

WRITING RIGHTS

[The Bill of Rights] should not entrench the position of those enjoying a privileged position, nor perpetuate a system that was basically unjust.

—Tom Mboya, 1960

I would suggest those who are not satisfied—like the seven at the lunch counter—return to their native Africa, and they'll find out they're doing a lot better here than they would in their native land.

—Louisiana Governor Earl Kemp Long,
reacting to the sit-in movement, 1960

MIDAS MIGHT HAVE TOUCHED THE WALLS of Lancaster House and reached up to brush his fingertips across the ceiling, drenching it in gold. The brilliance of the fine, detailed gold engravings, enhanced in the principal meeting room by a massive crystal chandelier, nearly eclipsed the beauty of the fine paintings, mostly of elegant women and children and of angelic visions, gracing the walls. In its opulence, it was a setting designed, it would seem, for one ruler to impress another.¹

Into these halls and up the gilded staircase came not only the British officials used to these accoutrements, but also the subjects of empire with very modest lives. The forces that had led to the gatherings at Lancaster House were in the streets of Britain's far-flung colonies, in the trading houses, in the camps of the insurgents. But it was in this gilded setting, around tables set with fine linens, that the British Empire negotiated the terms

of its retreat. It was here that one form of global dominance prepared to be eclipsed by another.

Thurgood Marshall was more comfortable on the streets of Manhattan, amid the gray stone buildings at Columbus Circle, in the Legal Defense Fund offices. The grandeur there lay not in the appointments but in a view of Central Park. But he was used to navigating the chasm between a home in Harlem and the majesty of the American Supreme Court building. And he was not in London to be comfortable but to do his job.

As an American, Marshall might seem like an intruder in a conversation, in essence, between British ruler and subject. But his presence was a marker of an era. His nation had thrown off British rule, an example that inspired the new generation. Now African Americans challenged their country to live up to its democratic ideals. In the decades ahead, would the world's leading democracy bestow full democratic rights on all its citizens? As emerging nations attained sovereignty, would they follow America's early path of rights only for some, or make of all their people full citizens?

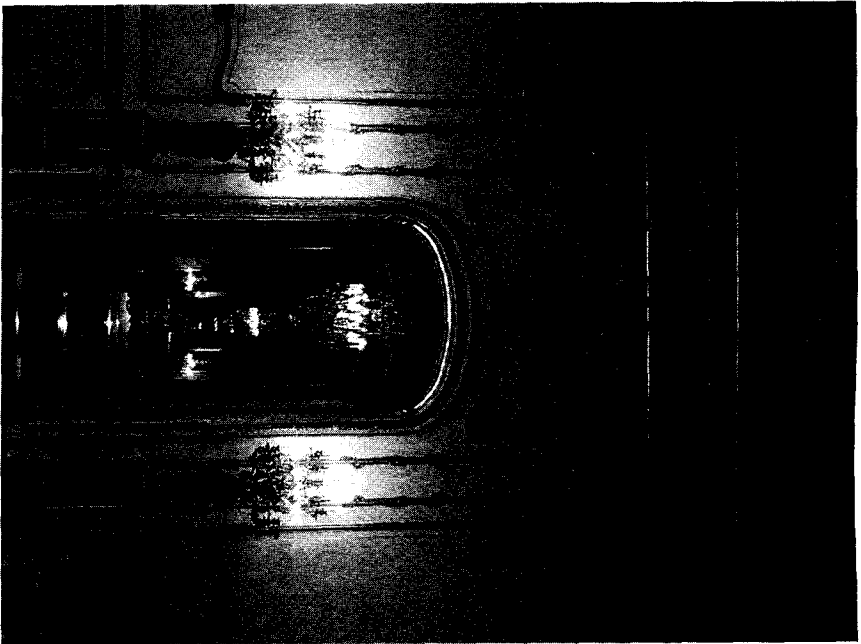
The task of those present in Lancaster House was to chart a rule of law to guide the future. But the setting said more about the role of power and privilege than equality under the law. Perhaps it was fitting, for this would not be a negotiation between free citizens about their future. Ultimately these proceedings would come to a close, and a constitution would be made, not with a vote of the people, but with the signature of a queen.

The beauty of the setting was at odds with the tenor of the proceedings. "Everybody was at everybody's throat," as Marshall put it. What mattered most to the Africans was democratic self-governance, and soon. Delay "would be disastrous," Ronald Ngala, leader of the African delegation, insisted. To reach that goal through constitutional negotiations, the Africans would have to address the problem of the rights of racial minorities. In the

past, rights of the white minority had not needed legal protection because they held the reins of power. In the Kenyan government, their interests were formally recognized through reserved seats for racial groups in the legislature, giving the whites far more political power even though they were outnumbered. Now, the Africans wanted "one man, one vote." No special seats for particular groups. Legal rights, rather than reserved seats in the legislature, were the ideal way to protect minorities, the Africans repeatedly emphasized. They favored something that had a very American ring to it: "a Bill of Rights enforced by an independent judiciary." Protection for minority rights had been a long-standing position, argued Dr. Julius 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, and in 1958, the African Elected Members circulated a memorandum pledging support for a bill of rights. Kiano stressed that Africans intended that an independent Kenya should subscribe to the Convention on Human Rights. The African Elected Members stressed that they had just the person to help with this: Thurgood Marshall, minority rights expert.²

The position of the Africans was not quite good enough for Michael Blundell and other so-called moderates in the multiracial New Kenya Group. They could go along with majority African voting power as long as they had both a bill of rights and a guarantee of their seats in the legislature. Since whites would be disadvantaged by a simple majority voting system, they wanted some seats in the legislature reserved only for whites, and other seats reserved for other racial minorities. They wanted it all: guaranteed rights and guaranteed seats.³

Asians and Muslims, caught in the middle of the three-tiered racial politics of Kenya, with greater numbers than the whites but with less political power than either whites or Africans, lined



An entryway at Lancaster House, decorated with gold highlights from floor to ceiling. Lit with gold candelabra and a crystal chandelier. (Photograph by the author, 2007)

up with the New Kenya Group. Special seats for minorities in the legislature, they believed, was the only way they would have a voice.⁴

The all-white United Party spoke for the hard-liners who had not yet come to terms with the passing of an era. They did not favor voting rights for Africans. Full enfranchisement, they argued, would have to wait until more Africans had been educated. If Africans had control, United Party leader L. R.

Briggs told the BBC, “they would make it ‘virtually impossible’ to farm, either by taxation or by political pressures.” For white settlers like Briggs, “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.”⁵

Colonial Secretary Ian Macleod thought that a bill of rights was only a second-best source of protection for minorities. He hoped to usher in an era of goodwill and fair dealing. A gradual transition in Kenya would give the races time 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.”⁶

The parties soon got to work. Days of grand statements were accompanied by nights of behind-the-scenes negotiations. Through this process, Macleod developed a blueprint for majority rule in Kenya. A new legislative council would consist of thirty-three members elected for the first time to open (non-racially designated) seats. Twenty remaining seats in the legislature would be reserved for minority groups: ten for Europeans, eight for Asians, and two for Arabs. No seats were reserved for Africans because they would be the electoral majority. Based on their proportion of the population, whites would still be over-represented in the colonial legislature, but it was still a major victory for the Africans. For the first time the British government had embraced majority rule in Kenya.⁷

How had this dramatic change come about? In a press conference, Macleod gave his perspective: “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 thought there was “a good chance that the wide measure of agreement” that he had long sought was now within reach.⁸

The Commonwealth Relations Office praised the New Kenya Group. By supporting majority rule if "reasonable agreement is reached on the safeguards," they had shown "great political courage in going beyond views of many supporters (of all races, but particularly of [the] European community)." Government officials hoped the party would "form an effective sandbag against African extremism" and also appeal to Europeans. But back in Kenya, it was unclear whether moderates could survive. Acting Governor Patrick Renison reported that European opinion was coalescing behind the United Party. The United Party opposed Macleod's proposals, but he was still hopeful, believing that "even they are anxious to join in the further discussions."⁹

Nationalist leader Oginga Odinga had a different view about the conference. He called Macleod "a skillful psychologist," able to manipulate all the parties to achieve his objectives. Macleod had held private meetings with each group, letting the Africans know that the British government was prepared to relax restrictions on colony-wide African political activity, but not to release Kenyatta. Macleod "appeared to be concerned with what was acceptable to Africans," and his approach "infuriated the settlers." The settlers' fury "impressed us that we were winning." But Odinga later realized that Macleod was playing the settler reaction against them. He was very patient. "We were at a constitutional disadvantage, he said. We should assist him in dealing with the settlers who were not prepared to give an inch of the way. He conscripted us into looking at the problem from his point of view."¹⁰

As rights became central to the conference, Thurgood Marshall, a supporting member of the Lancaster House cast of characters, found himself front and center. He was, after all, the "rights" man. A bill of rights was much more in this context, however, than a solemn commitment to future generations. The idea that rights could create a political climate in which all races in Kenya could coexist was what kept the conference going. It was

the unseen adhesive holding adversaries together in one place. A contest over rights enabled conflict around a conference table. For these political figures, each of whom believed there was blood on the hands of the other, to do battle around a table, and with words and legal clauses, was no small accomplishment.¹¹

It is not surprising that Marshall was enthusiastic about a bill of rights. The U.S. Constitution was amended to include a bill of rights protecting free speech, freedom of religion, and other important rights shortly after the nation was founded. It might seem curious, however, that the British government supported a bill of rights in the Kenyan constitution, since England did not have a written bill of rights. The path toward a bill of rights for Kenya was paved by the experience in Nigeria. Nigeria was the first British colony to adopt a bill of rights on the way to independence in 1960, but the proposal was not without controversy. At a 1953 conference on a constitution for that colony, Colonial Secretary Oliver Lyttleton "managed to laugh the Nigerians out of" a declaration of rights "by saying, 'Why not also put in God is love?'" Lyttleton thought that such a proposal was "not customary" and would be ineffective. Ultimately, however, concerns about minority rights in ethnically diverse Nigeria jeopardized the creation of a unified state. A bill of rights was the answer to the anxieties of minorities. In addition, as civil liberties came under attack in newly independent Ghana, human rights historian A. W. B. Simpson notes, "The failure of the Colonial Office to ensure that fundamental rights were to be protected now seemed to have been a mistake." The Colonial Office thought that a bill of rights for Nigeria would be particularly helpful in the predominantly Muslim north, but how could a document be drafted in a way that didn't cause one region to feel targeted? The answer was to turn to the European Convention of Human Rights, which already applied to Nigeria. A proposal based on the convention was then adopted with little controversy. According to Simpson,

"Though the purpose was to provide minority protection, the bill of rights was so drafted as to confer fundamental rights generally."¹²

Marshall's job of drafting a bill of rights at Lancaster House was not a neat and tidy task, confined to the pristine world of legal analysis. And the document would not inscribe rights that would last forever. Instead, it was bricks-and-mortar work, the laying of a political foundation. The Bill of Rights was most importantly a commitment on the part of the parties to each other, a commitment to politics. To craft rights was to help build a nation.¹³

On February 2, 1960, Marshall submitted his draft Bill of Rights to the Committee on Safeguards at Lancaster House. Although he was an advisor to the African Elected Members (AEM), Marshall submitted his memorandum on his own. "This proposal is solely mine," he wrote, "and has neither been discussed with nor approved or rejected by the African Elected Members or any other group. It is, therefore, submitted for use by all members of the Conference."¹⁴

Marshall's reasons for submitting it this way are not disclosed in the historical record. It may have reflected everyone's timing and priorities. The nationalists were tied up in negotiations leading to a compromise on representation and suffrage. They held press interviews and meetings, and did much work behind the scenes. Marshall also had to divide his time between his Kenyan work and ongoing responsibilities at the LDF. A bill of rights also raised many complicated issues that the nationalists did not have time to consider fully. And while Marshall and the African delegates supported each other's positions in discussions, Marshall was thought of as a Mboya man, so he was inevitably ensnared in group rivalries. At one point, Odinga was "reported denying rumours of clash between A.E.M. and Thurgood Marshall." But the British press often played up divisions in Kenyan politics, whether or not they existed. Ultimately, Marshall's sole authorship reflects more about his thinking than would a consensus document.¹⁵

In the end the nationalists were pleased enough with Marshall that when they prepared for a new Lancaster House conference in 1962, two competing nationalist groups named him as a possible advisor. One of the groups, the Kenya African National Union (KANU), the party of Mboya, Odinga, and Kenyatta, included Marshall's draft Bill of Rights among their constitutional demands. Marshall's appointment in October 1961 to the Second Circuit Court of Appeals, however, made him unavailable to serve.¹⁶

What did Marshall bring to the Bill of Rights? According to Juan Williams, Marshall said that to prepare for this work, he "looked over just about every constitution in the world just to see what was good." Pounding his fist on the desk, he exclaimed, "And there's nothing that comes close to comparing with this one in the U.S. This one is the best I've ever seen." Marshall's admiration for the American constitution was surely genuine. And Marshall assumed that some features of the U.S. constitutional system, such as judicial review, would be part of Kenyan law. But one of the more interesting turns of the story is that Marshall drew more heavily from other sources for his Kenya Bill of Rights. Many passages were identical to the Universal Declaration of Human Rights. Marshall was very familiar with international human rights due to NAACP involvement during the founding of the United Nations, as well as an NAACP petition to the United Nations written by W. E. B. Du Bois in 1948. And it surely helped that James M. Nabrit III, a young LDF lawyer, had thought to hand Marshall a copy before the trip. Marshall also learned about postcolonial constitutions during his work for the Kenyans. His Bill of Rights also borrowed from the independence constitutions of Nigeria and Malaya.¹⁷

Marshall explained to the Committee on Safeguards later that month that his proposals were intended "to protect the rights of every individual in Kenya, rather than the rights of any

particular minority groups.” Marshall put the most important principle in the Bill of Rights in the preamble: the principle of equality. “All persons are equal before the law and are entitled without any discrimination [sic] 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.” Marshall hoped 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.” It illustrates two of Marshall’s fundamental priorities. The starting point, upon which other rights were built, was equality, not liberty. And independent courts would be part of the political structure that gave these rights meaning.¹⁸

Section I of the Bill of Rights protected freedom of religion, speech, press, and association. Section II, “Personal Security,” protected rights to life and liberty, rights against slavery, and the right to equal protection of the law. Section III guaranteed rights to education, health, and welfare; Section IV protected the right to work; and Section V protected voting rights. Sections I, II, and V were similar in many ways to the U.S. Constitution, but Sections III and IV were different. The U.S. Constitution protects individuals against government misconduct. It protects against discrimination in provision of government services, but it does not require affirmative government assistance, such as health care or education. Marshall’s Kenyan Bill of Rights, in contrast, included affirmative rights to protection of social welfare, including rights to education, health, and welfare. The right to work guaranteed a right to employment and to what would now be called a living wage, providing 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.” It also protected the right “to form and to join trade unions.”

Marshall suggested that the conference should agree on general principles, with detailed drafting to be carried out later.¹⁹

The property rights clause was the most important provision at the Lancaster House conference. This provision had to balance two interests that seemed irreconcilable: private property rights and the need for land reform. Here Marshall recommended that provisions of the Nigerian Constitution be adapted to conditions in Kenya. His memo simply incorporated the Nigerian text because he thought its property rights clauses were “the best he had met.” This section required that the government could only take private property for public purposes. Property could not be “taken possession of compulsorily” except by law, and a forced taking of property required “adequate compensation” and gave the property owner a right to contest the acquisition and amount of compensation in court. Ultimately the language would be modified to include a right to take a dispute over a taking of property directly to the highest court in Kenya. Allowing the government to take property left open the option of land reform, while the requirement of compensation protected minority settlers from government abuse. Because only a tiny number of indigenous Africans in Kenya were lawyers, placing property disputes in the hands of courts meant that property disputes would be resolved in most cases, for the time being, by Asian and European judges. Marshall realized this and thought it was crucial for Kenyan Africans to be trained as lawyers.²⁰

The fairly straightforward language of this clause tapped 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 in the hands of Africans and was now exclusively owned by white settlers. These farmers produced Kenya’s agricultural exports, its principal tie with global markets. The settler community believed that the land belonged to them and that their

property rights must be protected. Nationalists believed that a key objective of a postcolonial government must be land reform and resettlement, which would redress a historical injustice: the displacement of African peoples 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 could not interfere with settler property rights, and so must be based on just compensation.²¹

An argument broke out in committee: for what “public purposes” could the government take land? Some white settlers wanted this spelled out very clearly in order to limit the power of an independence government over land. But to do that seemed to require the Africans to develop a land reform policy on the spot—something they were not in a position to do. Humphrey Slade, a white settler with the New Kenya Group, thought that even if compensation was provided, the government’s ability to take land should be restricted to public purposes, and “some definition of ‘public purposes,’ even if it were a negative one, should be included in the Bill of Rights.”²²

The nationalists balked at this. The new constitution should not tie the hands of a future government. The Bill of Rights “should not entrench the position of those enjoying a privileged position, nor perpetuate a system that was basically unjust.” Tom Mboya argued. Instead the Kenyan government should have power to redress inequities. The meaning of “public purposes” should be defined by the courts. In any case, Mboya insisted, a broad understanding of “public purposes” was important. Ngala stressed that it should include “the acquisition of unused land for distribution to the landless of all races.”²³

As the delegates focused on property rights, the conference stalled. Colonial Secretary Macleod was worried that this issue threatened his ability to create a consensus. “We are bogged

down over Safeguards,” his office reported. “Conference pretty well agreed there should be a Bill of Rights... largely based on Nigerian model. But [the] hitch came, when we got on to property rights.” Macleod explained in a memo to Prime Minister Harold Macmillan that the New Kenya Party had made their willingness to go along with the overall constitution conditional on acceptable safeguards. “By that they mean largely land.” However, the Africans were “very resentful of the Europeans” for raising the land issue when they had already agreed to have a bill of rights. The Africans “had not come here to discuss land issues” and would not commit to any precise formula. A further wrinkle, Macleod said, was that “they are of course very much divided on the issue themselves.”²⁴

In spite of the impasse, nearly all the participants hoped to reach some sort of agreement, so that Kenyans of all races could return as soon as possible to Kenya where conditions were worsening. The Africans were unhappy, but willing to compromise, Macleod thought. They wanted to return to Kenya with an agreement, so were prepared to accept a portion of the proposal in spite of their dislike for it. The one thing they would not accept was language defining and limiting the public purposes for which land could be confiscated. Meanwhile, Acting Governor Renison warned of growing unrest among the Europeans in Kenya. “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 [the] European community.”²⁵

In an effort at compromise, a new proposal for property rights was circulated to the committee. Under the draft, compulsory takings were limited to circumstances when “required for the fulfillment of contractual or other legal obligations” of the property owner or “circumstances in which such acquisition is justified in the general public interest.” On the second page of the

proposal, the limitations on the government's power to acquire property were spelled out. A taking would not be "justified in the general public interest" if the property was acquired to make it "available to another person or persons for his or their private advantage" unless the public benefit from the property outweighed the hardship to the property owner.²⁶

The Africans said that they could agree to the first page of this language, but not to the second page, with its weighing of public benefits against private harms. The white settlers, especially Slade, held out for page two. Marshall insisted that he was prepared "to stake his reputation" that the language of page two would "add nothing" to the provisions the nationalists were comfortable with. For him, the proposed balancing of public interests against private ones was the obvious way to show that the "general public interest" was served when one person's property was taken for use by another. Still, the nationalists were reluctant. It is unclear whether balancing these interests was itself objectionable or whether, at this point, they simply felt they had been pushed too far.²⁷

Macleod thought that the central obstacle to forging a compromise was less the New Kenya Party as a whole than Slade, whom Macleod described as "something of a fanatic" who viewed the issue as a matter of principle. Slade had earlier displayed his "willingness to be burnt to the stake for principle," as Blundell saw it, during the emergency. Slade represented a constituency on the border of the Aberdare Mountains, in the heart of the Mau Mau insurgency, and had demanded more extreme defensive measures than were forthcoming from the colonial government. During the state of emergency, Slade had battled with the British government over counterinsurgency methods. Now he turned to words in a constitutional compromise. As the political power of white settlers waned in Kenya, this was Slade's last place to stand his ground.²⁸

Macleod thought that he might need to bring Slade to see Prime Minister Macmillan, 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," was the only way of getting through to him. "Reason alone will not do it." The Africans, he thought, could not go further "or they would be repudiated at home." In fact, "already they may have gone too far." It seemed as if this effort to negotiate had pushed the parties to the brink.²⁹

For all the shouting, the nationalist leaders and their adversaries were locked in a debate that left out important interests. Women in Kenya petitioned to be included in the next round of constitutional talks, but they were ignored. And while there was consensus that some form of recognition of property rights of white settlers was essential, there was no discussion of the forest fighters, on the front lines of the independence struggle, and their demands to return to the land the settlers had long ago occupied. They were Mau Mau terrorists, in the eyes of the British, and any mention of their interests would have led to an impasse. And so those who had borne the harshest burdens in the struggle for an independent Kenya were left out of the project of building the nation.³⁰

Perhaps this was a necessary compromise, but it was a pact between Kenya's new leaders and the British, at the expense of those on the front lines of the fight for independence. Although it enabled constitutional reform and a peaceful transition, it embedded an injustice in the political structure of the new nation, tainting the legitimacy of Kenya's founding movement. Such a compromise—a bargain between colonized peoples and colonizer—ensured the continuing impact of the British Empire on Kenya even as the country slipped from Britain's grasp. The limits of democracy in Kenya's founding resonate with the work of African politics scholar Claude Ake, who later asked whether

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in the deep shadow of Western influence, something that we might call democracy could ever come to the nations of Africa.³¹

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