

**Working Toward Democracy:
Thurgood Marshall and the Constitution of Kenya
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Abstract

This Article is a work of transnational legal history. Drawing upon new research in foreign archives, it sheds new light on the life of Thurgood Marshall, exploring for the first time an episode that he cared very deeply about: his work with African nationalists on an independence constitution for Kenya. The story is paradoxical, for Marshall, a civil rights legend in America, would seek to protect the rights of white landholders in Kenya who had gained their land through discriminatory land laws, but were soon to lose political power. In order to understand why Marshall would take pride in entrenching property rights gained through past injustice, the Article tells the story of the role of constitutional politics in Kenya's independence. While Sub-Saharan Africa is often dismissed as a region with "constitutions without constitutionalism," the Article argues that constitutionalism played an important role in Kenya's independence. Against a backdrop of violence, adversaries in Kenya fought with each other not with guns but with constitutional clauses. The resulting Kenya Independence Constitution would not function as an American-style icon, but in that historical moment, constitutional politics aided a peaceful transition. In this context, Marshall built compromise into his bill of rights for Kenya to keep the parties together at the table.

Thurgood Marshall's role in Kenya's independence was limited, of course, but in following this story we gain an entirely new perspective on a major figure in American law. Before he began writing constitutional law as a Justice in the United States, Marshall played the role of a framer, crafting constitutional principles in the first instance. From the intersecting narratives of Marshall's travels and Kenya's constitutional development, we can also see constitutionalism at work in new ways, as constitutional politics functioned as a peace process. The Article also provides an historical example of a process more familiar in our own day: the role of American lawyers in constitution writing and nation building overseas.

March 6, 2006

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That, to my mind, is really working toward democracy, when you can give to the white man in Africa what you couldn't give the black man in Mississippi. It's good.

Thurgood Marshall (1977).¹

Introduction

"Thurgood Freezes as Kenyans Feud,"² announced the *Cleveland Call and Post* in a January 30, 1960 headline. The famous American civil rights lawyer Thurgood Marshall was in London in 1960, and was embroiled in a controversy. He had come at the invitation of Tom Mboya, a young nationalist leader from Kenya. Marshall traveled first to Kenya, and then to London to serve as an advisor to nationalists during negotiations on a new constitution for Kenya, then a British Colony. But as the *Call and Post* reported it, "Marshall sat in a London hotel room... 'too cold for American standards' ... sipping

¹ My work on this Article was made possible by my residency in two extraordinary places: the Law and Public Affairs Program, Princeton University, and the Rockefeller Study and Conference Center, Villa Serbelloni, Bellagio, Italy. I am indebted to Chris Eisgruber, Gianna Celli, and my colleagues in both locations for their comments and companionship. I greatly benefitted from comments by participants at workshops at Harvard Law School, Northeastern Law School, USC Law School, William Mitchell Law School, Stanford Law School, Woodrow Wilson School, Princeton University, University of Chicago Department of History, UCLA Department of Political Science, Columbia Law School Center for the Study of Human Rights and the NYU Legal History Workshop. For especially helpful criticism, comments, and conversations, I thank Margaret Burnham, Devon Carbado, Kimberle Crenshaw, Terry Fisher, Ron Garet, Heather Gerken, Lani Guinier, Dennis Hutchinson, Helen Irving, Ken Mack, Michael Meltsner, Martha Minow, Mae Ngai, James Sparrow, Matthew Stephenson and David Wilkins.

Thurgood Marshall, *The Reminiscences of Thurgood Marshall* (Columbia Oral History Research Office, 1977) reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES, MARK V. TUSHNET, ED. 413, 446 (2001).

² *Thurgood Freezes as Kenyans Feud*, CLEVELAND CALL AND POST, January 30, 1960, at 1A, 3A.

‘warm beer’ and fretting for action,” as the British government and the nationalists faced an impasse over constitutional advisors.³

What had brought Thurgood Marshall, a major figure in American legal history, to this London hotel room? What role did this American play in the dramatic developments that would lead to Kenya’s independence? And how did this Kenya sojourn, remembered so intently by Justice Marshall in later years, figure in the constitutional thought of a man who would later write constitutional law in America?

The story of Marshall and the Kenya constitution has eluded the attention of Marshall’s biographers.⁴ It is revealed in archives in the U.S. and England, and in press accounts from Africa, the United States and England. This study reveals a portrait of Marshall at mid-career as he grappled with legal rights in a new context. The story may seem paradoxical, for Marshall, a champion of the rights of African Americans in his role as chief NAACP Legal Defense Fund litigator, would support the rights of white landholders in Kenya. Whites were a numerical minority in Kenya, yet they had long held a monopoly on the finest agricultural land in the colony. Once it became clear in 1960 that indigenous Africans would soon become the dominant political power, a

³ *Id.*

⁴ Brief accounts appear in JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); ROGER GOLDMAN WITH DAVID GALLAN, THURGOOD MARSHALL: JUSTICE FOR ALL (1992). These works rely only on one or two oral history sources. This paper relies on archival records including Thurgood Marshall’s papers and other collections at the Library of Congress, U.S. State Department records at the U.S. National Archives, and British colonial records at The National Archives of the United Kingdom, Public Records Office,

central question was the land rights of minorities in an independent Kenya. Marshall sought to entrench minority safeguards by including strong property rights protection in a draft Bill of Rights. In doing so, Marshall accorded formal legal rights to a group that he described as worse than the Ku Klux Klan.

Was Marshall's support for the rights of whites who had been the beneficiaries of an historic injustice – the longstanding racially discriminatory distribution of land in the colony of Kenya – an indication that his commitment was to formal equality, regardless of material conditions? Was he simply oblivious to the impact of an American-style conception of equality in a post-colonial society, in keeping with the coming critique of law and development, that American ideas of law reform are often ill-fitting in foreign lands?⁵ Or was this paradoxical move in keeping with more personal goals: was his support for whites in Kenya a foreign parallel to his later embrace of a white successor, Jack Greenberg, which some have seen as Marshall's effort to curry favor with white elites in the hope of advancing his own career?⁶ Or is there a different story to tell about this Kenya sojourn, captured in Marshall's own words, that in his own necessarily imperfect way he sought to do the work of democracy, and that in this context democracy required that an historically oppressed group, upon assuming power, must reach out and

Kew, England, and on African, British and American newspapers, as well as other documentary sources, and new oral history interviews conducted by the author.

⁵ David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

accord entrenched rights to those who had oppressed them? One aim of this narrative is to explore these questions.

Thurgood Marshall's story intersects with another narrative: the story of Kenya's first constitution as an independent nation. The boundaries of what would become the nation of Kenya had been drawn by colonial powers during the "scramble for Africa" in the 1880s.⁷ Colonial lines brought together different tribes, cultures and languages into what would become one nation, and these lines also divided particular tribal lands between what would become one country and another. The constitution writing that happened in Africa in the early 1960s occurred in this particularly precarious context for nation-building.⁸ The difficulties in constitutionalism in sub-Saharan Africa are legion, leading to the widespread belief that the region has "constitutions without constitutionalism."⁹ As a result, even as constitutional studies take a transnational turn, comparative constitutional scholars tend to take interest only in the one African nation

⁶ See ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 145-47 (2005).

⁷ THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876-1912* (1992); ROBERT L. TIGNOR, *THE COLONIAL TRANSFORMATION OF KENYA: THE KAMBA, KIKUYU, AND MAASAI FROM 1900 TO 1939* (1976).

⁸ See generally JEFFREY HERBST, *STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL* (2000).

⁹ H.W.O. Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox," in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD*, ed. Douglas Greenberg et al. (1993). *But see* H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa* (critiquing Okoth-Ogendo) *TULANE L. REV.* (forthcoming).

seen as successful: South Africa.¹⁰ Because Kenya became a corrupt and authoritarian regime by the 1980s, perhaps constitutionalism in the country has “failed,” and there is nothing to learn from this “failure.” But in the records from Kenya, an interesting picture emerges. Against a backdrop of violence, in the early 1960s, groups that had been killing each other – African nationalists, white farmers, the colonial government – fought with each other over the things they held most dear, land and political power, not with guns and knives but with constitutional clauses. As violence erupted in the Congo, in South Africa, and elsewhere in the early ‘60s, in Kenya the result of constitutional bargaining was peaceful regime change. Constitutional politics aided that important achievement in Kenya, even if constitutionalism could not shield the country from the national and international political forces that would unravel Kenya’s first attempt at democracy. Perhaps if we look at constitutional moments in a different way, we can see constitutionalism at work in Kenya. Moments of constitutionalism can have value in

¹⁰ See, e.g., Vicki C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999) (with only three non-South Africa-related entries on Africa, all on the theme of the failure of African constitutionalism). An exception to the usual trend is A.J. VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* (1999). There is a long history of legal scholarship on Kenya, particularly the work of Yash Ghai, a leading comparativist. See, e.g., Y.P. GHAI AND J.P.W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT* (1970). Recent works on African constitutionalism include MUNA NDULA, JOHN HATCHARD AND PETER SLINN, *COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICA PERSPECTIVE* (2004); J. OLOKA-ONoyango, *CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES* (2001); For U.S. comparative constitutional law scholars, however, the region tends to be ignored, with the exception

themselves, even if the result is not an American-style iconic document that endures for ages to come. Constitutionalism may have functioned only for a moment in Kenya in the 1960s, but in that snapshot in time, the results nevertheless were measurable and meaningful.

These two narratives – Thurgood Marshall’s and Kenya’s – come together in a context that seems both foreign and familiar. Americans have been framing constitutions for other countries in the many years since the United States Constitution was written. They have sometimes been official American government representatives. Other times they have played this role as private citizens.¹¹ For Thurgood Marshall, the role of framer gave him an opportunity to imagine constitutionalism unconstrained by the American text. Marshall would later criticize the original United States Constitution as a constitution that embraced slavery.¹² In Kenya, as he saw it, he could start from scratch and get it right from the start. But as the story would unfold, getting it right ultimately involved accommodation and compromise. It involved striking a balance not unlike one struck by the U.S. framers he criticized: an affirmative accommodation of injustice to enable an ongoing political dialogue.

of South Africa. The rich literature of African studies, including African legal studies, remains largely cabined in “area studies.”

¹¹ See PAUL D. CARRINGTON, *SPREADING AMERICA’S WORD: STORIES OF ITS LAWYER-MISSIONARIES* (2005).

¹² Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987). See also William W. Fisher, III, *The Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER J. 131, 135-36 (1989). I thank Kimberle Crenshaw who first

Ultimately, this rich and unusual story gives us a window not only on the constitutional thought of someone who would soon write American constitutional law. It also gives us a window on constitutional politics. Constitution writing often happens against a backdrop of violence. In that environment, constitution writing is a peace process. Whether constitutionalism has worked or failed in Africa and other regions cannot be determined simply by looking for later signs of American-style constitutions and judicial review. In Kenya, for a short period of time, constitutional politics provided a structured and non-violent forum for political warfare. It is when we look for signs like this outside of courts that we get a fuller picture of how constitutionalism works, and what constitutional politics can do.

The Africans' Advisor

When Thurgood Marshall boarded a plane for his first trip to Africa in January 1960, a trip to aid nationalists in Kenya, he was following a well-worn path. African-Americans had long been interested in Africa. The earliest organized efforts by African Americans to aid African nations were missionary groups hoping to “Christianize and civilize” Africa in the nineteenth century. Later generations saw in Africa not a primitivism in need of redemption, but a source of the history of a people.¹³ W.E.B.

encouraged me to consider Marshall’s Bicentennial address in relation to his work on Kenya, and Lani Guinier who emphasized Marshall’s role as a framer.

¹³ JAMES MERIWETHER, PROUDLY WE CAN BE AFRICANS: BLACK AMERICANS AND AFRICA, 1935-1961, 9-20 (2002).

DuBois organized a series of Pan-African conferences with the goal of uniting peoples of African descent and aiding African liberation, and Pan-Africanism became a major theme in twentieth century relations between African Americans and Africa.¹⁴ Support for Africa was often complicated by the state of global affairs and U.S. foreign policy, and this was especially so during the Cold War years. Even as Ralph Bunch played a leadership role at the United Nations on trusteeship, and eventual independence, for the colonies of the losing powers after World War II, anticolonial organizations increasingly found themselves on the wrong side of American Cold War politics.¹⁵ As African Americans reached out to Africa during the 1950s and early '60s, their internationalism was constrained by the Cold War. Cold War politics opened avenues for international engagement, as African American cultural figures gained opportunities for government-sponsored travel because their very middle-class status was an advertisement abroad of the multiracial character of American society and was a rebuttal to Soviet propaganda that portrayed American democracy as unjust due to racial segregation and discrimination.¹⁶ But along with other activists, African Americans sometimes lost their passports because of their politics. For Paul Robeson, W.E.B. DuBois and other African

¹⁴ P. OLISANWUCHE ESEDEBE, *PAN-AFRICANISM: THE IDEA AND MOVEMENT, 1776-1991* (1994); DAVID LEVERING LEWIS, *W.E.B. DUBOIS: BIOGRAPHY OF A RACE*(1994); DAVID LEVERING LEWIS, *W.E.B. DUBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963* (2000).

¹⁵ BRIAN URQUHART, *RALPH BUNCHE: AN AMERICAN ODYSSEY* (REV. ED. 1998); PENNY VON ESCHEN, *RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937-1957* (1997).

Americans barred from travel during the early Cold War years, a particular threat was their tendency to criticize American racism overseas, at a time when international criticism of American racism was thought to undermine U.S. foreign relations.¹⁷ Yet even when structured through a Cold War frame, travel itself had an impact. James Baldwin described the paradox of the African American soldier overseas, discriminated against by the military, and yet “far freer in a strange land than he has ever been at home.”¹⁸

Marshall’s own exposure to African nationalists predated his tenure at the NAACP. Marshall attended Lincoln University, the oldest historically Black college in the United States. It was part of Lincoln’s founding vision to train African Americans who would then work in Africa, especially as missionaries. Many Africans attended Lincoln over the years, and one of Marshall’s undergraduate classmates was Nnamdi Azikiwe, who would later become President of Nigeria.¹⁹ Through the 1950s, occasionally NAACP lawyers would be called upon to help Africans in the United States.

¹⁶ PENNY VON ESCHEN, *SATCHMO BLOWS UP THE WORLD: JAZZ AMBASSADORS PLAY THE COLD WAR* (2004); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

¹⁷ MARTIN DUBERMAN, *PAUL ROBESON: A BIOGRAPHY* (1988); LEWIS, W.E.B. DUBOIS: *THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY*; DUDZIAK, *COLD WAR CIVIL RIGHTS*.

¹⁸ JAMES BALDWIN, *THE FIRE NEXT TIME* 54 (1962). See also PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 17-19 (1993) (describing the transformative impact of travel).

¹⁹ HORACE MANN BOND, *EDUCATION FOR FREEDOM: A HISTORY OF LINCOLN UNIVERSITY, PENNSYLVANIA* 487-550 (1976); ROGER GOLDMAN WITH DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 24-25 (1992); Levi A. Nwachuku, *Nnamdi Azikiwe and Lincoln University: An Analysis of a Symbiotic Relationship*, <http://www.lincoln.edu/history/journal/azikwe.htm>. See also David McBride, *Africa’s Elevation and Changing Racial Thought at Lincoln University, 1854-1886*, 62 *J. OF NEGRO HIST.* 363 (1977); Sibusiso Nkomo, *Strong Ties: Past and Present*, *LINCOLN J. OF SOCIAL AND POLITICAL THOUGHT* 19-20 (Summer 1990).

Marshall took a special interest in the case of a Lincoln student from Kenya who was threatened with deportation in the early 1950s. The U.S. apparently sought to deport the student because the British believed he had ties to the on-going Mau Mau uprising. The NAACP was concerned that if the U.S. sent him back, he would be persecuted by the colonial government.²⁰

Marshall's trip to Africa did not only carry on a tradition in African American engagement with the continent. He was also an early proponent of what would come to be called "law and development." By the time Thurgood Marshall went to Kenya, Americans had long conceptualized the world into "developed" and "underdeveloped" spaces.²¹ President Harry Truman had argued in 1949 that there were widespread benefits from promoting economic expansion, for "Greater production is the key to prosperity and peace."²² Technical expertise would bring about "development," and soon American lawyers lent a hand in bringing law to bear to aid "underdeveloped" nations.²³ By the 1960s, development discourse was so ubiquitous in thinking about

²⁰ Kenya File, Legal office files, NAACP Papers, Library of Congress.

²¹ ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 3-12 (1995).

²² Harry S. Truman, Inaugural Address (Jan 20, 1949), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, HARRY S. TRUMAN, 1949*, at 115 (United States Government Printing Office, 1964).

²³ See James C.N. Paul, *Forward: Law and Development and Peter Slinn*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* (2003), JOHN HATCHARD & AMANDA PERRY-KESSARIS, EDS, vii-xi; David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wis. L. Rev.* 1062 (1974); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457 (1977).

Africa and other “Third World” nations, that, as Arturo Escobar put it, “reality...had been colonized by the development discourse,” and “it seemed impossible to conceptualize social reality in other terms.”²⁴

Marshall had no meaningful background in Kenya law, politics and culture before his trip, but within an understanding of the world framed by a development continuum, he had something that an “underdeveloped” area like Kenya needed: expertise in a “developed” legal system.

Marshall had brought his legal skills to bear on matters outside U.S. borders before 1960. During the Korean War, Marshall responded to pleas of African American soldiers who had received harsh sentences for misconduct. Korea was the first major U.S. military engagement since President Truman had issued an executive order to desegregate the military in 1948, and many have argued that it was the Korean war that finally accomplished desegregation in the Army, as it became impractical to send needed replacement troops according to race.²⁵ But as reports came out of alleged disparities in disciplinary actions based on race, resulting in horrific sentences for African American soldiers, Marshall was concerned about discrimination. He traveled to Japan and then to

²⁴ ESCOBAR, ENCOUNTERING DEVELOPMENT, 5. On the critique of law and development, *see, e.g.,* Trubek and Galanter, *Scholars and Self-Estrangement*; J. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470 (1995).

²⁵ RICHARD M. DALFIUME, DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953 201 (1969).

Korea to research the cases, interviewing soldiers near the front lines. Ultimately he was successful in reducing the sentences of thirty soldiers.²⁶

Marshall represented American soldiers in Korea during the early 1950s when he also shouldered the burdens, and nourished the hopes, of the long legal struggle that resulted in *Brown*. Marshall faced the world in a different posture in 1960. *Brown* was won, and in the eyes of the nation, his name was forever associated with that compelling victory. The way his colleague Constance Baker Motley saw it, case made Marshall the “undisputed spokesman for black America.”²⁷ *Time Magazine* solidified his status, putting him on its cover as the “Man of the Year” for 1954.²⁸ But the years after *Brown* were difficult ones for him. According to Motley, “[h]e was simultaneously exhilarated and awestruck by his leadership position in black people’s struggle for equality. At times, he seemed immobilized by the inherent responsibility to move forward with implementation; at other times, he was literally overwhelmed by the onrush of events that the decision set in motion. It was like trying to navigate a ship in a hurricane.”²⁹ The Supreme Court, in 1955, undercut his hard-won victory by requiring only “all deliberate speed” in *Brown’s* implementation.³⁰ The decision was widely viewed as allowing delay.

²⁶ TUSHNET, MAKING CIVIL RIGHTS LAW 311-12; GOLDMAN WITH GALLEN, THURGOOD MARSHALL 112-116; Thurgood Marshall, *Summary Justice: The Negro GI in Korea*, in THURGOOD MARSHALL, SUPREME JUSTICE: SPEECHES AND WRITINGS (J. CLAY SMITH, JR., ED.) 134-141 (2003).

²⁷ CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 110 (1998).

²⁸ *Front Cover*, TIME, September 19, 1955.

²⁹ MOTLEY, EQUAL JUSTICE UNDER LAW 110.

³⁰ *Brown v. Board of Education (II)*, 349 U.S. 294 (1955).

The Supreme Court would not announce that “ the time for mere ‘deliberate speed’ has run out,” until 1964.³¹ In 1960, less than six per cent of African American children in the South attended non-segregated schools.³² Marshall was frustrated with this lack of progress. At the same time, his attention was drawn away from enforcement efforts as the NAACP and the LDF lawyers found themselves under attack in the South. Resistance to *Brown* would take many forms, and one of those forms was a campaign to harass civil rights lawyers. National and regional NAACP leaders were targets of Cold War anti-subversive investigations conducted by Southern states.³³

The civil rights movement regained its momentum in 1960, but civil rights lawyers were no longer the leading edge. Sit-ins and civil disobedience had been a strategy drawn upon by some activists in earlier years, but when four African American college students in Greensboro, North Carolina sat-in at a whites-only lunch counter in February 1960, a broad-based sit-in movement seemed to erupt overnight.³⁴ The LDF soon had to consider what its relationship would be to a movement whose agenda was framed principally by others. According to Mark Tushnet, “Marshall and other NAACP leaders

³¹ *Griffin v. School Board*, 377 U.S. 218 (1964)

³² WILLIAMS, THURGOOD MARSHALL 284; CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 56 (2004) (in 1960-61, 100% of black students in the South attended schools that were at least 90% nonwhite); U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1965*, 122 (in November, 1960, 23% of black students in Southern states attended schools in desegregated districts and 7% attended schools that had white students.)

³³ TUSHNET, *MAKING CIVIL RIGHTS LAW* 295.

³⁴ WILLIAM CHAFE, *CIVILITIES AND CIVIL RIGHTS* 99 (1980); MEIER AND RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT* (1973).

were ambivalent about the sit-in tactic at first.”³⁵ As Constance Baker Motley remembered it, “the NAACP and LDF had consciously avoided urging individuals to risk arrest by defying local Jim Crow laws and customs,” because under existing Supreme Court doctrine on state action, private restaurants and other public accommodations might be protected from liability.³⁶ Another concern the lawyers had was that “a new group of leaders might displace them....Robert Carter believed that...providing too much support for sit-ins ‘would tie us to something that some other organization has taken and run with.’”³⁷

Marshall was quite uncomfortable with another development, the increasingly popular Nation of Islam, and with ideas of black separatism or black power. In response to Nation of Islam calls for racial solidarity among African Americans in 1955, Marshall said: “Let’s stop drawing the line [between] colored and white. Let’s draw the line on who wants democracy for America.”³⁸ In 1959 Nation of Islam spokesmen denounced Marshall as a middle-class lawyer with ties to the black elite and white establishment. They called him a “half-white nigger,” who worked “hand in glove with the white folks.” Malcolm X called him a “fool.” Marshall disliked the separatism advocated by the

³⁵ TUSHNET, MAKING CIVIL RIGHTS LAW 310.

³⁶ MOTLEY, EQUAL JUSTICE UNDER LAW, 131.

³⁷ TUSHNET, MAKING CIVIL RIGHTS LAW, 310. Other concerns included the fact that, since the students were often prosecuted for crimes like disturbing the peace or trespassing, there was a serious question as to whether there was a valid legal theory on which to base a broad challenge to the prosecutions. Handling hundreds of individual cases in state court also would take tremendous resources. TUSHNET, MAKING CIVIL RIGHTS LAW, 310. WILLIAMS, THURGOOD MARSHALL, 286-89.

Nation. As Juan Williams has suggested, it was contrary to Marshall's constitutional vision. He was uncomfortable as well with Nation of Islam tactics, seeing them as inflaming African Americans during times of crisis, whereas his role had been to calm things down in the hope of avoiding bloody confrontations.³⁹

Thurgood Marshall had also reached a point in his life, at the age of 51, that he wanted to spend more time with his family. Following the death of his first wife, Vivian, in 1955, he married Cecelia Suyat, and by 1960 they had two children. After getting by for years on the salary of a civil rights lawyer, Marshall wished that he could earn more to better support his family. He was a legendary lawyer, yet his future path remained unclear. Marshall thought that he would never become a judge because Southern Democrats in the Senate would block his confirmation. This aspiration, of course, would come to pass not long after. Thurgood Marshall was appointed by President John F. Kennedy in a recess appointment to the Second Circuit Court of Appeals in 1961. After confirmation hearings were dragged out over nearly a year, he was confirmed. Marshall would leave the judiciary in 1965 to be Solicitor General of the United States under President Lyndon Johnson. In 1967, Johnson nominated Marshall to the United States Supreme Court. In the altered political landscape of 1967, he was easily confirmed.⁴⁰

³⁸ WILLIAMS, THURGOOD MARSHALL, 241.

³⁹ *Id.* at 275-78; E.U. ESSIEN-UDOM, BLACK NATIONALISM: A SEARCH FOR AN IDENTITY IN AMERICA 283 (1971).

⁴⁰ WILLIAMS, THURGOOD MARSHALL, 312, 328-31.

Marshall cannot have imagined this trajectory in 1960. He was instead a man who had secured his place in American legal history, yet he remained unsure of the impact of his life's work, and unsure of his own future.

Along with so many of his contemporaries, Marshall was a Cold Warrior, so it was not difficult for him to operate within the constraints of Cold War/civil rights discourse, in which it was acceptable to criticize U.S. race discrimination at home, but overseas it was important to argue that American democracy was a superior form of government to communism for peoples of color.⁴¹ In an era of vicious red-baiting of civil rights activists,⁴² Marshall believed that it was in his interests to maintain strategic ties with potential threats, including J. Edgar Hoover.⁴³ Once a federal judge, Marshall would travel to Kenya on a U.S. Information Agency sponsored trip for the purpose of improving the U.S. image abroad.⁴⁴ Marshall's 1960 trip, however, was that of a private citizen. He later speculated that perhaps the CIA had funded it.⁴⁵ Previously secret, now

⁴¹ See DUDZIAK, *COLD WAR CIVIL RIGHTS*.

⁴² See, e.g., GERALD HORNE, *BLACK AND RED: W.E.B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963* (1986); MARABLE MANNING, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA 13-39* (2nd rev. ed. 1991); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998); KENNETH O'REILLY, *RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972* (1989).

⁴³ WILLIAMS, *THURGOOD MARSHALL*, 325-26. See also Thurgood Marshall's FBI File at <http://foia.fbi.gov/foiaindex/marshall.htm>.

⁴⁴ Berl Bernhard, Oral History Interview, conducted by Mary Dudziak, Washington, D.C., July 2003. Many federal judges went on such government sponsored trips. Marshall's traveling companion, Berl Bernhard, was asked to help write part of a draft speech for Chief Justice Earl Warren to deliver in Tanzania. Bernhard's task was to address foreign criticism of U.S. race discrimination.

⁴⁵ *Reminiscences of Thurgood Marshall*, 446-47.

declassified, U.S. State Department and British government internal documents expressed surprise and initial displeasure upon hearing of Marshall's involvement.⁴⁶ In response to a Freedom of Information Act request, the CIA claims to have no records pertaining to Marshall.⁴⁷ While it is entirely possible that there was covert CIA financial support, there is no evidence to support the idea that Marshall himself collaborated with the U.S. or British government before he began his work with Kenya nationalists.

Tom Mboya would be Marshall's tie with nationalists in Kenya. Mboya was a young, dynamic emerging leader in Kenya in the 1950s. A labor activist, Mboya became active in the International Confederation of Free Trade Unions. Through this work, Mboya developed ties with labor activists around the world, including Walter Reuter of the United Auto Workers Union, and A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, an important African American labor union.⁴⁸ In 1959, Mboya returned to spend five months in the U.S. He gave lectures during this period, and on a number of occasions appeared together with Thurgood Marshall.⁴⁹

It was during Mboya's 1959 trip that he invited Marshall to serve as advisor at the upcoming conference on the Constitution of Kenya. Mboya apparently acted on his own

⁴⁶ See Amembassy London to Secretary of State, January 13, 1960 (telegram), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1360, National Archives.

⁴⁷ CIA to Dudziak.

⁴⁸ Randolph corresponded with and advised Mboya and other Kenya nationalists during the 1950s and 60s. See *Africa*, Box 97, Papers of A. Philip Randolph, Records of Brotherhood of Sleeping Car Porters, Group II, Library of Congress.

when he invited Marshall. This was just one of Mboya's unilateral actions, which sometimes irritated his compatriots.⁵⁰ But the nationalists had much to gain by associating themselves with Marshall. He was "Mr. Civil Rights" in the U.S., and he had built his career through the promotion of minority rights. As Kenya moved toward majority African representation in their legislature, minority rights became a crucial issue. Having Marshall on board therefore provided the Africans with a tangible means of reassuring other groups that minority rights were central to their agenda as well.

Early 1960 was an unsettling time in the Colony of Kenya. When the year began, Jomo Kenyatta, who would become the first President of Kenya, was in detention. Jailed in 1952 on suspicion that he was a leader in the violent Mau Mau rebellion against British Colonial rule, Kenyatta was thought to be so dangerous that he was detained even though he had completed his sentence. Kenya politics were constrained in other ways. Although a seven year state of emergency, the Colonial government's response to the Mau Mau, had ended, new security legislation was in place which gave the Colonial Governor "reserve powers with which to control all public gatherings for political purposes, provide for the continuance of control over African villages and require the registration of political parties." A "Detained and Restricted Persons Bill" would "enable the Government to continue to restrain and hold persons for security reasons without

⁴⁹ DAVID GOLDSWORTHY, TOM MBOYA: THE MAN KENYA WANTED TO FORGET 116-20 (1982); *Mboya to Confer on New Kenya Plan*, N.Y. TIMES, JUNE 29, 1959, at 7; Tom Mboya, *Key Questions for Awakening Africa*, N.Y. TIMES, June 28, 1959, SM8.

⁵⁰ GOLDSWORTHY, TOM MBOYA, 133.

trial.”⁵¹ There was a ban on colony-wide political organizations, which fractured the development of a new generation of nationalist leaders.⁵² Although the British government tried to contain African nationalism, 1960 was a political moment with a force of its own. Colonialism had been steadily unraveling since World War II. The United Nations created a trusteeship system, leading eventually to emancipation of colonies of the Axis powers of Germany and Italy. Anti-colonial movements achieved independence in India in 1948 and Ghana in 1957. 1960 would be known as the “year of Africa,” as seventeen African nations became independent in that year alone.⁵³

The end of colonialism in Africa was not a simple, gradual evolutionary process, however, but was powerfully affected by conditions within particular colonies, as well as politics in the Metropole. Kenya differed from many emerging African nations in that it had a sizeable white settler population. To encourage immigration to the colony, the British government had reserved to white settlers the richest agricultural land in Kenya, the “white highlands.” Africans were not allowed to own land in these areas. This led not only to concerns about racism and to a need for land reform; it also complicated Kenya’s economic future, since the colony’s principal tie with global economic markets

⁵¹ Amconsul Nairobi to Department of State, January 8, 1960, Despatch no. 337, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-860, National Archives; Nairobi to Secretary of State, January 7, 1960 (telegram), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-760, National Archives.

⁵² B.A. OGOT AND R.W. OCHIENG’, *DECOLONIZATION AND INDEPENDENCE IN KENYA, 1940-93* (1995).

⁵³ H.S. WILSON, *AFRICAN DECOLONIZATION* 177 (1994).

was large-scale, white-dominated agriculture. By 1960, some white families were in their third generation on their farms.⁵⁴

Kenya would not experience an easy path to liberation. Large white-owned farms had depended on African labor. This labor was induced through a brutal colonial regime. Violence beget violence, and in the 1950s the resistance movement took a bloody turn. The forest fighters, known as the Mau Mau rebellion, waged guerilla war on the colonial government, white farmers and African collaborators. Sensational accounts of violence flooded the newsreels, while Britain responded by bombing the forests.⁵⁵ The Colonial government seemed to have re-asserted control over the colony by 1960, but many whites in Kenya remained wary. Even before Colonial Secretary Ian Macleod announced that African majority representation in politics, and eventually independence, were coming to Kenya, whites reacted against upcoming constitutional talks and the very idea of African political control.

Many thought that no safeguards would be strong enough to protect the interests of white settlers in an African-run government. Some Kenya residents therefore developed elaborate plans for a transfer of white farms to Africans, and the departure of

⁵⁴ ROBERT L. TIGNOR, *THE COLONIAL TRANSFORMATION OF KENYA: THE KAMBA, KIKUYU, AND MAASAI FROM 1900 TO 1939* (1976); KEITH KYLE, *THE POLITICS OF THE INDEPENDENCE OF KENYA* (1999).

⁵⁵ CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (2005); E.S. ATIENO AND JOHN LONSDALE, EDS., *MAU MAU AND NATIONHOOD: ARMS, AUTHORITY, AND NARRATION* (2003).

white settlers from Kenya.⁵⁶ Others argued that African rule simply must not happen. A letter signed "E.M.J." from Mombasa, Kenya to the Colonial Secretary objected to the very idea of self-rule. "The Negroes of Kenya," the writer insisted, "are not ruling persons, and they have no even knowledge [sic] of regime,...they are like animals of the jungle and forest." They were "not yet riped to reach to self-rule, not before 200 years from now." This writer preferred that all nations be ruled by monarchs.⁵⁷ Others reacted more strongly. An unidentified writer, in a letter to the Colonial Secretary and others, said: "Dear Sirs, After ten meetings 2500 of us have decided that if you give the Africans equal voting power as the Europeans in this country we will blow up everything in Kenya. Then the African can start at the beginning the same as we did." The writer said in a follow-up, "we will not leave any railway Bridge, Power Station, or any Government Building standing." There would be "nothing left in Kenya worth having."⁵⁸

The stakes at the upcoming constitutional conference were high. Said one woman in Kenya, "Everything here is hanging on this Conference, and whatever happens I

⁵⁶ Nicholas D. Hayne-Upson to Secretary of State for the Colonies, January 13, 1960, and attachments on *A 'Common Sense' Appreciation of the Problem of White Settlement in Kenya*, CO 822/2349, 100600, The National Archives of the United Kingdom: Public Records Office, Kew, England; Marion W. Knowles to Macleod, February 10, 1960, CO 822/2349, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

⁵⁷ E.M.J. to Colonial Secretary, January 9, 1960, CO 822/23491, 00600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

⁵⁸ Anonymous to Macleod, Blundell, [illegible], January 1960, CO 822/2349, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England; Anonymous to Macleod, received January 15, 1960, CO 822/2349, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

expect it will result in strikes and riots at this end. Most people's one idea is to sell out quickly, tho' who is going to buy is quite another matter."⁵⁹

In these difficult circumstances, Thurgood Marshall embarked on his first trip to Africa. He traveled to Kenya in January 1960, and met with Kenyan nationalists.⁶⁰ As he remembered it, "[T]he restrictions were almost unbelievable. Africans could not hold a meeting in a building. So as a result, the only meetings they had were outside." Some Kenyan nationalists, including Jomo Kenyatta, "were under detention orders." Marshall met with a delegation, including Tom Mboya and Hastings Banda. "I listened to them and took their instructions, and left Kenya after a week or so under great handicap."⁶¹

Marshall was quickly introduced to race relations in colonial Kenya. On his second day in the colony, he went to the city of Kiambu for a meeting of the African Elected Members Organization. As Marshall later recounted, "[T]here were 2000 Africans standing out in the field, perfectly quiet, and the leaders were meeting in the

⁵⁹ Extract of letter from Mrs. Buckley-Mathews to Vera H. Whaler, received January 29, 1960, CO 822/2349, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

⁶⁰ On the way to Kenya he spent five days in Liberia. *U.S. Negro Leader Arrives in Kenya*, N.Y. TIMES, January 11, 1960, at 5.

⁶¹ *The Reminiscences of Thurgood Marshall* at 444.

Marshall's work on the Kenyan constitution was funded by a man he thought to be a multimillionaire, but who he later discovered "had less money than I did. Then, I got two and two - and I still suspect it was CIA money, that's all I could - I know it wasn't Commie money, so what else could it be? I don't know." *The Reminiscences of Thurgood Marshall*, 446-47. A Freedom of Information Act request filed by the author with the CIA resulted in no records pertaining to Thurgood Marshall. CIA to Dudziak. At this point there is no evidence to support or undermine Marshall's speculation. Some of Marshall's later overseas travel was funded by the State Department and the U.S. Information Agency.

building but they couldn't go in. The leaders were in one building. They were out. They were standing out in that hot sun, all day, waiting for the leaders to come out and report to them." Before Marshall could enter the building and join the meeting, the district officer intervened. He introduced himself, "very politely, like the British always are, and he said, 'What do you propose to do?'"⁶²

I said, "I'm going in there. That's what I came over here for, was to talk to these people."

He said, "Well, you can't go in there."

I said, "Why?"

He said, "You don't have a permit."

And Tom Mboya spoke up and he said, " Why, of course he has a permit. We got one last week."

He said, "Yes, and it was revoked yesterday."⁶³

At that point, Marshall "started to be loud and boisterous and get arrested, and suddenly it dawned on me that if I was arrested, I'd be searched. I had money and paraphernalia and stuff for Mboya and others in my pockets, and if I was caught with that,

⁶² *The Reminiscences of Thurgood Marshall* at 444; Amconsul Nairobi to Department of State, January 15, 1960, Despatch no. 349, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.03/1-1560, National Archives.

⁶³ *The Reminiscences of Thurgood Marshall* at 444. The American Consul in Kenya described Marshall's exclusion from the meeting slightly differently, however the Consul did not witness these events first-hand: "the Acting District Commissioner refused him permission to enter the meeting, saying that his name was not on the list of persons scheduled for attendance submitted at the time the license was granted for the meeting." Amconsul Nairobi to Department of State, January 15, 1960, Despatch no. 349, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.03/1-1560, National Archives.

I would really spend the rest of my life in jail.” Instead, he politely said to the district officer, “Of course. I understand. But before I leave, I wonder if I could just say a word to all those people out there?”

They said, “Nope. No speeches.”

I said, “I’m not going to make a speech. Just let me say one word of greeting.”

He said, “All right, all right, just one word.”

I said, “Okay,” and I jumped up on top of this station wagon that Mboya was driving, and I looked over the crowd, and they all recognized Tom Mboya, and I guess they knew who I was, I don’t know. Well, as I looked at them, I just shouted out real loud one word, “[Uhuru]”⁶⁴ and pandemonium broke out. They all crowded, cheered, and everything, and the district officer was really mad as all get out. The reason was, the word “[Uhuru]” means “Freedom Now”. Not tomorrow, but freedom right now.

And he said, “I told you not to—”

I said, “But I didn’t say but one word.”

So he told me where I’d better go right quick, so I did.⁶⁵

On January 14, Marshall held a press conference. According the American Consul, he told the press that “independence and freedom for Kenya was due now.” Marshall said that he was “in complete agreement with the constitutional proposals put forward

⁶⁴ The original transcript contains the word “Ururhu,” which is probably a transcription error. The Swahili word for freedom is “Uhuru.”

⁶⁵ *The Reminiscences of Thurgood Marshall* at 445. Marshall loved to tell stories, and it is likely that he massaged this narrative a bit for dramatic effect, however the underlying facts of his exclusion from the meeting are supported by other sources. On Marshall as a storyteller, see David B. Wilkins, *Justice as Narrative: Some Personal Reflections on a Master Storyteller* 6 HARV. BLACKLETTER J. 68 (1989).

by the African Elected Members.” Marshall had spent the day in Kenya’s White Highlands, and said that “he was in complete agreement with the Africans in Kenya about this European area, i.e., that there was no reason for land to be restricted on the basis of race anywhere in the world. He added, however, that he would apply this principle to the African land areas of Kenya as well as the White Highlands.”⁶⁶

The press seemed unsure what to think of Marshall’s role. Under the headline “Negroes’ Lawyer on World Stage,” the *New York Times* put it this way: “The fast-talking 51-year-old lawyer has argued for Negroes’ rights in the United States for a quarter of a century. Now he is testing his talents on the larger stage of the Negro’s rights in Africa.”⁶⁷ According to the paper, Marshall’s reasons for assisting the Kenyans were three:

1. There has been a growing awareness of African problems in the United States over the last five years or so.
2. Africa is providing opportunities for expansion and international contacts for Negro business men.
3. Mr. Marshall had never been to Africa before.⁶⁸

“I had always meant to go,” he said in an interview, “but I never got around to it. I was always too busy.”⁶⁹

⁶⁶ Amconsul Nairobi to Department of State, January 15, 1960, Despatch no. 349, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.03/1-1560, National Archives.

⁶⁷ *Negroes’ Lawyer on World Stage*, N.Y. TIMES, January 22, 1960, at 2.

⁶⁸ *U.S. Negro Leader Arrives in Kenya*, N.Y. TIMES, January 11, 1960, at 5.

⁶⁹ *Id.* See also *The Reminiscences of Thurgood Marshall* at 444-47.

Marshall seems not to have pre-judged the Kenya context prior to meeting with the nationalists in Kenya. When asked by a reporter upon his arrival whether he supported universal suffrage for Kenya, Marshall demurred and said, "I have got to have a look around." He planned to meet as well with Asian community leaders in Nairobi.⁷⁰ Marshall understood that Kenya had reached a critical juncture. "These people have had it," he wrote to his wife, "and they are not going to take any more."⁷¹

Marshall soon left Kenya for London and the Lancaster House Conference on the Kenya Constitution.⁷² He would be the only person present who was not British or Kenyan. Marshall's role, as the *Cleveland Call and Post* reported it, was to "write a tricky constitution that will give the Africans in Kenya complete political power on the basis of a democratically elected government by universal franchise, while protecting the rights of the white minorities which is outnumbered about 100 to one."⁷³

⁷⁰ *U.S. Negro Leader Arrives in Kenya*, N.Y. TIMES, January 11, 1960, at 5. While Marshall may have simply intended to be cautious before committing to a position on the constitution, this comment apparently disturbed some nationalists who planned to push for universal adult suffrage. DAVID GOLDSWORTHY, *TOM MBOYA: THE MAN KENYA WANTED TO FORGET* (1982), 133.

⁷¹ *Negroes' Lawyer on World Stage*, N.Y. TIMES, January 22, 1960, at 2.

⁷² Marshall indicated that prior to his work on the Kenyan constitution he had "helped a little" with the Nigerian constitution. He told an interviewer that he was unable to provide details due to State Department restrictions. *The Reminiscences of Thurgood Marshall*, at 450-51.

⁷³ *Thurgood Freezes as Kenyans Feud*, CLEVELAND CALL AND POST, January 30, 1960, at 3A. LDF attorney Jack Greenberg recalled that he "helped out by doing research on British Commonwealth constitutions, which I passed on to [Marshall]," however his recollection was that LDF staff had not drafted anything. JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994), 223; Greenberg to Dudziak, e-mail.

The Kenya Constitutional Conference would get off to a rocky start, with a dispute over advisors. Four delegations were present at Lancaster House in London. As Marshall described them, his delegation “was made up of all native African men born in Kenya.”⁷⁴ A second one, representing the New Kenya Group, was mixed. “It had Africans, it had white British, it had Indians, all mixed together.” A third delegation, representing the United Party, was all white, “and the best way I can explain them is that if you compared them to the Ku Klux Klan, in its heyday in this country, the Ku Klux Klan would look like a Sunday School picnic. These were real rabid, awful.” The fourth delegation was Asian Indians, a major minority group in Kenya.⁷⁵

Initially the British were a bit apprehensive about Marshall’s attendance. The British Colonial Office had expressed to the U.S. Embassy in London a “tinge of apprehension” about his appointment, and “expressed [the] hope [that] Marshall had Commonwealth constitutional experience.”⁷⁶ Ultimately, however, the Colonial Secretary concluded that he “had no objection to Thurgood Marshall as [a] special adviser.”⁷⁷ Other

⁷⁴ There was only one group of nationalists at this meeting, and differences among tribes did not figure prominently in the debates. For this reason, this paper does not take up the important issue of tribal differences and their impact on independence politics. These issues would be of great importance at the 1962 Lancaster House Conference. By that point nationalist politics had formally fractured into two competing parties (KANU and KADU), and nationalists were split between two different delegations to the conference. See KYLE, *THE POLITICS OF THE INDEPENDENCE OF KENYA* 115-118.

⁷⁵ *The Reminiscences of Thurgood Marshall* at 445.

⁷⁶ Amembassy London to Secretary of State, January 13, 1960 (telegram), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1360, National Archives.

⁷⁷ London to Secretary of State, January 18, 1960, Telegram no. 3552, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives.

British observers were not so sanguine. One man wrote a letter of protest to Colonial Secretary Ian Macleod. He was “surprised and astonished” to see an announcement of Marshall’s role in the British press. He urged Macleod to “arrange for this to be stopped.” Marshall was “leader of America’s *National Association for the Advancement of Coloured People*.” The writer was “informed on good authority that this organisation is largely run by *Communists* and it is known to have stirred up trouble against Britain in many parts of Africa. Surely the British Government cannot permit such an unwise and disgraceful arrangement for legal advice to be used at *our Conference on East Africa and Kenya here in London*.”⁷⁸

In contrast, *New York Post* columnist Murray Kempton thought that Marshall’s presence at the Lancaster House conference was “one of the most extraordinary events in colonial history....There seems to be no record in diplomatic history of a private citizen of the United States sitting at a British government conference whose subject is Crown colonial policy.” Kempton thought that there was “romance in the image of Thurgood Marshall, the product of segregated schools, a child in a border city, welcomed as a distinguished American lawyer by a British Colonial Secretary. He represents the only revolutionary force that we have constructed in this century and it is suitable for export all over the world.”⁷⁹

⁷⁸ Saullers [? illegible] to Macleod, January 12, 1960, Folder: Kenya Constitutional Conference, 1960 Miscellaneous Representations, CO 822/2349, The National Archives of the United Kingdom, Public Records Office (emphasis in original).

⁷⁹ Murray Kempton, *The Diplomat*, N.Y. POST, January 26, 1960, at 24.

The politics of the conference quickly became complicated. The Africans announced that they sought two advisors at the meeting, Thurgood Marshall and Peter Mbuyi Koinange.⁸⁰ The nationalists were in an awkward position without Kenyatta present, since they had taken the position that they should not collaborate with the colonial government, but instead insist on Kenyatta's release as a condition of any sort of collaboration. Their very presence at Lancaster House without Kenyatta therefore raised questions among some Kenyans at home. Koinange, a nationalist in exile, could provide the group with needed legitimacy, since he shared with Kenyatta having been associated by the British with the Mau Mau and therefore cast outside what the British considered to be an acceptable political community. There was, as well, an element of personal rivalry. Mboya apparently acted on his own in securing Marshall's participation. According to Philip Goldsworthy, this was just one of Mboya's unilateral moves related to the Lancaster House conference, and his tendency to go it alone generated tension and resentment within the group.⁸¹

The British government objected strongly to Koinange, calling him "one of only two men outside Kenya regarded by govt [sic] of Kenya as having special responsibility for [the] unhappy events which led to emergency in Kenya." The African Elected Members insisted that they would boycott the meeting if Koinange was barred. As an American newspaper put it, the Africans had given in to "the whites on their insistence

⁸⁰ GOLDSWORTHY, TOM MBOYA, 133.

⁸¹ *Id.* at 133-36.

that Jomo Kenyetta [sic], convicted and exiled on a charge of leading the Mau Mau terrorists in 1952, as one of their delegation.” Thurgood Marshall said that “the Africans believe that they need the advice of Koinange as an African ‘elder statesman, since they cant have Kenyetta [sic]....If they (the Africans) give in to this [objections to Koinange’s role], the people back home will accuse them of selling out and any agreement they make at the conference will be regarded with suspicion.”⁸² Hence, the Lancaster House Conference began without the Africans present. According to the U.S. Embassy, “Macleod hoped [that] African-elected members ‘having made protest...will join our discussions...which are so important to [the] future of Kenya.”⁸³

Ultimately, the controversy over Koinange led the British to embrace Marshall. Macleod called him “a very distinguished lawyer and one whom we will be very glad to see at our Conference.” Koinange, in contrast, was regarded by the British as tainted by Mau Mau ties, and hence unacceptable.⁸⁴

Macleod was sorry to have to proceed without the Africans. In his opening statement, Macleod said that he “regretted [that] African elected members absence made

⁸² *Thurgood Freezes as Kenyans Feud*, CLEVELAND CALL AND POST, January 30, 1960, at 3A.

⁸³ London to Secretary of State, January 18, 1960, Telegram no. 3552, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives. [no close quote in telegram.]

⁸⁴ Record of the First Plenary Session, Kenya Constitutional Conference, 1960, January 18, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 1.

[the] conference 'at this moment incomplete'."⁸⁵ Macleod set out the ultimate objective of Kenya negotiations: "we intend to lead Kenya on to enjoy full self-government, or if I may use a plainer word, Independence." This was the ultimate goal, but not the focus of the 1960 conference. Instead, "our task is to plan the next step in Kenya's constitutional evolution. To see at what pace Kenya can assume greater responsibility for the conduct of her own affairs." As conferees worked, Macleod emphasized, "we should remember that both Africans are easily the majority of all the people of Kenya and also that all those who have made their home in Kenya are entitled to make a full contribution to the work of governing their country." So Macleod set out the central problem underlying the constitutional talks: the issue of political enfranchisement of the majority without the sacrifice of minority rights. This dynamic created problems that "have to be solved before Kenya can come to independence."⁸⁶ The Secretary emphasized the importance of an inclusive approach to politics, and that, "for the time being...interest of minorities might have to be secured through constitutional safeguards." He proposed three

⁸⁵ London to Secretary of State, January 18, 1960, Telegram no. 3551, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives.

⁸⁶ Record of the First Plenary Session, Kenya Constitutional Conference, 1960, January 18, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 1-2. At this point, many British leaders believed that Kenya might become independent in about fifteen years.

The U.S. position was that it "supports [the] principle [of] orderly transition to self-government and eventual self-determination in [the] interest [of] all parties and peoples involved." According to the American position, "all people permanently resident in Africa have legitimate interests for which they can rightfully demand fair and just consideration." Nairobi to Secretary of State, February 2, 1960, Telegram no. 262, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-260, National Archives.

committees for the conference, among them a committee on the franchise and the colonial legislature, and one on a bill of rights.⁸⁷

As the conference got underway, Marshall, unable to attend the meeting due to the boycott, instead spoke to the press. He warned of the serious consequences for Kenya if an agreement acceptable to the Africans on Kenya's constitution was not reached. Marshall warned of a "new uprising in Kenya that nobody can control – any more than they could control Mau Mau." He was afraid that "a revolt might occur if the constitutional conference meeting ended with what the Kenyans considered to be an 'imposed constitution. This new group throughout Africa know exactly [sic] what they want,' Mr. Marshall was quoted as saying. 'They want independence now – tomorrow is too late.'"⁸⁸ As the *East African Standard* reported it, "Mr. Marshall spoke of his hopes for a common-roll democracy, with a constitution providing for minority safeguards and an effective Bill of Rights. 'The most important thing is that we protect property so that no future Government of Kenya can seize the land in the Highlands,' he added." The story continued, "[t]he central fact of Kenya's political future, in Mr. Marshall's view, was that there are 6,000,000 Africans as compared with 64,000 Europeans, 165,00 Asians and 35,000

⁸⁷ Record of the Second Plenary Session, Kenya Constitutional Conference, 1960, January 20, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 3-4.

⁸⁸ *Kikuyu protest at Second Advisor: Telegram from Loyalists sent to Mr. Macleod*, EAST AFRICAN STANDARD, January 25, 1960, at 5.

Arabs. What was more, the Europeans had made little effort to learn the Swahili language or otherwise adapt themselves to the culture of their adopted country.”⁸⁹

The *East African Standard* reported that Marshall was “working on a draft ‘Bill of Rights’ which they propose to submit to the conference. Indications are that their case is based on the following points...: Welcome for common roll elections; one adult, one vote; a demand for nine elected Ministers, including the Chief Minister; single-member constituencies, based geographically; perhaps three Civil Service Ministers for a transitional period; opposition to high qualifications for the franchise as a safeguard for minorities; no franchise on racial grounds; Africans willing to accept responsibility in the Government; reserved seats definitely unsatisfactory; and a national Parliament instead of the Legislative Council.”⁹⁰ Marshall’s task would be complicated, however, for the draft Bill of Rights would become a pivotal issue at the 1960 Lancaster House Conference.

Finally, according to the *Ghana Times*, “The Kenya Nationalists stood their ground

⁸⁹ *Id.*

The bill of rights and especially property rights were key issues at this conference. Another important issue that would be a focus of discussion later on would be citizenship, and the question of whether whites and Asians would become citizens of Kenya. Tom Mboya addressed this issue in a speech to white farmers in 1962. He encouraged them to stay in the new nation. However, “On the attainment of our independence all who were formerly ‘non-Africans’ must become full citizens of Kenya....But if you are not prepared to be citizens of Kenya, there will be no place for you here, except as aliens.” *Kenya as a Nation*, in TOM MBOYA, THE CHALLENGE OF NATIONHOOD 46 (1970). The 1963 Independence Constitution enabled whites and Asians to become citizens by registration within two years. After that they could only become citizens through naturalization, which required knowledge of Swahili. The constitution also expressly exempted noncitizens from protection against discrimination. Cite citizenship clauses. KENYA INDEPENDENCE CONST. (1963), Chapter I: Citizenship.

⁹⁰ *Mr. Macleod responsible for result*, EAST AFRICAN STANDARD, January 25, 1960, at 5.

and boycotted the conference till the Colonial Secretary, perhaps, realised that a Kenya conference without the accredited leaders of Kenya was like Hamlet without the prince.”⁹¹ Macleod brokered a compromise. Each delegation would be entitled to one adviser in attendance at the sessions in Lancaster House. Other advisers, including Koinange, could be present in the building, but could not attend sessions. Because of this deal, the African delegation’s sole advisor to be present at the sessions would be Thurgood Marshall.⁹² Macleod was now pleased with Marshall’s presence, for without him as an alternative advisor to Koinange, the African delegation would be without an advisor. As the U.S. Embassy in London put it, Marshall “appears to be persona grata coloff....(Without Marshall as alternative to Koinange ColSec would have been unable [to] apply [the] formula re attendance [of] advisers which permitted [the] conference [to] get underway this week).”⁹³

⁹¹ *Kenya’s Future*, GHANA TIMES, February 2, 1960, at 9. Macleod had been responding to pressure from white settlers, the paper speculated. To the settler representative in London, “recognition of Mr. Koinange, in any form, whatsoever, is an anathema; and the very mention of the man’s name, is said to cause the blood-pressure of certain people to shoot up.” The Ghana Times, the principal paper of a nation that achieved independence in 1957, was not sympathetic. “Well, these people, with all respect, will have to be told that the rising tide of nationalism in Africa is a fact which cannot be denied or ignored, and that it is more prudent to swim with the tide than against it.” *Id.*

⁹² London to Secretary of State, January 23, 1960, Telegram no. 3666, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-2360, National Archives.

⁹³ London to Secretary of State, January 29, 1960, Telegram no. 3782, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-2960, National Archives. According to the Embassy “[a]s adviser Marshall does not speak in [the] conference. While he has been mentioned in [the] press on several occasions, he has not become [a] subject of controversy.” *Id.*

Marshall's role also registered back at home. On January 28, Christian Herter, of the State Department cabled the U.S. Embassy in London for information. In "[v]iew of [the] wide press coverage and participation [by] Marshall," he said, the State Department would "appreciate Embassy comment, analysis [of the] Kenya conference."⁹⁴ The U.S. Embassy kept track of Marshall's work, and reported on his activities to the Secretary of State.⁹⁵

Writing Rights

The meetings at Lancaster House were not pleasant. As Marshall put it, "[E]verybody was at everybody's throat."⁹⁶ There was a rough consensus, however, on what mattered most. The central issue of voting rights and representation in the legislature. With majority representation possible for Africans, another matter seemed central: safeguards, or a bill of rights, to protect the interests of the powerful who were soon to become an electoral minority. Reacting to Macleod's opening statement, speaker

⁹⁴ Department of State to Amembassy London, January 28, 1960, Telegram no. 5700, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-2860, National Archives.

⁹⁵ See generally Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-2860, National Archives, and related folders.

⁹⁶ *The Reminiscences of Thurgood Marshall* at 445.

after speaker emphasized the importance of “safeguards” to protect minority rights as Africans gained political power.⁹⁷

For the African Elected Members, Ronald Ngala emphasized the importance of moving to democratic self governance soon. Delay, he suggested “would be disastrous.” Minority rights should be protected, but not through reserved seats for racial groups in the legislature, as was the case in 1960. Instead, “the best form of safeguard for all races in Kenya was a Bill of Rights enforced by an independent judiciary.” He announced that Marshall, “an expert on minorities and civil rights, had been retained by the African Constituency Elected Members and was drafting a proposed Bill of Civil Rights.”⁹⁸ The Africans repeatedly emphasized that a bill of rights, rather than reserved seats in the legislature, was the ideal way to protect minority rights. This had been a longstanding position, argued Dr. Kiano, and was not “developed merely to quiet the fears of those who were afraid of African domination.” Oginga Odinga had included a call for complete equality in a 1957 election manifesto. In 1958, the African Elected Members circulated a memorandum pledging support for a bill of rights. Kiano stressed that

⁹⁷ Record of the Fourth Plenary Session, Kenya Constitutional Conference, 1960, January 25, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England.

⁹⁸ *Id.* at 3-4.

Africans intended that an independent Kenya should subscribe to the Convention on Human Rights.⁹⁹

While he disagreed about reserved seats in the legislature for racial groups, Michael Blundell of the multi-racial New Kenya Group agreed that individual rights must be protected in the new constitution, and emphasized as well the importance of an independent judiciary.¹⁰⁰ Dr. S.G. Hassan, leader of the Asian delegation, emphasized the importance of Asians to economic progress in Kenya. The Asians and Muslims supported independence and majority rule in Kenya, but stressed that the fundamental human rights of their groups must be protected.¹⁰¹

For their part, Union Party members stressed not voting rights, but broader education, and argued that full enfranchisement of Africans would have to wait for some time until more Africans had been educated.¹⁰² United Party leader L.R. Briggs described the concerns of white settlers in a B.B.C. interview. According to news accounts, “Briggs said his party was afraid that if Africans had control they would make it ‘virtually impossible’ to farm, either by taxation or by political pressures.” He emphasized that,

⁹⁹ Record of the Sixth Plenary Session, Kenya Constitutional Conference, 1960, January 26, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 1-2.

¹⁰⁰ Record of the Fourth Plenary Session, Kenya Constitutional Conference, 1960, January 25, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 7-8.

¹⁰¹ *Id.* at 5-6.

¹⁰² Record of the Sixth Plenary Session, Kenya Constitutional Conference, 1960, January 26, 1960, [CO 822/2358, 100600], The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 5-6.

“Our feeling is that if a constitution were introduced which would have the effect of placing the Europeans under the dictatorship of the Africans, then we would naturally wish to enable our people to leave the country if they wished to do so.”¹⁰³

Although all conference participants thought that rights were important, a bill of rights was always a second-best source of protection for minority interests. The Secretary of State hoped that a gradual transition in Kenya would provide time for the races to work together. “This should help to generate mutual goodwill, respect and understanding, which will afford more lasting assurance of European position than any constitutional safeguards.”¹⁰⁴

Days of opening statements were accompanied by nights of behind-the-scenes negotiations. Discussions between groups and with the Colonial Secretary were productive, and the conference quickly agreed on a new plan for suffrage and representation.

In a statement for the press, the Secretary of State expressed his pleasure with the progress made at the conference. “I am very happy with the measure of agreement that the Lancaster House Conference has revealed. In Kenya the groups mainly concerned had taken up positions which it seemed impossible to reconcile. Here in London, by talking out their differences together, they have come much closer to each other.” He felt

¹⁰³ *Kenya Talks: Capt. Briggs Afraid of African Majority*, GHANA TIMES, February 9, 1960, at 9.

¹⁰⁴ Secretary of State for the Colonies to Kenya (O.A.G.), Telegram no. 30, February 15, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

that there was “a good chance that the wide measure of agreement for which I have always sought will now be obtained.” It was only the United Party that “stand out completely against [the proposals] and even they are anxious to join in the further discussions of the Conference.”¹⁰⁵

The Commonwealth Relations Office noted that the “conference has shown greater co-operation and agreement among all groups than ever before.” In particular, the “New Kenya Group has shown great political courage in going beyond views of many supporters (of all races, but particularly of European community).” The question remaining, of course, was whether the positions taken by representatives at the conference would be palatable to their constituencies back in Kenya. “Next week’s political meetings in Kenya will show whether moderates can survive.”¹⁰⁶

The New Kenya Group agreed to the proposals “provided reasonable agreement is reached on the safeguards.”¹⁰⁷ Much hope was put in the New Kenya Group, as a “rallying point for moderate Africans and as a means of bringing round European opinion.” Government officials hoped that “they may well be able to form an effective

¹⁰⁵ Secretary of State to Kenya (O.A.G.), February 16, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹⁰⁶ Outward Telegram from Commonwealth Relations Office, to Ottawa, etc., February 16, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹⁰⁷ P.M. (60) 7 (Note from Secretary of State to Prime Minister), undated, p. 1, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

sandbag against African extremism.”¹⁰⁸ Meanwhile, back in Kenya, the Acting Governor reported that European opinion was coalescing behind the United Party.¹⁰⁹

An agreement leading to majority rule in Kenya put Marshall’s work front and center, for Marshall’s contribution to the conference was a draft Schedule of Rights.¹¹⁰ On February 2, 1960, Marshall submitted a memorandum on a draft Bill of Rights to the Committee on Safeguards at the Lancaster House Conference.¹¹¹ There is a puzzling note in Marshall’s memo. Although he was serving as an advisor to the African Elected Members, Marshall submitted his memorandum on behalf of himself alone. “This proposal is solely mine,” he wrote, “and has neither been discussed with nor approved or

¹⁰⁸ Draft Note for the Prime Minister, undated, pp. 3-4, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹⁰⁹ Outward Telegram from Commonwealth Relations Office, to Ottawa, etc., February 16, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹¹⁰ As Marshall recalled, “I wrote the whole ‘schedule’ of rights, as they call it in Britain. I said it was a schedule. The Britishers said, it’s their language, and they knew what they were talking about, and the correct pronunciation (of schedule) was ‘shedule.’ I said, ‘Well, if that’s true, how are your children doing in shull today’ (as contrasted to ‘School, skool’) – but it still came down as a schedule.” *Reminiscences of Thurgood Marshall* at 445-46.

Three papers on a bill of rights were circulated at the conference: one by Thurgood Marshall, one by Colonial Office Advisor W.J. M. Mackensie, and one based on the Nigerian constitution. *Land Tenure And Bill Of Rights: Kenya Whites Seek to Perpetuate Evil*, GHANA TIMES, February 20, 1960. The *Ghana Times* reported that “Another document covering the best features of all three had been prepared by Dr. Marshall and had been accepted in its general terms by all delegates.” *Id.*

¹¹¹ Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England.

rejected by the African Elected Members or any other group. It is, therefore, submitted for use by all members of the Conference.”¹¹²

The reason that Marshall submitted the memorandum on his own, and without previously discussing it with the African Elected Members, is not disclosed in archival records or press accounts. It may simply have been a matter of timing, since Marshall’s work in London was cut short when he received an urgent call to return home due to developments in the civil rights movement in the U.S. In addition, the nationalists were tied up in negotiations leading to a compromise on representation and suffrage. Besides their behind-the-scenes work on these matters, press interviews and meetings among themselves on various matters were priorities early in the conference. The Bill of Rights also raised many complicated issues which the group would not have had time to fully consider. Alternatively, it is, of course, possible that Marshall had differences with at least some of the African delegates, and that this undermined their ability to work together. There is an ambiguous suggestion of this possibility in the records. After Marshall’s departure later that month, according to press reports, Mboya’s chief rival Oginga Odinga was “reported denying rumours of clash between A.E.M. and Thurgood Marshall.”¹¹³ Although Marshall’s sole authorship cannot shed much light on the nationalists’ views about rights as of the 1960 Lancaster House Conference, it provides a

¹¹² *Id.*

¹¹³ Kenya (Director of Information) to Secretary of State for the Colonies, Telegram, February 6, 1960, CO 822/2354, 100600, The National Archives of the United

better window into Marshall's thinking than a consensus document would have provided.¹¹⁴

Marshall explained his objectives at a Committee on Safeguards meeting later that month. He said that "the intention of his paper...was to protect the rights of every individual in Kenya, rather than the rights of any particular minority groups."¹¹⁵ The proposed Bill of Rights began with a preamble: "All persons are equal before the law and are entitled without any discrimination or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law."¹¹⁶ Marshall thought that the preamble would "help the Courts when interpreting the particular provisions of the Bill by setting out general principles on which it would be based."¹¹⁷

Kingdom, Public Records Office, Kew, England. "A.E.M." stood for African Elected Members.

¹¹⁴ At a later conference in 1962, one of two major nationalist groups included Marshall's draft bill of rights in their constitutional demands.

¹¹⁵ Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of a Meeting held in the Music Room, Lancaster House, London, S.W.1, on Tuesday, 16th February, 1960, at 11.15. a.m., Folder: CO 822/2363, Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of Meetings, The National Archives of the United Kingdom, Public Records Office, Kew, England. Note: minutes from the meeting summarized Marshall's comments, so some passages may be paraphrases of Marshall, and not all quotes are verbatim.

¹¹⁶ Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹¹⁷ Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of a Meeting held in the Music Room, Lancaster House, London, S.W.1, on Tuesday, 16th February, 1960, at 11.15. a.m., Folder: CO 822/2363, Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of Meetings, The National Archives of the United Kingdom, Public Records Office, Kew, England.

Section One protected the rights of “Freedom of Religion, Speech, Press and Association.” Section Two on “Personal Security” protected rights to life and liberty, rights against slavery, and the right to equal protection of the law. Section Three guaranteed rights to “Education, Health and Welfare,” Section Four protected the “Right to Work,” and Section Five protected voting rights. While sections One, Two and Five paralleled in many ways the U.S. Constitution, Sections Three and Four differed, at least from the U.S. text. Section Three on “Education, Health and Welfare,” and Section Four on “The Right to Work,” protected affirmative rights to education, to employment, and to what now would be called a “living wage.” It provided that “Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection..” The right to work also protected the right “to form and to join trade unions.”¹¹⁸ Marshall said that his draft drew upon provisions from the U.S. Constitution, the Malayan Bill of Rights, and the Constitution of Nigeria.¹¹⁹ The language of the right

¹¹⁸ Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England. While Marshall’s proposal included voting rights protection, he does not appear to have participated directly in debates over the franchise at the conference. The voting rights section of his proposal does not appear to have been a topic of debate.

¹¹⁹ *Id.*

to work clause does not parallel provisions of these constitutions, however, and instead tracks the language of the Universal Declaration of Human Rights.¹²⁰

The key section of the Bill of Rights was Section Six, on “Property Rights.” Here Marshall recommended that provisions of the Nigerian Constitution be adapted to conditions in Kenya, and his memo simply incorporated the Nigerian text. He relied on the Nigerian constitution for clauses protecting property rights, because these were “the best he had met.”¹²¹ This section provided, in part:

- (1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force –
 - (a) requires the payment of adequate compensation therefor;
 - (b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the Courts;
 - (c) gives to any party to proceedings in the Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.¹²²

¹²⁰ Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948). Thanks to Renee Rastorfer for tracking this down, and also to Naseem Sagati for her helpful work on this topic.

¹²¹ Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of a Meeting held in the Music Room, Lancaster House, London, S.W.1, on Tuesday, 16th February, 1960, at 11.15. a.m., Folder: CO 822/2363, Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of Meetings, The National Archives of the United Kingdom, Public Records Office, Kew, England. Marshall suggested that the Conference should agree on general principles, with detailed drafting to be carried out later. Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹²² Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England.

A “taking” could only be for public purposes, and this section of the Bill of Rights incorporated that idea through a reference to previously existing statutes.¹²³ This proposal would ultimately be modified to include a right to take a dispute over a taking of property directly to the highest court in Kenya.¹²⁴ Allowing the government to take property seemed to leave open the option of land reform, while the requirement of compensation was principally aimed to protect white minority settlers from government abuse.

The fairly straightforward language of this “takings” clause masked a deep underlying division at the Kenya Constitutional Conference, a fissure that ran through independence politics in the Colony. The most valuable land in Kenya had originally been tribal land, and now was exclusively in the hands of white settlers. These farmers produced Kenya’s agricultural exports, and so were the principal tie with global markets.

¹²³ Section Two of the Bill of Rights provided that “[n]othing in this section shall affect the operation of any existing law,” including subsequent amendments which did not add “to the kinds of property that may be taken possession of,” or “to the purposes for which or circumstances in which such property may be taken possession of or acquired,” or laws that “make the conditions governing entitlement to any compensation or the amount thereof less favourable,” or that deprive a person of the rights guaranteed in this section of the constitution. Memorandum, Committee on Safeguards, Kenya Constitutional Conference, 1960, February 2, 1960, The National Archives of the United Kingdom, Public Records Office, Kew, England, p. 5. In this way, the constitution would constrain future lawmaking affecting property rights, without immediately unsettling the entire statutory framework the country was based on. This kind of limitation was common in African constitutions written during this period.

¹²⁴ Because there was only a tiny number of indigenous Africans in Kenya who were lawyers, this meant that property disputes would ultimately be resolved in most cases by Europeans. Marshall was aware of this issue and hence was concerned that Kenyans needed to be trained as lawyers. *Reminiscences of Thurgood Marshall*. On courts in East Africa, see JENNIFER WIDNER, *BUILDING THE RULE OF LAW : FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* (2001).

The settler community believed that the land belonged to them, and that their property rights must be protected. Many nationalists believed that a key objective of a post-colonial government must be land reform and resettlement. Land reform would redress an historical injustice of displacement of African peoples from their lands under colonialism. For the British, contemplating a continuing relationship with Kenya as part of the Commonwealth, and hoping to protect British citizens who had settled in Kenya, any resettlement scheme must not interfere with settler property rights, and so must be based on just compensation.¹²⁵

An argument broke out in committee: what “public purposes” could the government take land for? Some white settlers wanted this spelled out very clearly. But to do that would seem to require the Africans to develop a policy on land reform on the spot – something they had not contemplated, and were not in a position to do. Mr. Slade, a white settler with the New Kenya Party, commented that “the provisions of the Nigerian constitution on expropriation, considered that even with fair compensation the right of the state to expropriate land should be restricted to public purposes, and that some definition of ‘public purposes’, even if it were a negative one, should be included in the Bill of Rights.” Seeing this as an attempt to tie the hands of a future government, nationalists objected. Ronald Ngala believed that “the acquisition of unused land for

¹²⁵ A land buy-out scheme was in place by 1963, with British and World Bank financing. This was directed principally at agricultural land held by white settlers, rather than commercial properties owned by Asians. See KEITH KYLE, *THE POLITICS OF THE INDEPENDENCE OF KENYA*

distribution to the landless of all races should come within the interpretation of 'public purposes,'" while Tom Mboya suggested that "the Bill of Rights should not entrench the position of those enjoying a privileged position, nor perpetuate a system that was basically unjust. It should be within the power of the Government of Kenya to bring in legislation to remove injustices. The Courts should be left to interpret 'public purposes' in the light of changing circumstances."¹²⁶

This issue would drive a wedge between groups at the conference, threatening the consensus Colonial Secretary Macleod had hoped for. "We are bogged down over safeguards," the Secretary of State's office reported to the Colonial Governor's office. "Conference pretty well agreed there should be a Bill of Rights... largely based on Nigerian model. But hitch came, when we got to property rights."¹²⁷ Macleod told the Prime Minister : "The New Kenya Party made their acceptance of the constitutional settlement conditional on reasonable proposals for safeguards, and by that they mean largely land....The Africans don't like it at all and are very resentful of the Europeans for raising the matter when the Africans have already agreed to a Bill of Rights." They "had

(1999); B.A. OGOT AND W.R. OCHIENG', EDS., DECOLONIZATION AND INDEPENDENCE IN KENYA, 1940-93 (1995).

¹²⁶ Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of a Meeting held in the Music Room, Lancaster House, London, S.W.1, on Tuesday, 16th February, 1960, at 11.15. a.m., Folder: CO 822/2363, Kenya Constitutional Conference, 1960, Committee on Safeguards, Record of Meetings, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹²⁷ To Kenya from Secretary of State, Telegram Secret and Personal No. 34, February 18, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

not come here to discuss land issues and will not commit themselves to any statement of the kind Slade is obviously after." A further wrinkle, Macleod thought, "They are of course very much divided on the issue themselves."¹²⁸ Nevertheless, the Africans "want an agreement and they want to return soon to Kenya with an agreement, and so in short although they dislike it very much they are prepared to accept" a portion of the proposal, but not language defining and limiting the "public purposes" for which land could be confiscated.¹²⁹ Because of these difficulties, there was "little hope of concluding business" soon, but the government was nonetheless "seized of importance of getting people back to Kenya with an agreement as soon as possible."¹³⁰ Meanwhile, the Acting Governor in Kenya warned: "all sources report growing unrest amongst Europeans. We are afraid that a band of hot heads may do something rash which will spark off a series of racial clashes which will do a good deal of harm particularly to European community."¹³¹

Ultimately the Committee considered the following language:

PROPERTY RIGHTS
Suggested Formula for Report

¹²⁸ To Kenya from Secretary of State, Telegram Secret and Personal No. 34, February 18, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹²⁹ Macleod to Prime Minister, February 20, 1960, Folder: PREM 11/3030, New Constitutional Arrangements for Kenya, 1957-60, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹³⁰ To Kenya from Secretary of State, Telegram Secret and Personal No. 34, February 18, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹³¹ From Kenya (Acting Governor) to Secretary of State for the Colonies, Secret Telegram No. 200, February 19, 1960, CO 822/2354, 100600, The National Archives of the United Kingdom, Public Records Office, Kew, England.

- p.1 In regard to rights in property, the Conference considered that the Bill of Rights should include provision to the effect:
- (1) that private rights in property of all kinds should be respected and should not be compulsorily acquired or extinguished without full and fair compensation;
 - (2) that any question or dispute as to the property to be acquired or the compensation to be paid therefor should be open to judicial determination by the Courts at the instance of the person from whom the property is to be acquired, and that such judicial determination should be subject to the normal avenues of judicial appeal in civil cases; and
 - (3) that compulsory acquisition of property of any kind should be confined to circumstances in which such acquisition is required for the fulfilment of contractual or other legal obligations attaching to the owner of the property or circumstances in which such acquisition is justified in the general public interest.

p. 2 The Conference did not however consider that compulsory acquisition of private rights in property would be “justified in the general public interest” if the purpose of the acquisition would be to make the property available to another person or persons for his or their private advantage unless the property is after acquisition to be so applied as to be of service to the public outweighing the resultant hardship to the dispossessed owner.

The Conference considered that the provisions in this regard in the Nigerian constitution would provide a convenient model for adaptation and modification to these requirements.¹³²

The nationalists indicated that they could agree to the first page of this language, but not to page two, while Slade held out for the inclusion of page two. Marshall insisted that

¹³² Kilmuir to Macleod[?], February 19, 1960, Folder: CO 822/2354, Kenya Constitutional Conference, 1960, Record of Proceedings, The National Archives of the United Kingdom, Public Records Office, Kew, England.

“he is prepared to stake his reputation on that the words on the second page add nothing to those on the first.”¹³³

The central obstacle seemed not to be the New Kenya Party as a whole, but Slade, who Macleod described as “something of a fanatic,” who viewed the issue as a matter of principle. He might need to bring Slade to see the Prime Minister, and suggested that “an appeal to Slade on the wider grounds of the importance of the Kenya agreement to the whole of Africa, and indeed the whole Commonwealth, would be the only possible way of breaking through his rigid position; reason alone will not do it.” The Africans, in contrast, were attempting to compromise, and Macleod thought that they could not go further “or they would be repudiated at home. Indeed already they may have gone too far.”¹³⁴

Coming Home

Before work on the Kenyan Constitution was complete, a call from home brought Marshall back from Kenya. Marshall was in London on February 1, 1960, a historic day in the U.S. civil rights movement. That day four African American freshman at North

¹³³ Kilmuir to Macleod[?], February 19, 1960, Folder: CO 822/2354, Kenya Constitutional Conference, 1960, Record of Proceedings, The National Archives of the United Kingdom, Public Records Office, Kew, England.

¹³⁴ Macleod to Prime Minister, February 20, 1960, Folder: PREM 11/3030, New Constitutional Arrangements for Kenya, 1957-60, The National Archives of the United Kingdom, Public Records Office, Kew, England.

Carolina Agricultural and Technical College, held a sit-in at the segregated lunch counter at Woolworth's in Greensboro, North Carolina. The simple protest soon expanded into a wide-spread sit-in movement. Jack Greenberg recalled, "it was as if a spark had been struck in an oxygen-filled atmosphere. The sit-ins spontaneously spread to neighboring cities in North Carolina and within two weeks they were all over the South. Blacks began demanding nonsegregated service at lunch counters, department stores, bus terminals, and all the places from which they had been excluded or segregated; supporters joined them at branches of the offending chain stores in the North as well." Greenberg would later write that the Legal Defense Fund "set out to defend the students immediately."¹³⁵ But the sit-ins posed a set of legal and practical dilemmas for civil rights lawyers, among them the problem that the students had violated facially valid trespass laws, not facially vulnerable segregation laws. Derrick Bell, then a young lawyer at the LDF, recalled: "Thurgood stormed around the room proclaiming in a voice that could be heard across Columbus Circle that he did not care what anyone said, he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks by going in their stores or lunch counters and refusing to leave when ordered to do so." He insisted that he would only take the cases if his staff could find some new and convincing

¹³⁵ GREENBERG, *CRUSADERS IN THE COURTS*, 271-73. *See generally* WILLIAM CHAFE, *CIVILITIES AND CIVIL RIGHTS*. Events like the sit-ins would generate widespread international media coverage, and sympathetic international reaction. On the international impact of the civil rights movement, *see* DUDZIAK, *COLD WAR CIVIL RIGHTS*.

arguments.¹³⁶ But Marshall later simply explained in an oral history interview that, “when word came over of the movement of Martin Luther King and the others, and after several telephone calls with the office in New York, I decided I’d better come home and take care of home, instead of trying to take care of Kenya.” He finished his work on the constitution, he said, and quickly returned home.¹³⁷

In London, meetings continued on the question of safeguards. According to the U.S. Embassy in London, the “subject [is] not all plain sailing.” The “goal of [the] conference continues [to] be [a] fairly short set of general principles, which will form [the] basis of [a] detailed constitution to be drafted later in Nairobi and London.”¹³⁸ However, “This highly emotional issue has apparently postponed conclusion of conference[. P]articipants searching hard for formula either to resolve or shelve [the] issue.” At the same time, Africans were “getting uneasy about [the] extent to which they have accepted Colonial office and Blundell group proposals, for while they recognize [the] merits of [the] proposals, they worried about [the] reaction of their constituents in Kenya.”¹³⁹ As Mboya saw it, some representatives at the conference “want the bill to contain safeguards

¹³⁶ WILLIAMS, THURGOOD MARSHALL, 287. See also Derrick Bell, *An Epistolary Exploration for a Thurgood Marshall Biography*, 6 HARV. BLACKLETTER L.J. 51 (1989).

¹³⁷ *The Reminiscences of Thurgood Marshall*, 476. Marshall’s oral history indicates that these events occurred in 1961, however Marshall worked on the Kenyan constitution in London in 1960.

¹³⁸ London to Secretary of State, February 16, 1960, Telegram no. 4038, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-1660, National Archives.

on land which would exclude any future Government from expropriating land with or without compensation." Mboya said, "[w]e are not prepared to discuss this question. The bill already safeguards land and property owners within the due process of law."¹⁴⁰ According to the *Times* of London, it was "understood that the Africans agree on the principle of no expropriation without compensation: but other delegates ask how one judges the compensation, and whether it is right that it should be used for the settlement of Africans in the present agricultural system."¹⁴¹ The *Ghana Times* reported that the Africans wanted to make it "'crystal clear' they will always uncompromisingly uphold private property rights of any citizen irrespective of his race or national origin but, Ngala said, 'we feel that the people of Kenya must preserve their right to carry out such land reforms as will accelerate economic betterment of the country.'"¹⁴²

With the conference facing deadlock, the *Ghana Times* reported, "all delegates and officials now believe that the only hope for a compromise solution depends on Macleod

¹³⁹ London to Secretary of State, February 18, 1960, Telegram no. 4088, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-1860, National Archives.

¹⁴⁰ *Land Tenure And Bill Of Rights: Kenya Whites Seek to Perpetuate Evil*, GHANA TIMES, February 20, 1960.

¹⁴¹ *Kenya Talks Crisis: Macleod Attempts to Break Deadlock*, GHANA TIMES, February 22, 1960, at 9, quoting THE TIMES (London).

¹⁴² *Kenya Conference: Report To Be Placed Before Parliament Today*, GHANA TIMES, February 25, 1960, at 4.

taking things into his own hands and formulating an alternative policy on which both sides would be able to compromise.”¹⁴³

In late February the conference ended, but with the major question of safeguards unresolved. While Thurgood Marshall was no longer in London, his presence continued to be felt. Macleod’s official report on the conference addressed the unsettled question of safeguards. Two documents were singled out as particularly helpful: a discussion of the Nigerian constitution, and “a very helpful paper by Dr. Thurgood Marshall outlining the kind of provisions which might help to meet the situation.” The ideas in these documents would be put to use. “It is the firm view of Her majesty’s Government that legal provisions are needed in the proposed constitution, which will be made by Order in Council, to provide for the judicial protection of human rights, on the lines of the provisions in the Nigeria (Constitution) Order in Council, taking into account the draft prepared by Dr. Thurgood Marshall and the special circumstances of Kenya.”¹⁴⁴

The ideas in Marshall’s draft would be put to further use. In 1962, the principal nationalist party in Kenya, KANU, included Marshall’s bill of rights in their

¹⁴³ *Kenya Talks Crisis: Macleod Attempts to Break Deadlock*, GHANA TIMES, February 22, 1960, at 9.

¹⁴⁴ *Kenya Constitutional Conference, 1960: Report on the Conference*, THE KENYA GAZETTE, Vol. LXII (February 25, 1960), p. 247, enclosure to Amconsul Nairobi to Department of State, March 1, 1960, Despatch no. 402, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/3-160, National Archives.

The conference produced no final constitutional text, only Macleod’s report summarizing the meetings’ accomplishments and difficulties.

constitutional demands.¹⁴⁵ The final 1963 independence constitution would contain very detailed clauses regarding confiscation of land for public purposes, along the lines that Marshall had supported in 1960.

While most of the major players agreed to go forward with the agreements they had reached so far, the all-white United Party “denounced [the] conference as [a] death-blow to [the] European community,” and said that “the reported proposals would virtually mean that Europeans and Asians would no longer have genuine representation.” In contrast, the Africans “appeared willing [to] go ahead to [the] next phase.”¹⁴⁶ The *Ghana Times* called the resolution of the conference “a victory for the African Nationalists, who were, after due thought and consideration, supported by the Colonial Secretary.”¹⁴⁷ Meanwhile white settlers were reportedly calling Macleod’s constitutional proposals “a Mau Mau victory.”¹⁴⁸ The future remained uncertain. The U.S. Embassy in London was of the opinion that “Macleod has only just managed [to] avoid [a] conference breakdown and that local Kenya reaction to [the] positions of [the] three principal groups may jeopardize [the] results.”¹⁴⁹

¹⁴⁵ *Id.*

¹⁴⁶ *Kenya African Leaders Appeal For Calm*, GHANA TIMES, February 15, 1960, at 4.

¹⁴⁷ *Africans Win at Kenya Talks*, GHANA TIMES, February 15, 1960, at 9.

¹⁴⁸ *Kenya Talks*, GHANA TIMES, February 18, 1960, at 2.

¹⁴⁹ London to Secretary of State, February 22, 1960, Telegram no. 4129, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-2260, National Archives.

Macleod's proposals were "endorsed by Her Majesty's Government."¹⁵⁰ The constitution was now called the "Macleod Constitution," identified with the Colonial Governor in the same way that earlier constitutions, less based on deliberation, had been.¹⁵¹ The Constitution was no longer an agreement that Africans would embrace, however, but rather a colonial position that would be a starting point for their arguments about further change. Meanwhile, the U.S. Consul in Kenya's assessment of the conference was that "it would appear that [Britain] has made up its mind to divest itself of its colonial responsibilities in Africa as expeditiously as feasible."¹⁵²

With independence and an eventual African government on the horizon, a new climate of negotiation emerged back in Nairobi, although colonial politics would be

¹⁵⁰ Amconsul Nairobi to Department of State, March 1, 1960, Despatch no. 402, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/3-160, National Archives.

¹⁵¹ KYLE, THE POLITICS OF THE INDEPENDENCE OF KENYA 102-07.

¹⁵² Amconsul Nairobi to Department of State, March 3, 1960, Despatch no. 407, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/3-360, National Archives.

What sort of decolonization did the British have in mind? Even before the Lancaster House conference, the British government was developing plans for what would follow. British officials told U.S. Consul Charles D. Withers that "[v]arious British officials in Kenya were...trying now to establish such firm control of the Colony's government departments that incoming African ministers would be little more than figureheads." African nationalists, including Mboya, told Withers that they were aware of these plans. According to Withers, the British planned to strengthen high-level, entrenched British civil service employees in Kenya. Then when an African became a minister and wanted to do something, the British officials would say: "That is not the way things are done in a parliamentary system of government. These matters are handled by the permanent secretariat and civil service staff." Withers was told that this would be done even for financial and policy matters. Amconsul Nairobi to Department of State, January 14, 1960, Despatch no. 344, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1460, National Archives.

further complicated by an eventual split among nationalists and the formation of two principal nationalist parties.¹⁵³ The New Kenya Party would ultimately propose a formula for resolving the land issue. According to Colin Leys, "It soon became clear that the essence of the formula must be to have the incoming African settlers purchase the land with funds lent to them by the new Kenya government, which in turn would be lent the money by the British government, and if possible also by the World Bank."¹⁵⁴ Ultimately, the nationalist leaders would agree, and this resolution would be in place before the next Lancaster House conference on the Kenya Constitution in 1962.¹⁵⁵

Perhaps influenced by an economic crisis in the colony that, according to Leys, was precipitated by the move toward independence at the 1960 Lancaster House Conference,

¹⁵³ Ogot and Ochieng', *Decolonization and Independence in Kenya* 61; Jennifer Widner, *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"* (1992).

¹⁵⁴ Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, 1964-1971*, 55 (1975). According to Leys, this formula "was adumbrated in the New Kenya Group's thinking during 1960, after the first Lancaster House Conference of January 1960 at which the British government finally made it clear that there would be an elected African majority in the next Kenyan legislature." *Id.* at 56.

¹⁵⁵ According to Leys, "It may well seem puzzling why the African leaders should have agreed to [the formula], especially since a militant wing of the leading African party, the Kenya African National Union (KANU)...had been calling for land transfer without compensation." Possible reasons for this included

the moderating influence of Kenyatta; the fear of independence being delayed; the hope of changing things after independence; a lack of interest in the detail of the negotiations; a fear that the rival party, the Kenya African Democratic Union (KADU), for whose supporters the land issue was less vital..., might agree to the proposed scheme first and perhaps manage to get KANU excluded from the transitional government; and finally, the risk of alienating the former forest fighters if they were not provided with land quickly.

upon his release, Kenyatta would emphasize that property rights would be protected by the future African government, and that “We will encourage investors in various projects to come to Kenya and carry on their business peacefully, in order to bring prosperity to this country.”¹⁵⁶ In light of these developments, land and the compensation clauses, a focus of the 1960 meeting, were not a major issue in later negotiations, which would turn instead on regional versus national government, tribal politics and federalism. The final 1963 independence constitution would contain very detailed clauses regarding confiscation of land for public purposes, along the lines that Marshall had supported in 1960.¹⁵⁷

Id. The emergence of KADU, and the KANU/KADU rivalry, developed between the 1960 and 1962 Lancaster House conferences.

¹⁵⁶ *Id.* at 62. See JOMO KENYATTA, SUFFERING WITHOUT BITTERNESS (1968).

¹⁵⁷ The 1963 Kenya Constitution provisions on property rights are, in part, as follows:

19 – – (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the Supreme Court for:

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and (b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person

But in February 1960 in Nairobi, the future was far from certain. Twenty Kenyan political leaders including Michael Blundell, leader of the multi-racial New Kenya Group, and Ronald Ngala, African leader, arrived at the Nairobi airport upon returning from Lancaster House. Blundell he was greeted by whites shouting "Traitor," and "Thirty Pieces of Silver." A white man with a microphone yelled, "Congratulations, Mr. Ngala, you stood by your policies. Blundell, you have sold your own people." An African shouted in response, "Blundell, you will get our votes if necessary. You have sold nobody. You are all right."¹⁵⁸

Mboya, Odinga, and other nationalists would have a different experience when they arrived a couple of days later. They were met at the airport by thousands of

having the right or interest in the property) from a tribunal or authority, other than the Supreme Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court or any other tribunal or authority in relation to the jurisdiction conferred on the Supreme Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the Supreme Court or applications to the other tribunal or authority may be brought). KENYA INDEPENDENCE CONSTITUTION (1963), CHAPTER II: PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL.

The particular language of these provisions, and of other specific clauses, was hammered out in ongoing negotiations in Kenya between the 1960 conference and subsequent Lancaster House conferences. While the Kenya Constitution has been amended several times since 1963, the clauses above have not been changed.

While constitutional scholars sometimes assume that similar constitutions were imposed by the British on former colonies, the Kenya example reveals a different experience of hard bargaining among competing interests. This suggests that any similarities with other British post-colonial constitutions were not simply imported from one constitution to another, but instead were successfully bargained for by one of the parties in Kenya.

¹⁵⁸ *Blundell Heckled by Whites in Kenya*, GHANA TIMES, February 26, 1960, at 12.

Africans. The new constitution would not last, Mboya told the crowd. "The struggle had only begun," and a move toward independence would happen "immediately." While he believed that there was a place in Kenya for all races, he said that "Those who did not believe in democracy should sell out and leave." Kenya's destiny, Kiano said, was "for the first time turned over to Africans."¹⁵⁹

Twenty-five thousand people attended a gathering at the African Stadium. Mboya asked the crowd that whether they supported the stand taken by the African delegation on the Kenyan Constitution. If they did, he asked them to raise their hands. Around African Stadium, the press reported, "nearly every hand [was] raised."¹⁶⁰

The crowd was "jubilant." Not willing to let this moment of promise slip away, as the leaders left the stadium, "crowds began to follow Mboya home." When they reached the city limits police tried to turn them back. When they would not disperse, the "riot act was read." At this point in the American Consul's telegram reporting on the incidents, the description of what followed was very simple: "tear gas used and baton charges made, crowd eventually disbursing." It is impossible to know how violent this confrontation was. In the end, only two people were reported to be injured.¹⁶¹ Perhaps the incident best illustrated the limits of Colonial authority in Kenya in 1960. While

¹⁵⁹ Nairobi to Secretary of State, February 29, 1960, Telegram no. 310, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-2960, National Archives.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Colonial police could suppress a demonstration, a spirit of independence was alive in Kenya, and no tear gas canisters or police batons could make it go away.

Conclusion

At the 1960 conference on the Kenya Constitution, the issue of greatest concern to Marshall – property rights and their impact on minority rights – was so volatile that it interfered with the Colonial Secretary’s efforts to bring the Conference to a successful conclusion. In the controversy among delegates, Marshall’s ideas played a key role. It is possible that his position on constitutional questions may have placed him in tension with some of the nationalists he was there to support, nevertheless, having Marshall as an advisor was of great political value for the nationalists. When pressed as to whether extending political power to them would abrogate the rights of the white minority, the nationalists could point to the fact that their constitutional advisor had devoted his career to the protection of minority rights.

Thurgood Marshall and other American civil rights lawyers took American legal ideas to Africa and had an impact. When these sojourners returned home, they brought their African experience with them.¹⁶² Thurgood Marshall maintained ties with African

¹⁶² For example, when Pauli Murray returned from a year in Ghana, Africa was intermixed with America on the walls of her small New Haven apartment. Her African experience was integrated into her life, as she maintained a strong interest in legal development in Africa. See Murray to Marshall (Marshall’s copy of letter from Pauli Murray to many friends), July 10, 1962, Papers of Thurgood Marshall, U.S. Court of Appeals, General Correspondence, Box 5, Folder: “M” Miscellaneous, 1961-63, Library of Congress; Pauli Murray, *On Teaching*

nationalists, and while he was not present at later Kenyan constitutional negotiations, his work on the Bill of Rights continued to be influential.¹⁶³ Marshall returned to Kenya in 1963 on a State Department sponsored trip, and again later in the year as an honored guest of Prime Minister Jomo Kenyatta at Kenya's independence ceremonies.¹⁶⁴ After traveling to Kenya in 1978 to attend Kenyatta's funeral, Marshall remarked that he was "happy to find that the Schedule of rights that I drew for the Kenyan Government was working very well."¹⁶⁵ Marshall was proud of his work on the Kenya Constitution. It was better than the original U.S. Constitution had been, he thought. In the U.S. Constitution, the Bill of Rights was a set of amendments. In the Kenya Constitution, the Bill of Rights was there in the original.¹⁶⁶

As he described it, the Bill of Rights "gave the white citizen living in Kenya absolute protection, the strongest, I maintained, of any constitution in the world, spelled out in detail." And in spite of the vast historical and material differences in the minority

Constitutional Law in Ghana, 8 YALE LAW REPORT 10 (Fall 1961). See also KEVIN GAINES, AMERICAN AFRICANS IN GHANA: BLACK EXPATRIATES AND THE CIVIL RIGHTS ERA (forthcoming 2006)(on Pauli Murray in Ghana); LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 188-99 (1998)(on Murray as a civil rights lawyer); Paul L. Edenfield, *An American Heartbreak: A Biographical Sketch of Pauli Murray*, (unpublished paper, Stanford Law School, 2000) at <<http://www.stanford.edu/group/WLHP/papers/paulimurray.pdf>>.

¹⁶³ In later negotiations, the nationalist Kenya African National Union party demands included a Bill of Rights based on Marshall's draft. See Nairobi to Secretary of State, November 28, 1961, 745r.03/11-2861, General Records of the State Department, RG 59, Central Decimal File, 1960-63, Box 1706, Folder: 745r.03/3-1661, National Archives. British records on subsequent negotiations on the Kenya Constitution confirm Marshall's continuing influence.

¹⁶⁴ WILLIAMS, THURGOOD MARSHALL, 307-09.

¹⁶⁵ Thurgood Marshall, *Remarks at the Second Circuit Judicial Conference*, September 8, 1978, in MARK V. TUSHNET, ED., THURGOOD MARSHALL, 174.

¹⁶⁶ Bernhard, Oral History Interview.

experience in Kenya and the United States, he would often emphasize a point he made in an oral history interview: “That, to my mind, is really working toward democracy, when you can give to the white man in Africa what you couldn’t give the black man in Mississippi. It’s good.”¹⁶⁷ It may seem a puzzling irony that for this champion of African American rights, the priority in Kenya was protection of the rights of privileged white people. What was he doing? How did he think about it?

If this was “working toward democracy,” as Marshall put it, it was a rather perverse form of democracy, playing out within the halls of the colonial power in Lancaster House. When the Kenya Independence Constitution was completed in 1963, the final act of ratification was not a vote of the people, but the signature of the Queen of England. These and other anti-democratic features of late-colonial politics make it easy to dismiss the entire story of constitutional politics in Kenya and other parts of Africa in the 1960s, at least if we focus only on conventional, contemporary measures of democratic politics. No wonder, among comparative constitutional scholars, sub-Saharan Africa is so often left out of the conversation.¹⁶⁸

If African constitutionalism was meaningless, why did it look so different from the perspective of the participants at the time? For groups in Kenya, constitutional politics mattered so much that they saw constitutional debates as the only path away from nearly

¹⁶⁷ *The Reminiscences of Thurgood Marshall* at 446.

¹⁶⁸ See, e.g., JACKSON & TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (with only three non-South African-related entries on Africa, all on the theme of the failure of African constitutionalism).

certain violence. The resistance movement had armed itself in the forests before; with change at hand, threats of destruction now came from the privileged. Adversaries would engage in hard clause-by-clause constitutional bargaining between the 1960 Lancaster House Conference and independence in 1963. During the endless hours of negotiations in Kenya and in London, as armed conflict erupted in other parts of the continent, adversaries in Kenya reached instead for constitutional clauses. Tribal differences would split the nationalist coalition after the 1960 conference, but even the new nationalist parties, KANU and KADU, made constitutional bargaining a central feature of their political struggles.¹⁶⁹

Thurgood Marshall's part in this, in 1960, was to play a role in a process that kept these adversaries at the table. In light of the bloody alternative, that, in itself, was an accomplishment.¹⁷⁰ As Kenya moved toward majority rule, and "minority safeguards" became the order of the day, Marshall's mere presence was of political value to the nationalists. There was nothing they could do to reassure the Union Party, but it helped their position with white moderates, the British Government and the international press that one of their advisors was a well-known champion of minority rights.

¹⁶⁹ See Kenya Constitutional Conference, 1962, Record of Meetings, The National Archives of the United Kingdom, Public Records Office, Kew, England; KYLE, *THE POLITICS OF THE INDEPENDENCE OF KENYA* 115-118.

¹⁷⁰ *But see* MAU MAU & NATIONHOOD : ARMS AUTHORITY & NARRATION, E.S. ATIENO ODHIAMBO AND JOHN LONSDALE, EDS. (2003) (resistance groups argued that armed struggle would have resulted in more meaningful social change). *See also* CLAUDE AKE, *THE FEASIBILITY OF DEMOCRACY IN AFRICA* (2000).

When Marshall wrote a Bill of Rights for Kenya, he built into it many robust, forward-looking rights, beyond those that the United States has ever seen in the area of economic rights. But on the question of equality and property – the paradox of entrenching rights gained through historic injustice – was he placing form over substance? Was this, perhaps, an earlier manifestation of a contemporary phenomenon that, for David Kennedy is one of “the dark sides of virtue,” as building a rule of law is turned to as a development strategy in itself, “which obscures the need for distributional choices or for clarity about how distributing things one way rather than another will, in fact, lead to development.” The result is a “sleight of hand, positioning the rule of law as a substitute for politics and economics.”¹⁷¹ Perhaps in Kenya, “minority rights” was an abstract moniker that obscured the necessary trade-offs on the critical issue of land reform.

It is in describing that particular aspect of the Bill of Rights that Marshall emphasized that he was “working toward democracy.” This tells us not necessarily what he, in substance, accomplished, but how he would like us to remember it.

Marshall’s harsher critics might see him as taking a limited role in a messy and ongoing political struggle but casting it in grandiose diplomatic terms. Perhaps in working toward democracy he had taken himself beyond the courthouse and onto a broader public stage, one that might help recast him as a lawyer serving the national

¹⁷¹ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 155-57 (2004).

interest in a way that might gain the attention of the incoming Kennedy Administration, in the hopes that they might tap him for a coveted court seat.¹⁷² From this perspective, by saying that he was working toward democracy, he was telling listeners how important his work had been.

But perhaps Marshall was also saying something about a substantive conception of democracy. One reading might be that in protecting the rights of whites, Marshall was embracing formal equality,¹⁷³ and was abstracting his conception of equality from the material conditions on the ground in Kenya. Readers may find this idea incredulous. There was such material inequality in Kenya, how could one speak of rights in formal, abstract terms? But American civil rights leaders of this era often spoke about equality in this way.¹⁷⁴ It was as if generalizing rights to all of humanity made others able to see them more clearly, perhaps made them more acceptable, and therefore more within

¹⁷² For this point, I am grateful to Mike Meltsner. While not embracing this interpretation, he suggested it as a possibility.

¹⁷³ Deborah L. Rhode, who clerked for Marshall when he was a Justice on the U.S. Supreme Court, has argued that “the Justice was careful never to confuse formal and substantive justice.” He opposed efforts to stop race-based affirmative action programs in the name of color-blindness, believing that such arguments represented “commitments to formal equality and racial neutrality [that] came several generations too early and several generations too late.” Deborah L. Rhode, *A Tribute to Justice Marshall: Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1260, 1263 (1992).

¹⁷⁴ Although not a formalist, Martin Luther King, Jr. discussed just and unjust laws in abstract terms in his *Letter from Birmingham Jail*: “An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.” Martin Luther King, Jr., *Letter From Birmingham Jail* (April 16, 1963), in *WHY WE CAN'T WAIT* 85 (Harper & Row, 1964).

reach. But if Marshall embraced formal equality in Kenya, thereby entrenching a legacy of historic injustice, might he be denying Martin Luther King's argument that "law and order exist for the purpose of establishing justice"?¹⁷⁵ Perhaps there is a particular wrong in using the tools of law to entrench injustice rather than eradicate it.

If it was a formal equality that he embraced, it could not have been based on a lack of awareness of its implications, an abstraction that might distance him from the moral consequences of the trade-offs of his theory. In arguing against abstraction, James Baldwin insisted that "it is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime."¹⁷⁶ Marshall had lived among the Lancaster House adversaries for weeks, and he had to have been aware that he was entrenching rights of the privileged residents of "Happy Valley," a white settler community that had nurtured a decadent culture through white power and black subordination.¹⁷⁷ The question to ask instead is why knowingly entrenching such rights was so important to him.

"That, to my mind, is really working toward democracy," he said, "when you can give to the white man in Africa what you couldn't give the black man in Mississippi. It's good."

when you *can give*
when you have the power to give

¹⁷⁵ *Id.* at 88.

¹⁷⁶ JAMES BALDWIN, *THE FIRE NEXT TIME* 5-6 (1995).

¹⁷⁷ See NICHOLAS BEST, *HAPPY VALLEY: THE STORY OF THE ENGLISH IN KENYA* (1979).

what you *couldn't* give
what you didn't have the power to give

Perhaps he was speaking of himself, and what it meant to act in a matter that he conceived of as democratic, when conditions allowed him to create structures of equality in one context, yet not in another. In later years he would criticize the framers of the United States constitution for having framed an undemocratic document that embraced slavery.¹⁷⁸ In his oral history, we can see the way he would like us to remember his role as a framer: as protecting the rights of an “other” very unlike himself. He presents this as “working toward democracy.”¹⁷⁹

It mattered most to him to keep these parties talking to each other, and doing so required a document that all the principals could live with. While democracy requires much more, it could begin with bargaining rather than bullets.¹⁸⁰ Thurgood Marshall, alone, did not keep the guns silent in Kenya, of course, but he was part of a process of constitutional politics, a moment of constitutionalism that mattered in Kenya.

¹⁷⁸ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

¹⁷⁹ Beyond the property clauses, Marshall's vision for democracy in Kenya is reflected in the progressive, forward-looking Bill of Rights he wrote. The importance of rights to his conception of democracy helps us to see the importance of law, American-style courts and judicial review, and lawyers to the democracy he envisioned. For a discussion of democracy and constitutionalism in the American context, see FRANK MICHELMAN, *BRENNAN AND DEMOCRACY* (1999).

¹⁸⁰ Cf. Randall Kennedy and Martha Minow, *Thurgood Marshall and Procedural Law: Lawyer's Lawyer, Judge's Judge* 6 HARV. BLACKLETTER J. 95, 99-100 (1989) (on Marshall's belief in the Rule of Law); Fisher, *Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER J. at 138-140 (same).

What we might see in this story is an historical example of the broader problem of how to make present politics out of a history of bloodshed, and when the tables have turned, the question of whether democracy can require the subordination of a history of injustice to keep some parties at the table. We have seen many examples in the bloody history of the twentieth century of efforts to create a forward-looking politics following historic injustice.¹⁸¹ The most dramatic of these, perhaps, were the international efforts after World War II, not only to bring Nazi war criminals to justice, but also to create an international body dedicated to the hope that a global politics could prevent war.¹⁸² In more recent years, constitution writing has become a familiar ritual to signal change from one political regime to another. New constitutions could reflect the departure from an unjust regime through the embrace of particular substantive rights.¹⁸³ In this way the outcome of constitutional politics – the text itself – can be the mechanism for addressing a country’s historic injustice.

Perhaps Marshall is showing us another way to think about it: that there is justice in the process. If constitutional negotiations were not successful, he warned before the Lancaster House conference, it would be “worse than the Mau Mau.” It was writing a

¹⁸¹ See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

¹⁸² See PETER MACGUIRE, *LAW AND WAR: AN AMERICAN STORY* (2001); GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2001); STANLEY MEISLER, *THE UNITED NATIONS: THE FIRST FIFTY YEARS* (1995).

¹⁸³ The Constitution of South Africa, for example, provides restitution for some victims of apartheid, while at the same time protecting white minority property rights. See JOSEPH SINGER,

constitution itself that kept these adversaries out of the trenches and kept the guns, at least for a time, out of their hands. Perhaps for Marshall, giving whites in Africa what he hadn't been able to give blacks in Mississippi – writing a Bill of Rights with the full knowledge that it entrenched an historic injustice – kept the parties at the table. What resulted was not a fully formed, ideal democratic constitution, but was a path left open, a way to continue working toward democracy.

That these efforts had profound limits was clear long before Marshall's first contact with Kenya, Tom Mboya, once groomed to replace Kenyatta, lay dead in the streets of Nairobi from an assassin's bullets in 1969. Thurgood Marshall would return to Kenya twice in 1963 and once more for the funeral of Kenyatta in 1978. During his years on the Supreme Court, his principal engagement with Kenya seemed to be with his memories of the early 1960s, rather than with the dark turn in later Kenya politics.¹⁸⁴ He recounted stories of Kenya to his colleagues, his law clerks and his friends. In telling the story, it was at least his object to make it part of the story of his life.

ENTITLEMENT: THE PARADOXES OF PROPERTY¹⁹² (2000); VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES, 320-358.

¹⁸⁴ In this respect, his experience mirrored others. In his study of African American engagement with Africa from 1935 to 1961, James Meriwether has argued that through much of the twentieth century, African Americans engaged with Africa tended to “focus on countries embroiled in national liberation struggles, as opposed to countries that already had gained independence.” This “enabled African Americans to build transatlantic bridges while finessing direct engagement with deep complications of independent Africa.” MERIWETHER, PROUDLY WE CAN BE AFRICANS, 5.