

ORIGINAL ARTICLE

Kenya's Emergency Powers: Legal Continuities in the Post-Colonial State, 1959–1969

Kyle J. Melles

University of Warwick, Coventry, England, Global History and Cultural Centre affiliated as a post-graduate visiting academic
Email: kmelles@wustl.edu

Abstract

Kenya's first post-colonial government, under Prime Minister Jomo Kenyatta, came to power in December 1963 having adopted emergency powers and security legislation that had been used in the colonial suppression of the Mau Mau rebellion. Kenyan nationalists opposed this authoritarian and often draconian legislation in the 1950s for its abuses of human rights and excesses of state powers. This article explains how Kenya's nationalists came to accept and adopt this legislation, illiberal emergency powers becoming a key element in the protection of the fragile bureaucratic-executive state after 1963. An account is given of how colonial security officers used emergency powers in the counterinsurgency against the Mau Mau. In the decolonization process, the continuing activities of Mau Mau's Kenya Land and Freedom Army, the shifta secessionist movement in the Northern Frontier District, and political opposition from within the Kenya African National Union (KANU) party threatened Kenyan stability. To combat these challenges, colonial officers and nationalists alike agreed to retain colonial security laws, especially the Preservation of Public Security Ordinance. The legacies of colonial law therefore remain prominent in Kenya's security legislation and have been used as recently as 2023 to deal with perceived threats to the bureaucratic-executive state.

During Kenya's final transition to independence, between 1959 and 1963, British colonial administrators and African nationalist rulers found common ground in their desires to maintain political stability and economic growth. But preserving the ideology of the centralized bureaucratic state and its political-economic structure was surely not what the radicals of the Kenya Land and Freedom Army (as Mau Mau's fighters called themselves) had in mind when they raised armed rebellion against colonial rule in 1952: and it was not what they expected their political leaders to accept in the negotiations

© The Author(s), 2024. Published by Cambridge University Press on behalf of American Society for Legal History. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is unaltered and is properly cited. The written permission of Cambridge University Press must be obtained for commercial re-use or in order to create a derivative work.

toward independence. The rebellion had been suppressed between October 1952 and January 1960 under the authority of draconian Emergency Powers legislation, allowing the colonial regime to imprison without trial, to sequester property, to dispossess landholders, to close schools and churches and ban public gatherings, and to vastly extend the use of capital punishments. Rebels who fought against such tyranny would therefore justifiably have been surprised at independence in 1963 to witness Prime Minister Jomo Kenyatta accept into law the Preservation of Public Security (PPS) Ordinance, a colonial piece of legislation that, in essence, retained the powers that colonial authorities deployed under Emergency Regulations. Kenya's nationalist government chose to maintain the same powers of coercion and control that had been developed by their former colonial rulers. In the coming decade, Kenyatta's inner circle would use these laws several times to impose controls that were strongly reminiscent of the counterinsurgency against Mau Mau. Just as the colonial state had banned nationalist political parties and detained Kenyatta in 1952, Kenyatta would in 1969 do the same to the opposition Kenya Political Union (KPU) and its leader, Oginga Odinga.¹

This article seeks to explain how and why Kenya's first African national government chose to maintain colonial legal and ideological structures in preserving and sustaining what Branch and Cheeseman have termed the "bureaucratic-executive state."² This was a form of government by "gatekeeping," and its implications were more far-reaching than the effects of any individual piece of legislation. Examples of gatekeeping states, which exploit "the interface between the wealthy and powerful institutions outside the country and the weaker structures of production and communication inside," are well-documented and continue today in many nation-states throughout Africa.³ Kenya's gatekeeping apparatuses had grown over the 1950s as the colonial government suppressed the Mau Mau through its "dirty" counterinsurgency tactics by giving authoritarian powers to local state functionaries.⁴ A key element in this was the maintenance, after independence and the introduction of electoral constituencies, of a political administration across all of the provinces and districts of the country. Through this unelected but "local" administrative cadre, the Office of the President could control everything--regardless of the influence of any elected bodies or individuals--just as the Governor had done in colonial times.

The PPS Ordinance gave the Executive authority to suspend existing legislation and replace it with direct rule under Emergency Regulations. This might be used to retain law and order under threat of insurrection, but it

¹ William Robert Ochieng', "Structural and Political Changes," in *Decolonization and Independence in Kenya, 1940-93*, eds. Bethwell A. Ogot and William Robert Ochieng' (Athens: Ohio State University Press, 1995), 102.

² Daniel Branch and Nicholas Cheeseman, "The Politics of Control in Kenya: Understanding the bureaucratic-executive state, 1952-1978," *Review of African Political Economy* 33 (2006): 11-31; Wunyabari Maloba, "Nationalism and Decolonization, 1947-1963," in *A Modern History of Kenya, 1895-1980*, ed. William R. Ochieng' (Nairobi: Evans Brothers Limited, 1989), 194.

³ Frederick Cooper, *Africa since 1940: The Past of the Present* (Cambridge: Cambridge University Press, 2019).

⁴ David Anderson, *Histories of the Hanged* (London: Weidenfeld and Nicolson, 2005).

might also be used to remove or restrict opposition, and to silence dissent. Many internal threats confronted Kenya's nationalist leadership as they embarked upon the negotiation of independence in 1960.⁵ The threat of a revived Kenya Land and Freedom Army (KLFA) was real, stimulated by released former detainees who were unwilling to accept the defeat of Mau Mau's rebellion.⁶ As the clock ticked toward British departure in December 1963, the clamor of opposition to the ruling nationalists grew voluble and threatening. Faced by internal challenges from within their own party (KANU), as well as challenges from rival political groups, Kenyatta's government was persuaded of the need for executive powers allowing them to forcibly suppress dissent. As independence drew closer, Kenya's ruling elites sought protection for their bureaucratic-executive state in the same legislation that had defended the colonial bureaucracy.

This article offers an original analysis of legal continuities in emergency powers from the Kenyan colonial government to the Kenyatta administration, using sources only recently made available after years of coverup by the British government.⁷ The article will first build on the established literature on the context of colonial emergency powers and their historical use up to January 1960, demonstrating how emergency legislation permitted an illiberal subversion of the rule of law in colonial Kenya. An account of the debate around the retention of Emergency Regulations from 1959 will follow, explaining the initial reluctance of the colonial government to remove emergency legislation and showing how this hardened in the wake of the Hola massacre of March 1959 into a policy to retain legislation amid fears of a KLFA revival. This section adds to previous discussion on the post-emergency legislation by describing the process leading to the PPS Ordinance's creation and showing examples of the colonial regime pushing the boundaries permitted by already broad legal powers. By August 1961, Kenyatta's release from detention saw these fears abate, but KANU members had by then seen the benefits of retaining draconian security powers. This section, using correspondence between senior colonial officials and constitutional meetings with Kenyan Ministers, grants an unprecedented survey of the gatekeeper state's legal continuities, evident in the transfer of security legislation from a colonial "Ordinance" to an independent Kenyan "Act." The final section will illustrate how these laws were deployed after independence—in the *shifta* conflict in Kenya's north, to combat dissent within KANU at the local level, and to thwart opposition political coalitions like Odinga's KPU. This section draws connections between the colonial

⁵ David Anderson, "Exit from Empire: Counter-Insurgency and Decolonization in Kenya, 1952–1963," in *At the End of Military Intervention: Historical, Theoretical and Applied Approaches to Transition, Handover and Withdrawal*, eds. Robert Johnson and Timothy Clack (Oxford: Oxford University Press, 2014), 107–36; Bethwell A. Ogot, "The Decisive Years, 1956–63," in *Decolonization and Independence in Kenya, 1940–93*, eds. Bethwell A. Ogot and William Robert Ochieng' (Athens: Ohio State University Press, 1995), 48–82.

⁶ Niels Boender, "'The Dregs of the Mau Mau Barrel,' Permanent Exile and the Remaking of Late Colonial Kenya, 1954–61," *Journal of Social History*, Advance Article (accessed August 21, 2023).

⁷ Aoife Duffy, "Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure," *Law and History Review* 33, no. 3 (2015), 494.

regime and independent state, adding to existing connections made between counterinsurgency in the colonial and independent periods to show that the KANU government used existing colonial legal structures with the same illiberal purposes.

Emergency Powers in Context

The Emergency Powers Order in Council was first used in Kenya to address war-time threats. On March 9, 1939, the Emergency Powers Order in Council allowed a governing official “to make such regulations as appear to him to be necessary or expedient for securing the public safety,” including the power of detention without trial.⁸ On August 24, UK Parliament passed the Emergency Powers (Defence) Act, extending its provisions to colonial governors through the Emergency Powers (Colonial Defence) Order in Council.⁹ The Colonial Office, conceptualizing “states of exception” where the legal principles of English common law could be superseded, saw utility in using emergency powers to address insurgency and challenges to colonial rule.¹⁰ Across the empire, governors invoked Emergency Regulations against local populations. Kenya’s colonial government had previously held the power to detain individuals without trial through the Native Courts Regulations of 1897, a power that transferred through other Regulations up to 1952.¹¹ But in 1949, the Deportation (Aliens) Ordinance made detention without trial acceptable only in emergency cases, with oversight from the Colonial Secretary.¹² Only for a brief period, 1949 to 1952, was Kenya’s governor denied powers to detain without trial. From 1952, the Emergency Powers Order in Council would become central to the suppression of the Mau Mau insurgency. On October 7, 1952, Mau Mau murdered Paramount Chief Waruhiu, a key ally of the colonial regime and staunch opponent of the Mau Mau. This was the trigger for the colonial governor of Kenya, Evelyn Baring, to request a declaration of emergency, which was duly approved by Colonial Secretary Lyttleton and implemented from October 20.

The Emergency Regulations allowed the colonial government to take extreme action under the protection of legality. As Duffy has noted, Baring very rapidly invoked legislation against non-Europeans that flagrantly disregarded liberal legal principles.¹³ The implementation of emergency powers

⁸ Emergency Powers Order in Council 1939, March 9, 1939, Part Two—S.6(1) and 6(2).

⁹ Emergency Powers (Defence) Act, August 24, 1939; *Hansard*, HL Deb, “Emergency Powers (Defence) Bill,” August 24, 1939, vol. 114, 895–903; David French, *The British Way in Counter-Insurgency, 1945–1967* (Oxford: Oxford University Press, 2011), 76.

¹⁰ French, *The British Way*, 75; Michael Lobban, *Imperial Incarceration: Detention without Trial in the Making of British Colonial Africa* (Cambridge: Cambridge University Press, 2021), 15.

¹¹ Native Courts Regulations, No. 15 of 1897, S.77; Albert O. Mumma, “Preservation of Public Security through Executive Restraint of Personal Liberty,” *Laws and Politics in Africa, Asia, and Latin America* 21, no. 4 (1988): 446.

¹² Deportation (Aliens) Ordinance, April 5, 1949, G.N. No. 751, No. 39 of 1949; Jackson B. Ojwang, “Chapter 6: Kenya,” in *Preventative Detention and Security Law: A Comparative Survey*, eds. Andrew Harding and John Hatchard (Dordrecht: Martinus Nijhoff, 1993), 107.

¹³ Duffy, “Legacies of British Colonial Violence,” 496.

varied from place to place, but in Kenya it began with the arrest of suspected Mau Mau leaders in "Operation Jock Scott."¹⁴ The police arrested Jomo Kenyatta and over a hundred other nationalist leaders, many of whom had no connection to the Mau Mau movement.¹⁵ Among those detained along with Kenyatta was the radical nationalist Bildad Kaggia,¹⁶ and Senior Chief Koinange wa Mbiyu, who was initially charged with Waruhiu's murder.¹⁷

What began as an effort to arrest the "ringleaders" of Mau Mau quickly spiraled into a full-fledged counterinsurgency operation as British troops arrived in Kenya and Emergency Regulations were extended across all aspects of Kenyan life.¹⁸ Detention without trial was initially authorized only through Baring's office, but this power was soon extended with "District Detention Orders" being issued locally and without any requirement for evidence or authentication. This led to the incarceration of perhaps as many as 150,000 people being detained without trial, some of them being held under abysmal conditions.¹⁹ Emergency conditions also led to greater numbers of accused being brought to court, and so to relieve pressure upon the court system, Baring issued the Emergency (Emergency Assizes) Regulations in March 1953. This allowed for Mau Mau cases where a capital charge prevailed to be heard in a truncated procedure, where a single judge presided without a jury, where witnesses need not be summoned, where defendants often lacked properly briefed counsel, where prosecution evidence did not need to be revealed to the defense, and where the opportunity for appeals was greatly reduced.²⁰ From 1952 to the Emergency's end in 1960, an estimated 1,499 capital punishment convictions occurred in these Special Courts.²¹

From April 1953, further extensions of the Emergency Regulations sanctioned confiscation of land and other assets, including livestock, crops, and money from suspected rebels, allowing the government to censor newspapers and restrict public assembly and other aspects of political freedom.²² The applicability of these measures was sometimes questionable, yet many of these regulations were widely used and their powers gradually expanded. Perhaps the

¹⁴ Andrew W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004); Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (Philadelphia: University of Philadelphia Press, 2013).

¹⁵ Oginga Odinga, *Not Yet Uhuru* (London: Heinemann, 1967), 123.

¹⁶ Bildad Kaggia, *Roots of Freedom, 1921-1963* (Nairobi: EAPH, 1975), 177.

¹⁷ Chief Inspector, Metropolitan Police, Special Branch, "Information, East Africans," December 22, 1952, The National Archive, Kew [hereafter UKNA], KV 2/2541.

¹⁸ French, *The British Way*, 81.

¹⁹ Emergency (Detained Persons) Regulations, 1953, G.N. 729 of 1953; Anderson, *Histories of the Hanged*, 98; Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London: Pimlico, 2005).

²⁰ Emergency (Emergency Assizes) Regulations, 1953, G.N. 931 of 1953; later discussed in *Hansard*, HC Deb, "Kenya (Emergency Assize Courts)," May 1, 1956, vol. 552; Anderson, *Histories of the Hanged*, 97.

²¹ *Ibid.*, 354, table 7. ii.

²² Emergency (Control of Livestock) Regulations, 1953, G.N. No. 992 of 1953; Emergency (Control of Crops, Food and Dwellings) Regulations, 1953, G.N. No. 1399 of 1953; Emergency (Publications) Regulations, 1953, G.N. 222, Forfeiture of Lands Ordinance, 1953, No. 11 of 1954.

most consequential law for the future of Kenyan politics, the 1953 Forfeiture of Lands bill, enabled land confiscation from individuals convicted of Mau Mau-related crimes. Land confiscation occurred anywhere in affected areas of the Emergency where Kikuyu males were absent, based on very loose requirements of evidence. On July 18, 1955, for example, Deputy Governor Frederick Crawford issued Native Land Rights Confiscation Orders against hundreds of Kenyans in multiple districts.²³ Collective punishments, including extensive fines, also became the norm, being applied across a range of legislation. A District Commissioner might order an entire community suspected to be assisting Mau Mau to pay a fine of twenty shillings each, as happened in Naivasha on May 20, 1955.²⁴ On August 24, 1955, colonial officers used the Emergency (Control of Crops, Food, and Dwellings) Regulations in Timau Township to block food sales and purchases to Kenyans without a permit.²⁵

Emergency Regulations were also tacked on to existing legislation, allowing in some cases for a dramatic extension of powers. For example, the Police Ordinance (1948) already allowed a Provincial Commissioner or senior police officer to issue Curfew Orders in cases where there was “a reasonable apprehension that a riot” or other threats of violence might occur, and to regulate meetings, public broadcasting, and speeches. The Governor’s authority to rescind or change the Curfew Order checked these powers, and the extent of the curfew was restricted.²⁶ After 1954, the Governor’s influence on this was removed and the powers were extended down to District Commissioners, while the punishments imposed under the Curfew Orders were greatly enlarged in 1955.²⁷ By 1955, a further amendment allowed Curfew Orders not only “in the face of imminent trouble, but also as a precaution to secure the public safety or to maintain public order.”²⁸ By 1957, the law allowed that “the police officer in charge of the Force in any area [...] may, in any such manner as he may deem fit, regulate the extent to which music may be played, or to which music or human speech or any other sound may be amplified, broadcast, or otherwise reproduced by artificial means,” and to “issue such orders as he may consider necessary or expedient.”²⁹ This trajectory of expansion in powers was common during the Emergency, as laws became more punitive over time with checks on power being weakened.

Security Laws: KANU Opposition and Colonial Abuse

Once the British army adequately suppressed the insurgency, by the end of 1956, Governor Baring revoked certain Emergency Regulations to relieve the

²³ The Forfeiture of Lands Ordinance, 1953, No. 11 of 1954, Native Land Rights Confiscation Order, G.N. 1020–1036, cases listed in UKNA CO 822/1505.

²⁴ Emergency Regulations, 1952, Emergency Regulation 4A—Order Imposing Fine, May 20, 1955, G.N. 1018, UKNA CO 822/1505.

²⁵ Emergency (Control of Crops, Food, and Dwellings) Regulations, August 24, 1955, G.N. 1258.

²⁶ Police Ordinance, No. 79 of 1948; Police (Amendment, No. 2) Ordinance, August 1, 1950, G.N. No. 893, CO 822/1505.

²⁷ Emergency (Amendment of Laws) (No. 8) Regulations, 1953, G.N. 346 of 1953.

²⁸ Emergency (Amendment of Laws) (No. 17) Regulations, 1955, G.N. 1637 of 1955.

²⁹ Emergency (Amendment of Laws) Regulations, December 24, 1956, L.N. No. 1 of 1957.

Kenyan court systems and appease the British metropolitan government, who were by then pressing for relaxation of restrictions.³⁰ African political participation was restored at the end of 1956, and constitutional reform allowed African candidates to stand in Legislative Council elections in March 1957.³¹ Africans now had a limited political voice, and some immediately agitated for an end to emergency powers. Colonial Secretary Lennox-Boyd met with African Elected Members in London in July 1957, and then held discussions with them in Nairobi on his visit there in November. Two of Kenya's first elected African Legislative Council members, Bernard Mate and Tom Mboya, were particularly outspoken about the Emergency Regulations regarding land confiscation and restrictions of political freedom. Mate acknowledged the continued threat of violence but nevertheless demanded an immediate end to the Emergency. Lennox-Boyd and Baring referenced the threat that the KLFA still posed and strongly advocated maintaining emergency powers.³²

Privately, the Kenyan colonial government reluctantly accepted that these laws had to be revoked. By 1957, the Emergency was a deep embarrassment; colonial rule had failed to secure law and order through liberal democratic means in Kenya. Yet Governor Baring worried about releasing detainees before the government's rehabilitation methods had taken effect.³³ Fearing both political reprisal from settlers and the violence of vengeful ex-detainees, Baring resolved to retain powers like detention without trial in permanent legislation. In September 1957, the War Council reviewed the Emergency Regulations, requesting the Internal Security Working Committee to review which laws the government might relax without endangering colonial security. In January 1958, the Committee reported that the government should not revoke Emergency Regulations until permanent legislation replaced them, if they were revoked at all.³⁴ Colonial policy permanently entrenched illiberal emergency powers and secured the bureaucratic state's ability to suppress popular mobilization. Through this policy, Baring resolved to satisfy the British government and nationalist Kenyans' demands for an end to the Emergency while also placating settlers and protecting loyalists from a Mau Mau revival.

From 1958 until the Emergency ended in 1960, colonial security officials embarked on a policy of emergency relaxation, which they claimed as "liberalization," but stemmed more pragmatically from their desire to reduce the burdens on colonial security and the costs of the Emergency. Baring initially took a slow approach to "liberalization," introducing changes only gradually. On September 4, 1958, for example, African Affairs Minister C.M. Johnston announced a relaxation of emergency measures in areas less affected by the insurgency, including relaxed curfew measures and in some areas, such as Meru, a lifting of the entire curfew.³⁵

³⁰ *Hansard*, HC Deb, February 29, 1956, vol. 549, 35.

³¹ Ogot, "The Decisive Years, 1956–63," 48; Anderson, "Exit from Empire," 120.

³² Extracts, Council of Ministers' Minutes, C.M. (57) 345, Comments from Mate, Lennox-Boyd, Baring, and Mboya, November 4, 1957, UKNA CO 822/1505.

³³ Boender, "The Dregs of the Mau Mau Barrel."

³⁴ Review of Emergency Regulations, Memorandum by the Internal Security Working Committee, January 3, 1958, UKNA CO 822/1505.

³⁵ Baring to Lennox-Boyd, September 5, 1958, UKNA CO 822/1505.

Such measures were typically opposed by European settlers, who feared a resurgence of the violence, but were pushed through nonetheless.³⁶

The Hola Camp Massacre, in March 1959, forced public recognition that the conditions of the Emergency needed to end. On March 3, 1959, prison guards at the Hola detention camp killed eleven Kenyan prisoners for refusing hard labor. The courts had tried and charged only four of the eleven prisoners; seven had been detained on suspicion alone.³⁷ Attempts to cover-up the massacre implicated Governor Baring and brought heavy criticism upon Colonial Secretary Lennox-Boyd, who persisted in defending the rehabilitation methods applied in detention camps and characterized the prisoners as “sub-human creatures.”³⁸ In the parliamentary debates on Hola, the British government was pressed hard to end the Emergency as speedily as possible.³⁹ Yet, in Nairobi senior officials continued to insist that emergency powers were needed if the threat of a KLFA resurgence was to be thwarted. After Hola, the strategy to achieve this changed, with officials now arguing not for the maintenance of special Emergency Regulations but for their incorporation in substantive law. This could even be presented as a stage of “liberalization,” thus allowing the government to “retain Emergency powers in all but name.”⁴⁰ Colonial administrators now busied themselves drafting new legislation, retaining all the most significant emergency legal powers except for detention without trial. This exception finally recognized that the British government had now signed onto the European Convention of Human Rights. Article Five of the Convention did not allow for detention without trial except in cases of an emergency defined as threatening the life of the nation.⁴¹ But Kenyan colonial officers would also find a way to maneuver around this by including within the new PPS Ordinance provision for detention without trial under conditions of a local emergency. Baring’s successor, Patrick Renison, chose to announce these changes in a speech to Kenya’s Legislative Council.

In preparing for his speech on November 10, 1959, Renison sought to strike a delicate balance between the liberalization policy pushed by his Colonial Office bosses, but also to retain illiberal measures to calm wary colonial settlers and assist the Kenyan government’s ability to suppress dissent. In writing the speech, Renison consulted London, where Lennox-Boyd’s successor, Iain Macleod, pushed him to include statements touting liberalization efforts, such as his line that he was “not trying to restrain politics but to ensure peace.”⁴² To the still European-dominated Legislative Council, Renison outlined three major legislative acts to address the end of emergency and ensure public

³⁶ Relaxation of Emergency Restrictions in the Central Province, Memorandum by the Minister for African Affairs, December 22, 1958, UKNA CO 822/1505.

³⁷ *Hansard*, HC Deb, “Hola Detention Camp,” June 16, 1959, vol. 607, 249.

³⁸ *Ibid.*, 266.

³⁹ *Hansard*, HC Deb, “Hola Camp, Kenya (Report),” July 27, 1959, vol. 610, 232.

⁴⁰ David Percox, *Britain, Kenya, and the Cold War: Imperial Defence, Colonial Security, and Decolonisation* (New York: I.B. Tauris, 2004), 153.

⁴¹ Report to Richard Armitage, June 11, 1960, UKNA CO 1015/2237.

⁴² Renison’s Speech to Legislative Council, “Revocation of the Emergency Regulations,” November 10, 1959, UKNA CO 822/1505.

security; the PPS bill, the Detained and Restricted Persons bill, and the “Act of Grace.” The new PPS bill kept emergency powers “available in reserve should they again be unhappily required.”⁴³ The bill allowed the Governor to, “when-ever he considers it necessary for the PPS, bring into being powers to make regulations for such purposes as the exigencies of the situation strictly require.”⁴⁴ The Detained and Restricted Persons bill allowed the continued detention and imprisonment of individuals (such as Kenyatta) whose release threatened Kenya’s security. This bill also set up the “Appeals Tribunal,” an advisory body tasked to review detained and restricted persons every twelve months.⁴⁵ Finally, Renison’s “Act of Grace” promised to pardon and release Mau Mau detainees—albeit with a long list of exceptions, including Kenyatta and four affiliates who in October 1952 had been detained under the Deportation (Immigrant British Subjects) Ordinance of 1949. After announcing this “Act of Grace,” Renison explained that many of the security provisions against militant nationalists remained in force with the new laws.⁴⁶ These laws enabled Renison’s government to maintain control over Kenyan nationalists and the bureaucratic state once emergency laws expired in January 1960.

Initially, the politicians who later became members of KANU had starkly opposed substantive legislation that retained any vestige of colonial emergency powers, but as they gained power themselves, the potential advantages of the PPS Ordinance became apparent. During Renison’s announcement, Julius Kiano reportedly ran out of the meeting clapping ecstatically.⁴⁷ Newland G. Ngombe, an African Specially Elected Member, felt that ending the Emergency was a mistake as violence and intimidation continued, and questioned whether some of the nationalists were participating in secret societies at night.⁴⁸ Another African Elected Member from the Maasai community, Justus Tipis, responded that he should substantiate these claims or keep quiet, and pressed for the Act of Grace to extend to Kenyatta.⁴⁹ Yet Tom Mboya and others viewed the end of emergency as a farce, pointing to the new substantive legislation and Kenyatta’s exile as evidence of continued restrictions on Kenyan life. Mboya stated:

“The African was not going to be fooled by the mere declaration of the end of the state of emergency if some of those oppressive and suppressive laws from which he has suffered are to be retained in any form.”⁵⁰

With the new substantive legislation in place, Kenya’s Emergency formally came to an end on January 12, 1960.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Detained and Restricted Persons (Special Provisions) Ordinance, January 11, 1960, L.N. No. 15 of 1960.

⁴⁶ Ibid.

⁴⁷ Perth to Macleod, November 11, 1959, UKNA CO 822/1230.

⁴⁸ Specially Elected Members like Ngombe were derided by nationalists as “black Europeans” and traitors. Keith Kyle, *The Politics of the Independence of Kenya* (New York: St. Martin’s Press, 1999), 82–84.

⁴⁹ Clipping from *Daily Mail*, November 13, 1959, UKNA CO 822/1230.

⁵⁰ “Don’t Fool Africans, Says Mboya,” *Daily Mail*, November 13, 1959, UKNA CO 822/1230.

From January 1960 to Kenyatta's release in August 1961, the colonial government used their new substantive laws to the detriment of Kenyan political organization. In Renison's view, Kenyatta and others represented a threat to Kenya's security and Britain's geopolitical interests. Kenya's nationalists continued to be victims of these laws rather than benefactors during this period, so they opposed their use until Kenyatta's freedom. At Kenya's first Lancaster House Conference from January 18 to February 21, 1960, Kenyatta's restriction created tensions. Colonial officials aimed to discuss constitutional development in Kenya in a measured and gradualist manner, yet Macmillan's "Wind of Change" speech to the South African Parliament occurred during the conference and worked to destabilize the discussions.⁵¹ The two main Kenyan political organizations represented, Odinga and Mboya's Kenya Independence Movement (KIM) and Masinde Muliro and Ronald Ngala's Kenya National Party (KNP), disagreed by this point. Though these parties would not last past 1960, the dynamics of their disputes would persist throughout the transition period. While the KNP espoused multi-racialism and initially grew out of the Legislative Council African Elected Members, Odinga and Mboya's KIM sought an African nationalist platform.⁵² While these two groups could agree on the need for Kenyatta, or Peter Koinange, son of the detained Senior Chief Koinange wa Mbiyu and an exile in London, to participate in the first conference, they agreed on little else.⁵³ In protest, the African delegates initially boycotted the conference, and following the "Wind of Change" speech some of the leading white settler leaders refused to play any further part and returned to Nairobi.⁵⁴ Nonetheless, substantive legislation allowed the colonial regime to protect the ideological foundations for a favorable bureaucracy at independence at the expense of African Elected Members' desires for national government.

Renison had avoided discussion of the PPS legislation at Lancaster House, but he faced continued scrutiny from London. In March 1960, the Inns of Court Conservative and Unionist Society member, Charles Fletcher-Cooke, wrote a letter of concern to Colonial Secretary Macleod over the PPS legislation's avoidance of the European Convention of Human Rights' obligations and its contradictions with the "British concept of Justice."⁵⁵ In June 1960, Governor Renison defended the laws to Macleod, saying it was necessary to retain Part Three of the PPS Ordinance because African District Councils refused "to introduce further controlling legislation" and because of the revival of "the Kenyatta cult" in recent months, which they feared would require

⁵¹ Harold Macmillan, "The Wind of Change," Address to Members of Both Houses of the Parliament of the Union of South Africa, Cape Town, February 3, 1960, in *British Imperial Policy and Decolonization 1938-64*, vol. 2, eds. Andrew N. Porter and Anthony J. Stockwell (Basingstoke: Macmillan, 1989), 522-31; Kyle, *The Politics of the Independence of Kenya*, 102-7.

⁵² *Ibid.*, 94.

⁵³ Odinga, *Not Yet Uhuru*, 177; Michael Blundell, *So Rough a Wind* (London: Weidenfeld and Nicolson, 1964), 268-70.

⁵⁴ "Two Facets of Freedom, 1960," *British Pathé*, January 21, 1960, [TWO FACETS OF FREEDOM - British Pathé \(britishpathe.com\)](https://www.britishpathé.com) (accessed August 21, 2023).

⁵⁵ Fletcher-Cooke to Macleod, March 22, 1960, UKNA CO 822/2024.

further action if mobilized.⁵⁶ Renison argued for the retention of Part Three at least until the end of 1960, but they kept these laws right through to December 1963 and beyond into Kenya's independence.

Throughout 1960, colonial officials exercised control over their districts in central Kenya by using the PPS Ordinance to suppress further KLFA activity. In Nyeri District, rising tension and violence culminated in the murder of Headman Wambugu Kimathi at his home on May 28 by four Kikuyu individuals suspected of Mau Mau affiliation.⁵⁷ The violence and a resurgence in KLFA activity scared settlers like Captain Briggs, who demanded the government to "make use of the existing legislation to the full to terminate once and for all the revival of Mau Mau."⁵⁸ Odinga spoke out against Briggs, consistent with his opposition to substantive legislation. In response to the murder, Renison published the Public Security Regulations for Nyeri District on June 8, allowing Central Province Commissioner Hughes to issue curfew orders in multiple problem areas.⁵⁹ On June 22, KANU Commerce and Industry Minister Julius Kiano spoke out against the ability of a Provincial or District Commissioner to impose a curfew.⁶⁰

In December 1960, three months before the first national general election between KANU and the Kenya African Democratic Union (KADU), Kenyan security officials prepared to use the PPS Ordinance to respond to potential election violence. These two political organizations somewhat resembled the KNP and KIM. KADU represented smaller minority communities like Ngala's Mijikenda and Daniel Moi's Kalenjin, against KANU's Luo and Kikuyu representation in Odinga and Mboya, and later the released Kikuyu members like Kenyatta. While KANU and KADU had ideological differences, they also had internal disputes that were subjugated to the main source of division: the minority groups of KADU feared oppression and being blocked from the rewards of independence by the majority groups.⁶¹ Colonial security officers believed some in KANU had ties to KLFA activity, and they watched the coming election nervously. The Security Council advised that, if Kenyans organized into campaigns of civil disobedience or passive resistance and boycott, they would use the military, security forces, and varying degrees of the PPS Ordinance in "Operation Prophesy." In a serious but localized situation, "Operation Prophesy" would utilize Section Three of the PPS Ordinance. But in a "grave situation" affecting the entire colony, "Operation Prophesy"

⁵⁶ Renison to Macleod, June 2, 1960, UKNA CO 822/2024.

⁵⁷ Memorandum, Minister for Internal Security and Defense, Council of Ministers (60)169, June 16, 1960, UKNA CO 822/2024.

⁵⁸ *Kenya Hansard*, Legislative Council Deb, "Notices of Motion—Murder of Headman William Wambugu Kimathi," June 7, 1960, vol. 85, 1269; *Hansard*, HC Deb, "Situation," June 21, 1960, vol. 625, 187–88.

⁵⁹ Public Security (Nyeri District) Regulations, 1960, July 7, 1960, UKNA CO 822/2024.

⁶⁰ Extract, Minutes of Council of Ministers Meeting, June 22, 1960, UKNA CO 822/2024.

⁶¹ Bethwell Ogot and Tiyaambe Zeleza, "Kenya: The Road to Independence and After," in *Decolonization and African Independence: The Transfers of Power, 1960–1980*, eds. Prosser Gifford and Wm. Roger Louis (New Haven: Yale University Press, 1988), 415.

would invoke Section Four, amounting to a declaration of emergency.⁶² In such a case, the colonial government planned to hold political detainees in the old Mau Mau emergency detention camps.

Fortunately, the 1961 elections passed without widespread violence, but its political outcome would serve to further consolidate the PPS Ordinance in Kenyan law. KANU won handsomely, but its members refused to govern without Kenyatta. On May 17, 1961, Odinga and other KANU politicians proposed a motion in the Legislative Council for the “Release of Jomo Kenyatta and others.” The motion failed forty-three votes to twenty-six with Ronald Ngala and other KADU elements voting in opposition.⁶³ KADU then accepted a proposal to form a government with the settlers, and through a Government by Decree prepared by Governor Renison, KADU governed without an electoral mandate for the next two years.

In May 1961, the colonial government pushed the boundaries of security measures allowed under the European Convention of Human Rights, again provoked by anxieties over continued KLFA activity. On May 18, Police Commissioner Richard Catling and Director of Intelligence and Security, Mervyn Manby, jointly requested permission to detain suspects without trial or remand. They argued that to properly infiltrate Kikuyu subversive movements, they needed to interrogate individuals, requiring at least twenty-eight days of detention. Catling even wanted to detain individuals indefinitely. Attorney General Eric Griffith-Jones pointed out that such measures violated the European Convention, except in a case of emergency threatening the life of the colony. Faced with deadlock in these discussions, Parliamentary Colonial Undersecretary Hugh Fraser recommended that Governor Renison evaluate whether provision could be made for detention without trial of up to twenty-eight days. Renison felt uneasy, his view being that as they moved toward independence, laws should become less authoritarian.⁶⁴ Griffith-Jones finally concluded later in May that an emergency declaration was unjustified, and any invocation of the second part of the PPS bill, which allowed for detention without trial, would be “*ultra vires*” to the Convention and to Kenya’s own Schedule of Fundamental Rights.⁶⁵

The growing tension around the use of PPS legislation finally abated on August 14, 1961, when Governor Renison grudgingly released Kenyatta from restriction.⁶⁶ Kenyatta became KANU’s leader, and Kaggia also joined the organization shortly following his release on August 23.⁶⁷ Renison now accepted that at independence, KANU led by Kenyatta would control the bureaucratic

⁶² “Memorandum,” Internal Security Working Committee, December 21, 1960, UKNA CO 822/2024.

⁶³ *Kenya Hansard*, Legislative Council Deb, “Motion—Release of Jomo Kenyatta and Others,” May 17, 1961, vol. 87, 117.

⁶⁴ “Record of a Meeting to Discuss the Security Situation,” May 18, 1961, UKNA CO 822/2031.

⁶⁵ “Memo,” Griffith-Jones, May 1961, UKNA FCO 141/6979.

⁶⁶ “Kenya: Jomo Kenyatta Returns from Exile, 1961,” *British Pathé*, August 15, 1961, [KENYA: JOMO KENYATTA RETURNS FROM EXILE - British Pathé \(britishpathe.com\)](https://www.britishpathe.com/video/kenya-jomo-kenyatta-returns-from-exile-1961) (accessed August 21, 2023).

⁶⁷ Kaggia, *Roots of Freedom*, 177.

state. Thus began KANU's shift toward acceptance of the "gatekeeper state" at independence, and acceptance of the potential usefulness of the PPS legislation. KANU elites who desired to stifle internal dissent and political opposition now had incentives to retain the "twilight" legislation. Colonial officers and new nationalist elites within KANU both desired stability for Kenya.⁶⁸ Kenyatta and his cabinet now chose to pursue stability and continuity through the existing legal system, designating the PPS and other colonial security legislation as post-colonial institutions.

KANU's Acceptance of Security Laws

With Kenyatta, Kaggia and the other detainees freed, and KANU set to win the next general election in 1963 to decide self-government in Kenya, KANU members advocated for flexible emergency powers laws in constitutional negotiations taking place throughout 1962 and 1963. Over this period, the British colonial government concluded that a KANU government with strong powers to act against remaining threats was their best hope in securing a stable Kenyan regime suited to their geopolitical interests. Once Renison released Kenyatta, their worst fears of a resurgence in the KLFA and the "Kenyatta cult" dissipated as KANU took control of its own dissident elements and many KLFA adherents accepted Kenyatta's leadership. While KLFA secretive activities and subsequent arrests continued up to independence in December 1963, their effectiveness was reduced by Kenyatta's release and the various steps he initially took advocating for reconciliation and to address the root causes of unrest in Kenya.⁶⁹

There would be further struggles on Kenya's journey to independence, but the PPS legislation would no longer be as controversial. The second Lancaster House Conference took place from February 14 to April 6, 1962, and resulted in a draft *majimbo*, or regional, constitution in the KADU model. KADU members feared domination by the majority and wanted a constitution with many checks on centralized state power, including emergency powers.⁷⁰ KANU members, on the other hand, opposed a constitution with rigid checks and wanted a strongly centralized system.⁷¹ In March 1962, disagreements between KANU and KADU on emergency powers emerged, but with just over a year left before independence, the two main Kenyan political parties had not debated substantive security legislation and remained divided on their views of emergency powers.⁷² The parties did, however, find common ground on the utility of emergency powers regarding the *shiftya* threat, which had the potential to

⁶⁸ Poppy Cullen, *Kenya and Britain After Independence: Beyond Neo-Colonialism* (Cham: Palgrave Macmillan, 2017), 10.

⁶⁹ Anais Angelo, *Power and the Presidency in Kenya: The Jomo Kenyatta Years* (Cambridge: Cambridge University Press, 2020), 181.

⁷⁰ "KADU Memorandum," March 13, 1962, UKNA CO 822/2369.

⁷¹ "Kenya Constitutional Conference, 1962, Conference Papers—Observations by KANU," March 11, 1962, UKNA CO 822/2369.

⁷² "Summary of Main Points Agreed at Lancaster House," February/March 1962, UKNA CO 822/2367.

destabilize Kenya. The Northern Frontier District (NFD), a vast, semi-arid region in Northern Kenya covering nearly half of Kenya's geographic size, had never been closely integrated within the colony in part due to its marginalization through security legislation by the British colonial administration.⁷³ Two-thirds of the NFD's population consisted of Somali, who, in 1962, voted in a plebiscite to leave Kenya and become part of the new independent state of Somalia. When Macmillan's government rejected the plebiscite's results, some Somali decided to mount an armed insurrection, supported covertly by the Somali state.⁷⁴ Known as *shifita*, these violent secessionists became a serious threat to Kenya's stability before independence. Both KANU and KADU were "opposed to any measure that would lead to secession of any part of the Northern Frontier District."⁷⁵ At Lancaster House, the NFD delegation, led by Alex Kholkholle and MP Abdi Khalif from Wajir North in the NFD, requested regional autonomy before any further constitutional changes occurred. Colonial officials mostly agreed with Kenyan politicians in staunch opposition to autonomy in the NFD: "there is no question in our minds but that NFD will remain part of Kenya," declared a senior colonial official, "so long as Her Majesty's Government has any responsibility in Kenya."⁷⁶ There was an apparent need for strong powers in the NFD as independence loomed, and Kenyan nationalists supported this.⁷⁷

Following the conference, debates in mid-1962 revealed disagreements between KADU and KANU on emergency powers, but time was running out to resolve such matters. What would happen if a government decided it was necessary to declare an emergency? KADU members agreed that this might necessitate a ratifying parliamentary vote after the declaration of emergency, but no agreement could be reached on how soon this vote would happen. They also disagreed on how long an emergency declaration should continue without parliamentary confirmation.⁷⁸ On both matters, KANU members generally desired longer time periods, whereas KADU members wanted shorter timeframes for a parliamentary vote. Legal Affairs Minister Anthony Webb finally presented an exhaustive memorandum on emergency powers in August 1962. Webb proposed that the head of state should be allowed to declare an emergency initially, to be ratified by Parliament within seven days.⁷⁹ The Council of Ministers agreed.

The status of the PPS Ordinance was determined only three months before independence. Webb advocated for substantive laws being maintained in an independent Kenyan constitution. He had disagreed in 1962 with ministers

⁷³ Kenya Hansard, Legislative Council Deb, "Committee of Supply—Vote 11—Ministry of Defence," October 19, 1962, vol. 90, 229–30.

⁷⁴ Hannah Whittaker, *Insurgency and Counterinsurgency in Kenya: A Social History of the Shifita Conflict, c. 1963–1968* (London: Brill, 2014), 33, 51–55.

⁷⁵ Reginald Maudling, "Report of the Constitutional Conference, 1962," LLMC Digital, April 6, 1962, 11, 1962, Kenya Constitutional Conference (llmc.com) (accessed January 20, 2022).

⁷⁶ Monson to Renison, August 24, 1962, UKNA CO 822/2255.

⁷⁷ Ibid.

⁷⁸ Council of Ministers Meeting, July 18, 1962, UKNA CO 822/2252.

⁷⁹ "Memorandum," Anthony Webb, August 24, 1962, UKNA CO 822/2252.

who had expressed the view that any emergency might be speedily ended, and “normal” government restored, and then pushed for the agreement that a 75% vote threshold was required in parliament to ratify emergency powers (though this would later be amended to a lower threshold).⁸⁰ Webb’s advocacy for permanent legislation under the PPS law and fewer checks on the emergency powers came from a concern that KANU members might act unconstitutionally if the constitution constrained their authority. A potential constitutional crisis distressed colonial administrators, and they were trained to avoid such a scenario. Tom Mboya, and others in KANU leadership, began to threaten unconstitutional behavior if Britain and KADU denied them the centralized bureaucracy they wanted.⁸¹ In September and October 1962, colonial legal advisor Henry Steel and Webb both worried over the possibility of such a constitutional crisis. Webb and Steel felt that a 75% majority might result in the majority government acting unconstitutionally. To Steel, this rigidity was the better of two bad options, as they needed to allay the fears of the minority party. Yet Webb feared the demise of the independence constitution more than the dominance of the majority groups over the minority.⁸² Webb’s sentiments guided the colonial government’s policies on emergency powers in the year before independence. So it was that in late November 1962, Acting Governor Griffith-Jones proposed that Kenyan Ministers lower the vote threshold required for emergency powers and increase the amount of time allowed for emergency powers before they must be renewed.⁸³ KANU got what they wanted.

The Council of Ministers held constitutional meetings prior to Colonial Secretary Duncan Sandys’ visit to Kenya in February and March 1963. On January 10, 1963, KANU ministers and colonial advisors, among them Mboya and Webb, worried that the rigid 75% voting majority might cause a constitutional crisis.⁸⁴ Mboya preferred a 60% majority. KANU Finance Minister James Gichuru also preferred a lower voting majority but suggested a two-thirds majority vote. Constitutional Affairs and Administration Minister and KADU leader Ronald Ngala represented KADU’s overall desire to keep the high threshold to guard against an “irresponsible government.”⁸⁵ KADU members advocated for strong checks against an oppressive government but recognized their weakened negotiating power against both the colonial government and KANU. On January 23, 1963, the Council of Ministers agreed to compromise between Mboya and Ngala’s positions at a 65% majority to invoke emergency powers. The lowering of checks on central government power made Ngala and his KADU ministers increasingly concerned, telling voters “If you vote KANU

⁸⁰ Council of Ministers, 36th Special Meeting, August 29, 1962, UKNA CO 822/2252.

⁸¹ David Goldworthy, *Tom Mboya: The Man Kenya Wanted to Forget* (Nairobi: Kenya, East African Educational Publishers), 192.

⁸² Webb to Steel, October 12, 1962, UKNA CO 822/2253.

⁸³ “Kenya Constitution—Progress Report Week Ending November 23,” November 26, 1962, UKNA CO 822/2259.

⁸⁴ “Fourth Constitutional Meeting of the Council of Ministers,” January 10, 1963, Churchill Archives Centre, Cambridge, DGFT 5/22.

⁸⁵ *Ibid.*

you are voting for a party that will destroy the constitution.”⁸⁶ In March 1963, the conversation turned toward the length of time between an emergency declaration and its expiration. KADU ministers like Bernard Mate had compromised on the voting threshold and did not want to extend the period of emergency past seven days.⁸⁷ KANU ministers like Mboya agreed with Sandys’ position to extend this period. However, the disagreement between KANU and KADU meant Governor Macdonald maintained the seven-day period.

As the May 1963 elections drew closer, KANU and KADU tensions reached dangerous levels as Mboya, and other KANU officials, made it publicly clear that KANU intended to change the 1962 *majimbo* constitution at the October 1963 independence conference. Throughout April and May 1963, Mboya made a series of speeches and published two newspaper articles advocating for a less rigid constitution. Mboya threatened that KANU would change the constitution if they could not govern effectively.⁸⁸ In the May elections, KANU overwhelmingly defeated KADU through their campaign to govern with strong central powers.⁸⁹ Yet KANU’s hold on power was fragile: the clash of personalities in the organization, and KADU’s effectiveness in marketing the gravity of a Kikuyu-Luo dominated government for minority groups, threatened to unravel Kenyatta’s proposal for unity. On June 1, 1963, the newly elected leaders took over self-government.

In late June 1963, when the Cabinet determined December 1963 as the month for independence, they still had not deliberated on the future of the PPS legislation. On August 8, 1963, Kenyatta spoke to a room of settlers at an agricultural meeting in Nakuru. To the sound of five hundred settlers stomping, cheering, and clapping, Kenyatta reassured his audience that they need not fear any change in land ownership policy.⁹⁰ Throughout the final months before independence, he would give other speeches with similar messages under the guise of “unity.”⁹¹ Increasingly confident about Kenyatta’s “grip” on power, colonial officials now decided to maintain the PPS legislation in the transition to independence. In September 1963, Fernley Webber (head of the East African desk in London) noted with approval that colonial emergency powers and substantive legislation should be left in place for Kenya.⁹² London did not want former colonies to inherit undemocratically invoked colonial legislation.⁹³ But both Colonial Permanent Secretary Frank Loyd and Principal to the Colonial Office Peter Kitcatt believed there was not enough time before

⁸⁶ “Mr. Ngala urges fight against interference,” *East African Standard*, February 11, 1963.

⁸⁷ Minutes, 33rd Constitutional Meeting, Council of Ministers, March 1963, UKNA CO 822/3110.

⁸⁸ Bernard W. Meynell to K.A. East, May 17, 1963, UKNA CO 822/3052.

⁸⁹ Kyle, *The Politics of the Independence of Kenya*, 176.

⁹⁰ “Kenya: Jomo Kenyatta Cheered by White Farmers,” *British Pathé*, August 13, 1963, [Kenya: Jomo Kenyatta cheered by white farmers - British Pathé \(britishpathe.com\)](https://www.britishpathe.com) (accessed August 21, 2023).

⁹¹ “Kenya: Nairobi: Jomo Kenyatta’s Triumphant Return—Call for Unity,” *British Pathé*, October 21, 1963, [KENYA: NAIROBI: JOMO KENYATTA’S TRIUMPHANT RETURN - CALL FOR UNITY - British Pathé \(britishpathe.com\)](https://www.britishpathe.com) (accessed August 21, 2023).

⁹² Emergency Powers Orders in Council had “sunset clauses” in Ghana, Tanzania, and Uganda’s constitutions.

⁹³ Webber to Loyd, September 12, 1963, UKNA FCO 141/7077.

independence to raise this point with the Council of Ministers, as the last constitutional conference was scheduled for October, just a few weeks before independence.⁹⁴ In Kenya's case, the revocation of colonial emergency laws did not matter because the constitution provided emergency powers. Griffith-Jones and Webber decided to break from the colonial precedent for the PPS legislation. For one, the PPS legislation was in current use at that time (to deal with the NFD), and the KANU government desired its use at independence. Griffith-Jones believed that KANU would resist the repeal of the laws and resent any arbitrary appeal overriding their objections. Thus, it would be a "pretty pedantic virtuosity" to force Kenyatta's government to pass the legislation again.⁹⁵ The will of Kenyan elites and the unaddressed threats to the bureaucratic state during decolonization justified the retention of the PPS Ordinance from a British perspective.

Kenyatta now used the PPS to address threats to Kenyan statehood. In October 1963, KADU's potential secession and the *shifita* conflict in the NFD drew serious concern and violent threats. At the start of the independence conference from September 25 to October 19, Ngala became increasingly oppositional. KADU members, including Daniel Moi, made serious plans to partition sections of Kenya, and in October 1963, KADU drew up plans for violent protest.⁹⁶ On the same day, the KANU government issued a PPS order that penalized making statements likely to cause alarm and despondency. They drafted this order ostensibly to address *shifita* secession claims in the NFD, but the threat to KADU was palpable.⁹⁷ Ngala and other KADU officials feared this was a sign of greater oppression to come. Webber and Griffith-Jones advocated for the order's rescission, but KANU ministers Joseph Murumbi and Achieng Oneko refused to rescind the order.⁹⁸ Following the conference's end, when independence was officially announced for December 12, Justus Tipis, Moi, and others continued to advocate for violent protest. However, other KADU members like Robert Matano and Masinde Muliro now opposed violence and urged cooperation, and Ngala reluctantly came to the same view.⁹⁹ Additionally, as violence increased in the NFD, the KANU regime detained several Somali fighters without trial in October 1963, and passed substantive legislation to combat the insurgents.¹⁰⁰

KANU's Consolidation of Power

Following Kenya's independence on December 12, 1963, Kenyatta inherited and used both emergency powers and the PPS legislation against internal and external challenges to his bureaucratic-executive state. While the threats

⁹⁴ Kitcatt to Loyd, September 20, 1963, UKNA FCO 141/7077.

⁹⁵ Griffith-Jones to Webber, September 21, 1963, UKNA FCO 141/7077.

⁹⁶ Special Branch Weekly Intelligence Report, October 1 to 7, 1963, UKNA FCO 141/7110.

⁹⁷ Griffith-Jones to Webber, October 11, 1963, UKNA CO 822/2053.

⁹⁸ Ibid.

⁹⁹ Macdonald to Sandys, October 30, 1963, UKNA CO 822/3052.

¹⁰⁰ Karen Weitzberg, *We Do Not Have Borders: Greater Somalia and the Predicaments of Belonging in Kenya* (Athens: Ohio University Press, 2017), 128.

from the *shifta* continued to necessitate a widely publicized use of emergency powers and substantive law, KANU's internal dissent encouraged Kenyatta's power consolidation. Though KANU received an electoral majority over KADU in the independence elections, the government was divided within. KANU's leftist elements remained a potential threat to Kenyatta's leadership over the first decade of independence. In 1964, the PPS Ordinance became the PPS Act, translating colonial legislation into independent legislation.¹⁰¹ In late December 1963, the murder of a Kenyan soldier by *shifta* "terrorists" had created uproar within the Kenyan government. John David Kali, government whip and MP for Nairobi East, threatened that MPs would start their own volunteer force against the *shifta* if the government did not act soon.¹⁰² Mboya advocated for imposing Emergency Regulations in the North Eastern Region (NER, as the old NFD was now named) regardless of the Senate's decision to ratify the declaration within a week, as the independence constitution required.¹⁰³ On December 25, 1963, every KADU minister in the National Assembly blocked its passage, and prevented the declaration from reaching the 65% vote threshold required. After further negotiations between Kenyatta's Cabinet members in an emergency meeting, Governor-General Malcolm Macdonald passed a declaration of emergency on the same day.¹⁰⁴ A week later, the National Assembly ratified the declaration, constitutionally allowing the Emergency Regulations to continue.¹⁰⁵ The declaration of emergency effectively suspended the rule of law in the NER and brought in force the PPS Act and Public Security Regulations of 1963.¹⁰⁶

Kenyatta employed the PPS Act and emergency powers to secure hegemony in the NER. The PPS (North-Eastern Region) Regulations of 1963 allowed for a five-mile prohibited zone along the Kenya-Somalia border, where people could not settle or move. Within this region, anyone without authorization was subject to search without a warrant and could be arrested and detained for up to twenty-eight days without trial.¹⁰⁷ In practice, this also allowed the police to use lethal force. In April 1964, *Kenya Gazette* published the Kenya (North-Eastern Region) (Amendment) Regulation by applying the 1963 Public Security Regulations to the Constitution in the NER. This allowed for a constant state of emergency in the region without parliamentary approval. Further amendments to this bill in September 1964 allowed for livestock seizure, destruction of buildings and property, and expanded the area to include some districts in the Eastern and Coast regions.¹⁰⁸

¹⁰¹ The Kenya (Amendment of Laws) (Written Laws) Order, 1963, December 31, 1963, L.N. No. 2 of 1964.

¹⁰² "N.F.D. group plans visit to Gatundu," *East African Standard*, December 24, 1963.

¹⁰³ Charles Hornsby, *Kenya: A History since Independence* (London: I.B. Taurus, 2012), 94–95.

¹⁰⁴ "N.F.D. buffer strip set up: Emergency follows fresh attacks," *East African Standard*, December 27, 1963.

¹⁰⁵ "Kenya Independence Order in Council 1963," December 4, 1963, No. 1968.

¹⁰⁶ "Border emergency details published," *East African Standard*, December 28, 1963.

¹⁰⁷ *Ibid.*

¹⁰⁸ Whittaker, *Insurgency and Counterinsurgency in Kenya*, 95–96.

While Kenyatta and his Attorney General Charles Njonjo expanded legal powers in the NER, they worked to expand the central government's constitutional powers as well. By November 1964, Kenya was a *de facto* one-party state as KADU politicians joined KANU; the benefits of joining the government outweighed exclusion from power as an opposition organization.¹⁰⁹ A year after independence, Prime Minister Kenyatta became President Kenyatta through Kenya's first constitutional amendment, which made Kenya a Republic instead of a British Dominion and consolidated power to the center.¹¹⁰ Under this amendment, the provincial administration now fell under the new Office of the President.¹¹¹ The second and third constitutional amendments in 1964 and 1965 completed Njonjo and Kenyatta's push toward centralized government and rid the constitution entirely of its initial *majimbo* structure. The third amendment also lowered the voting threshold to declare an emergency from the 65% majority to a simple majority, even lower than Mboya requested before independence.¹¹² In March 1965, with the KADU opposition dissolved, Njonjo pushed this amendment through. Left-wing KANU members viewed the bill negatively, though they still motioned to support. Kaggia saw the amendment as an attempt "on the part of the government to bring about a dictatorship in this country."¹¹³ Nonetheless, the third amendment passed with 103 votes for it and only three votes against.

By this point, the KANU government had fully adopted the gatekeeping practices used by the colonial government against the Mau Mau in 1952. As Kenyatta consolidated centralized power in the bureaucratic state, he continued to employ colonial tactics against the *shifta* threat. The villagization techniques used in the NER to suppress the *shifta* borrowed directly from the Mau Mau counterinsurgency and from other previous methods used to govern the NFD as a "state of exception."¹¹⁴ On June 4, 1965, KANU MP and Laikipia branch chair Godfrey Gitahi Kariuki motioned in the House of Representatives to "villagize immediately all Somali [...]" in order to enable security forces to deal effectively with the *shifta*.¹¹⁵ Kariuki and other MPs whose districts experienced *shifta* attacks felt the government failed to act rapidly. In his opening statement, Kariuki referred to the colonial government's villagization of Kikuyu, saying "we must apply the same method as the Imperialist Government applied in order to defeat Mau Mau activities."¹¹⁶ This motion

¹⁰⁹ Cullen, *Kenya and Britain After Independence*, 132.

¹¹⁰ Angelo, *Power and the Presidency in Kenya*, 115, 134–35.

¹¹¹ Andrew Burton and Michael Jennings, "The Emperor's New Clothes? Continuities in Governance in Late Colonial and Early Postcolonial East Africa," *International Journal of African Historical Studies* 40 (2007): 11.

¹¹² Constitution of Kenya (Amendment) Act, 1965, December 12, 1964, No. 14 of 1965, S.29.

¹¹³ *Kenya Hansard*, House of Representatives Report, "Second Reading—Constitution of Kenya (Amendment) Bill," March 24, 1965, vol. 4, 761.

¹¹⁴ Julie MacArthur, "Decolonizing Sovereignty: States of Exception along the Kenya-Somali Frontier," *The American Historical Review* 124 (2019), 108–43.

¹¹⁵ *Kenya Hansard*, House of Representatives Report, "Motion—Villagization of Somalis for Security," June 4, 1965, vol. 5, 225.

¹¹⁶ *Ibid.*, 226.

passed, and the resulting villages closely resembled those of the Mau Mau experience.¹¹⁷

Kenyatta's consolidation of the bureaucratic-executive regime in 1964 also enabled him to suppress internal opposition.¹¹⁸ Kenyatta had struck a careful balance after independence on land redistribution, demonstrating to settlers and outgoing British colonial officials that he would not nationalize their assets.¹¹⁹ When Kagga overtly criticized the government's land policies in April 1965, the police banned a rally he organized in Kahuro.¹²⁰ Odinga's opposition was more difficult to confront. With the publication of Sessional Paper No. 10 on "African socialism," Kenyatta attempted to outdo Odinga by touting a mixed economy approach, which welcomed foreign investment and supported earning land through hard work and cash payments.¹²¹ Despite this, there was much popular resistance against Kenyatta on the question of land distribution. Odinga and other leftist politicians targeted KANU's land appropriation to mobilize popular opposition. In response, Kenyatta eventually stripped the vice-presidency office of most responsibilities, and then removed Odinga from this position.¹²² Then, in March 1966, KANU's new party constitution removed the vice-president position entirely.¹²³ On April 14, 1966, Odinga left KANU to lead a new political party, the Kenya People's Union (KPU). Having been sacked from government by Kenyatta, Kagga then joined the KPU as its deputy president.¹²⁴ The KPU Manifesto explicitly addressed the land problem, accusing the government of "abandoning tens of thousands of landless who have no jobs to go to."¹²⁵ KPU leadership demanded immediate "distribution of free land to the neediest, including squatters and those who lost their land in the struggle for independence."¹²⁶ These direct threats to Kenyatta rallied support for the KPU as a source of settling unanswered land grievances.

In response to the KPU's formation in 1966, Kenyatta and Njonjo developed further legal instruments to defend their position of power. The fifth amendment, passed by Njonjo on April 30, 1966, required anyone who resigned from a

¹¹⁷ Whittaker, *Insurgency and Counterinsurgency in Kenya*, 116.

¹¹⁸ Branch and Cheeseman, "The Politics of Control in Kenya."

¹¹⁹ Angelo, *Power and the Presidency in Kenya*, 111.

¹²⁰ "Kagga Meeting Stopped," *Daily Nation*, April 19, 1965.

¹²¹ KANU Sessional Committee, "African Socialism and its Application to Planning in Kenya," 1965, [Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya \(kippra.or.ke\)](#) (accessed August 21, 2023); Tony Hall, "Kenya Defines African Socialism," *Daily Nation*, April 28, 1965; Ogot and Zeleza, "Kenya: Road to Independence," 418.

¹²² Kenya Hansard, House of Representatives, "Oral Answers—Question No. 232—Duties of Vice-President and His Office," February 1, 1966, vol. 8, 310.

¹²³ "Wanachi Declaration: The Programme of the Kenya People's Union," 1966, 4, UKNA FCO 31/352; Hastings W. O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963–69," *African Affairs* 71 (1972).

¹²⁴ Bildad Kagga, Wiegert de Leeuw, and Mwangani Kagga, *The Struggle for Freedom and Justice: The Life and Times of the Freedom Fighter and Politician Bildad M. Kagga (1921–2005)* (Nairobi, Kenya: Transafrican Press, 2012), 191.

¹²⁵ Kenya People's Union, "K.P.U. Manifesto for 1966 By-Elections" (Nairobi: Pan-African Press, 1966), 6.

¹²⁶ *Ibid.*, 8.

political party to immediately seek reelection.¹²⁷ This provision applied to KANU members who joined the KPU. Njonjo published, tabled, and assented the law in under forty-eight hours.¹²⁸ While politicians like Mboya and Kenyatta had previously celebrated the KADU to KANU crossovers, they now labeled KPU transfers as treacherous “political acrobats.”¹²⁹ Many KANU deserters immediately rejoined the party,¹³⁰ but learned that they still had to be reelected during the June 1966 “Little General Election.”¹³¹ This election became an undemocratic referendum on land policy.

Kenya’s sixth constitutional amendment strengthened the PPS Act for Kenyatta to suppress challenges to his executive power. Njonjo and Mboya claimed the law would allow the government to use emergency powers more effectively against wars and internal conflicts.¹³² The sixth amendment updated the colonial-era PPS Act allowing for detention without trial and completely overhauled emergency powers in Kenya.¹³³ Passed in under four hours on June 2, 1966, the bill allowed the President to use Part Three of the PPS Act and its provisions, including detention, “at any time” based on his own judgment.¹³⁴ The amendment removed parliamentary control over emergency powers. The duration of powers expanded from 21 to 28 days. Previously, an emergency had to be renewed every eight months. Through the sixth amendment, an emergency did not require any renewal. The amendment allowed for the KANU government to acquire, occupy, or use Trust Land during an emergency.¹³⁵ The vote took place when the KPU had vacated their seats, so the minimum required MPs were present. Former KADU members Martin Shikuku and C.B. Ngala-Abok both supported the bill but questioned the allowance of twenty-eight days for emergency powers, the ability to confiscate land, and for detention without trial. Shikuku, whom Kenyatta would later detain in 1975, stated that if power ever changed, they would be subjects of these laws. Gichuru replied that the law only applied for the current president, meaning that a future president must pass the bill again, thereby protecting the land and security of the incumbent KANU leaders. MPs Shikuku and S.T. Omar compared the detention abilities to the Mau Mau era’s human rights abuses.¹³⁶ Omar proposed revisions to check that the arbitrary detentions of that emergency did not occur again, but MP Kassim Mwamzandi requested

¹²⁷ Constitution of Kenya (Amendment) (No. 2) Act, 1966, April 30, 1966, No. 17 of 1966, S.3, S.42a(1).

¹²⁸ Okoth-Ogendo, “The Politics of Constitutional Change,” 25.

¹²⁹ Ibid.

¹³⁰ Daniel Branch, *Kenya: Between Hope and Despair, 1963–2011* (New Haven: Yale University Press, 2011).

¹³¹ Susanne D. Mueller, “Government and Opposition in Kenya, 1966–1969,” *Journal of Modern African Studies* 22, no. 3 (1984): 399–427.

¹³² Kenya Hansard, House of Representatives, “Bill, Second Reading, Constitution of Kenya (Amendment) (No. 3) Bill,” June 2, 1966, vol. 9, 274–90.

¹³³ Kenya Hansard, House of Representatives, “Motion—The Constitution (Public Security) Order 1966,” July 21, 1966, vol. 9, 2118; Angelo, *Power and the Presidency in Kenya*, 243.

¹³⁴ Constitution of Kenya (Amendment) (No. 3) Act, 1966, June 7, 1966, No. 18 of 1966, S.29.

¹³⁵ Ibid.

¹³⁶ Kenya Hansard, House of Representatives, “Report and Third Reading, Constitution of Kenya (Amendment) (No. 3) Bill,” June 2, 1966, vol. 9, 328.

that they vote quickly without further deliberation. Only MP G.J. Mbogoh (of Embu North) opposed the vote during the second reading, but he did not vote when the other seventy-three members unanimously approved.¹³⁷ During the third and final reading, all seventy-four members approved of the amendment. By June 7, 1966, President Kenyatta now had practical powers to detain anyone in the KPU without trial.

Suppression of the KPU in the “Little General Election” was the collective result of Kenyatta’s utilization of colonial law and constitutional amendments. The KPU won the districts it had strong recognition in, particularly in Odinga’s Central Nyanza Province and the Machakos District. The KPU petitioned sixteen of the results on claims of rigging and disadvantage in the campaigns due to the new laws, but all claims were dismissed.¹³⁸ After the election on August 4, 1966, Kenyatta used the new PPS Act’s powers to detain six KPU supporters and administrators, including KPU Youth Leader J. M. Oyangi and KPU Nairobi Branch Secretary Vicky Wachira.¹³⁹ In the following years, Kenyatta continued to use the PPS Act to detain KPU members and aides to Odinga. On April 2, 1968, Kenya police raided the KPU’s offices, and later that month, Kaggia and the KPU’s South Nyanza branch chairman, Gogo Ochok, were sentenced to a year of imprisonment under violation of the Public Order Act prohibiting holding a public meeting without a permit.¹⁴⁰ In August 1968, Kenyatta invoked the Public Security (Detained and Restricted Persons) Regulations of 1966 to detain Nairobi journalist Erastus Obura and Odinga’s former bodyguard, Frederick Ogai. By July 1968 there were at least eight detainees held with affiliations to the KPU,¹⁴¹ and in October 1969, Kenyatta invoked the PPS Act to detain Odinga and other KPU members after violent protests in Nyanza.¹⁴² Kenyatta had effectively suppressed the opposition by using colonial legislation.

Conclusion

The persistence of emergency powers and the PPS Act between colonial and independent Kenya permitted the illiberal tendencies of the colonial regime to continue under an independent Kenyan government seeking to maintain its political-economic integrity as a nation-state. In Kenya’s North Eastern Region, the Emergency first declared in 1963 officially lasted until November 29, 1991. From the formation of the Northern Frontier District in colonial Kenya to the present day, Kenyan rulers governed this region under worse standards than the rest of Kenya. Similarly, after the detention of Odinga and other KPU members in the 1960s, Kenyatta and his successor Moi repeatedly used legislation to detain dissidents who criticized their government.

¹³⁷ Kenya *Hansard*, House of Representatives, “Bill, Second Reading, The Constitution of Kenya (Amendment) (No. 3) Bill,” June 2, 1966, vol. 9, 322.

¹³⁸ Hornsby, *Kenya*, 164.

¹³⁹ John Ling to British High Commission, July 28, 1967, UKNA FCO 31/207.

¹⁴⁰ “K.P.U. Offices in Nairobi Raided,” *East Africa Standard*, April 2, 1968, UKNA FCO 31/207; “Kaggia and Ochok Jailed for a Year,” *East Africa Standard*, April 20, 1968, UKNA FCO 31/207.

¹⁴¹ “Detentions Officially Announced,” *East Africa Standard*, April 19, 1968.

¹⁴² Ogot and Zelenza, “Kenya: Road to Independence,” 418.

Throughout the 1980s and 1990s, the Moi administration arguably became more oppressive than the Kenyatta administration, expanding arrests and detention without trial and banning books, organizations, and other forms of political expression.¹⁴³ In 1997, Amnesty International and other watchdog groups petitioned the Kenyan government to repeal the PPS Act for its complicity in human rights abuses.¹⁴⁴

The PPS Act is an active Kenyan law, retaining much of the wording of the original colonial Ordinance, and empowering a non-elected provincial administration to act upon the law when needed. But following the formation of Kenya's new constitution in 2010, the position of the PPS Act has come under greater critical scrutiny. It is no longer clear whether invoking the PPS today would be equivalent to declaring a state of emergency, or if the PPS grants the President additional powers.¹⁴⁵ The 2010 constitution's Article 17 set a limit for reform of the provincial administration to take place within five years, but thirteen years later the provincial administration is still left without democratic accountability. It is important to note that laws such as the PPS Act can be useful to solve genuine national threats. In 2011, President Mwai Kibaki used the Act to respond to nationwide droughts.¹⁴⁶ Nations need laws to respond to national emergencies in a flexible way. Yet the vague wording and broad powers of the PPS Act in Kenya has allowed for its infringement on human rights in "emergencies" that could have been resolved without such drastic measures. It remains uncertain if Kenya's 2010 Constitution has limited some of the malign influences of such legislation.

At the same time, other colonial laws continue to be used in Kenya. In February 2023, Interior Cabinet Secretary Kithure Kindiki issued Public Order No. 1, imposing dusk-to-dawn curfews and sending additional security forces to the Northwest region of Kenya to respond to banditry and violence in six Rift Valley counties. At the time of writing, Kindiki had extended the Public Order in the affected areas each month since, allowing the curfews and security measures to persist.¹⁴⁷ While President William Ruto did not invoke the PPS Act, this manner of approaching conflict in Kenya is reminiscent of the strategy utilized in colonial times. The endurance of such colonial legislation has aided the preservation of the Kenyan nation-state, both physically and ideologically.

Acknowledgements. The author wishes to thank Dr. Tim Parsons and Dr. David Anderson for their mentorship on this project.

¹⁴³ Amnesty International, "Kenya: Violation of Human Rights: Communications between Amnesty International and the Government of Kenya," AFR 32/27/97, September 9, 1997, [Kenya: Violations of Human Rights: Communications between Amnesty International and the Government of Kenya - Amnesty International](#) (accessed August 21, 2023).

¹⁴⁴ *Ibid.*, 2.

¹⁴⁵ Jill Cottrell Ghai, "Do we need a state of emergency and what does it mean?" *Katiba Institute*, May 9, 2020, [Katiba Institute](#) (accessed August 21, 2023).

¹⁴⁶ Preservation of Public Security Act, June 8, 2011, L.N. No. 59 of 2011.

¹⁴⁷ Public Order Curfew Extension Order No. 5 of 2023, July 7, 2023, L.N. No. 63 of 2023.

Kyle J. Melles is a post-graduate researcher at University of Warwick studying colonial legislation and its legacy in postcolonial Kenya under the Fulbright Scholarship. This research builds on his previous thesis work at Washington University in St. Louis.

Cite this article: Kyle J. Melles, "Kenya's Emergency Powers: Legal Continuities in the Post-Colonial State, 1959–1969," *Law and History Review* (2024): 1–24. <https://doi.org/10.1017/S0738248024000191>