he was asking me to stab Rajat and Abu in the back. I simply said that was impossible.

I was subsequently allowed to visit both Neogy and Abu in detention.

Neogy was stripped of his Uganda citizenship and then tried in a court of law. The Judiciary was sufficiently independent that Neogy was acquitted. He and his magazine went into exile in Ghana. Abu Mayanja was eventually released.

As for the subsequent debate between Akena Adoko and me in the Kampala Town Hall, it did become a major political and national event. Some Kampala schools were closed so that students could attend. There were loud speakers outside the Town Hall because of the massive crowds. It was during that debate that I defined an intellectual as “a person who has the capacity to be fascinated by ideas, and has acquired the skills to handle some of those ideas effectively.”

Akena was the most powerful member of President Obote’s relatives. To Akena Adoko’s argument that African intellectuals had to be politically committed, I replied, “Perhaps, but political commitment should not be confused with political conformity.”

Akena Adoko was at the time the second most powerful civilian in the country after Milton Obote. But in January 1971 that power configuration ended. Idi Amin staged a coup, and Uganda entered a whole new phase of history.

Abu Mayanja became a Minister under Idi Amin. One evening Mayanja came to my house at Makerere to ask if I would agree to serve as a special Political Adviser to President Amin. Was I prepared to be the equivalent of Henry Kissinger if Idi Amin was the equivalent of Richard Nixon? Could I play Kissinger to Amin’s Nixon? Although Idi Amin himself did not use that analogy, Abu told me the invitation to me was from Idi Amin himself.

In those days one did not say “NO” to Idi Amin outright. I asked for time. I said I had lecturing engagements in Britain. Could I respond to the invitation upon my return?

Abu and I agreed that if I did not want to play such a role, I would simply be silent on the issue upon my return. Idi Amin was bound to have moved to other ideas by that time. When I

returned from England, I told Abu my real answer of “No”—but silence was a better answer to Amin.

Idi Amin did move to something else relevant to this saga between rulers and intellectuals. Idi Amin started a dialogue with apartheid South Africa. One of his ideas was to send to South Africa brilliant African minds to convince White people that Black people could *think*. Ali Mazrui was supposed to be Exhibit A. I was in the audience in the Main Hall at Makerere waiting to be addressed by the President. Idi Amin summoned me towards him and started whispering his idea of sending me to South Africa as an intellectual exhibit. I was alarmed but we promised to discuss the concept later.

When, through Abu Mayanja, Idi Amin wanted me to play Henry Kissinger, I could avoid the role by a clever strategy of silence. But when Idi Amin wanted me to play the role of *super intellectual envoy*, my only hope was *prayer*. Fortunately, my prayers were answered. The apartheid regime in South Africa declined Idi Amin’s offer. The South Africans preferred government to government negotiations and contacts before experimenting with people to people. The White South Africans were not enthusiastic about Black intellectuals on the loose in Pretoria. Idi Amin’s anti-apartheid experiment collapsed forever.

RELIGION AND THE LAW

Former British Africa attained independence with at least two systems of law—the British colonial legacy itself and the indigenous African customary law. The Anglo legacy was highly institutionalized with courts, judges, jails, police and elaborate texts of law.

Indigenous African customary law, on the other hand was far less institutionalized, relying heavily on chiefs and colonial administrators for implementation.

In countries like Kenya and Nigeria there was a third system of law—Islamic law with its Kadhis courts.

In the interest of full disclosure, I should mention that my father was the Chief Kadhi of Kenya during the colonial period. Indeed, the Mazrui extended family has played disproportionate roles in the scheme of Kadhi's courts from the 1930s to the first decade of the 21st century.

Wiser men than me have articulated the following:

“Government is a contrivance of human wisdom to provide human wants. Men have a right that these wants should be provided for this wisdom. . .

. . . It is not what a lawyer tells me what I *may* do, but what humanity, reason and justice, tell me I ought to do.”

—Edmund Burke, Reflections on the Revolution in France

The Western legal tradition leans towards the open society. The Sharia and African customary law lean towards the compassionate society. That is a major reason why the Muslim Brotherhood triumphed in the first free and fair elections in Egypt's history in 2012. For decades the Muslim Brotherhood had operated as a charitable and compassionate organization among the poor. Free elections in Tunisia had also been won by Islamist parties.

While Arab Africa is experiencing this contest between secularists and Islamists in Constitution-making, South Africa after apartheid has embraced Western liberalism more

completely in its own Constitution. Indeed, the South African constitution has been widely described as the most liberal in the world, and not merely in Africa. South Africa has even embraced gay rights and same-sex unions, when most of the Western world and most of the States in the United States are still hesitating in recognizing same-sex unions.

Ironically, South Africa's neighbor, Zimbabwe, under Robert Mugabe has been close to being homophobic. Mugabe himself has personally denounced homosexuality, although independent Zimbabwe had for a while a homosexual President, President Banana.

Africa has extremes of legal attitudes to homosexuality. The most homophobic (anti-homosexual) seems to be Uganda, which had at one time even considered making homosexual practices liable to the death penalty. But international outrage finally led to the withdrawal of the death penalty.

More recently Uganda has been considering whether to criminalize even *knowing* a homosexual without reporting him or her to the police.

But on the whole, African laws against homosexuality are seldom enforced against lesbians. On the contrary, African customary law has sometimes accepted some versions of same-sex lesbian marriages. It is mainly male homosexuality that is regarded as repugnant.

It is worth considering that for centuries Great Britain legalized lesbianism while outlawing male homosexuality. But post-apartheid South Africa has now legalized both. South Africa has also abolished the *death penalty*—way ahead of most other African states.

FROM THE IMPEACHMENT GAP TO THE MILITARY COUP

It may be one of the major constitutional gaps in post-colonial institutions that the *impeachment process* was not available for disgraced or unpopular members of the Executive or Judicial branches short arbitrary ouster.

When Kwame Nkrumah wanted to get rid of his Chief Justice he unilaterally sacked him—instead of using an impeachment process in parliament.

Even worse was the situation in Idi Amin's Uganda. His dissatisfaction with his Chief Justice led to tragedy only partly because of the absence of an impeachment process. Chief Justice Benedicto Kiwanuka was kidnapped in broad daylight by Idi Amin's thugs from the Chief Justice's office. Justice Kiwanuka was never heard of again.

Would Kenya's outbreak of violence in 2007–2008 have been averted if there was an impeachment process available to deal with the executive branch in controversy?

The impeachment process was not available to be invoked against Africa's Heads of State either. What action can be taken whenever there was acute dissatisfaction with the performance of such Head of State as Robert Mugabe? Has it been unfortunate that African constitutions have not had the impeachment option to invoke?

In the British tradition the impeachment started as far back as the fifteenth century. But the imperial impeachment of Warren Hastings for his performance as a colonial Governor of India occurred in the eighteenth century, led by the brilliant political philosopher Edmund Burke. The impeachment was in the House of Commons, while the trial was in the House of Lords. Edmund Burke articulated brilliant responsibilities for countries which ruled other societies. British governors of colonies could be impeached.

The process of impeachment declined in the British system of government at home from the nineteenth century. In the post-colonial era the impeachment idea was sometimes made difficult because the legislature in the colonies was not necessarily bicameral. A single legislative house could not differentiate between the Lower House which impeached and the Upper House which tried.

In the United States the impeachment process continues for both the Executive and the Judicial branches. The last great impeachment in the United States was of Bill Clinton when he was President. Like Warren Hastings centuries earlier, Bill Clinton was impeached by the Lower House but acquitted by the Upper House. The struggle continues.

In the absence of impeachment did Africa experience more military coups instead? Some African countries were particularly *coup prone*. These have indeed included Uganda, Nigeria, Burkina Faso, Sudan, Ethiopia, and Somalia.

On the other hand, some African countries have been *coup-proof*. These have included Kenya, Tanzania, Zambia, Senegal, and indeed Zimbabwe in spite of the economic collapse. Tanzania and Zambia have escaped the coup for more than fifty years.

Would we have had more coup-proof African countries if we had experimented with the impeachment process in countries like Ghana in the earlier years?

May the impeachment process be inaugurated in the later years of the post-colonial Africa.

We may have to wait until the second half-century of the post-colonial era before impeachment replaces the coup as a method of domestic regime change.

In the summer of 2013 Egypt experimented with impeachment by mass street demonstrations. An incredible 20 million Egyptians [allegedly] demonstrated against the

government of the Muslim Brotherhood under Morsi. While the Egyptian street protestors impeached President Morsi, the Egyptian military unilaterally removed him from power.

Unfortunately, mass street impeachment turned out to be no substitute for a constitutional process. If it was possible to impeach President Morsi constitutionally, try him in parliament, and remove him peacefully, thousands of lives might have been saved.

The first American President to be impeached was President Andrew Johnson in the 1860s—more than a century before the impeachment of Bill Clinton. Clinton was acquitted comfortably, but Andrew Johnson was acquitted by a single vote.

In the second half century of Africa's independence should our constitutions include provisions for impeachment instead of relying on arbitrary regime change? Within the next 50 years let us consider impeachment and outlaw military coups.