ASR FOCUS: THE POLITICAL ECONOMY OF DEMOCRATIC REFORM IN KENYA

Reform and Political Impunity in Kenya: Transparency without Accountability

Mwangi wa Gĩthĩnji and Frank Holmquist

Abstract: Kenya has been going through a period of political reform since 1991, when section 2A of the constitution, which had made Kenya a de jure one-party state, was repealed. This reform followed a prolonged struggle on the part of citizens both inside and outside the country, and their call for democracy was one that, after the fall of the Berlin Wall, was embraced by Western countries. Via diplomatic pressure and conditionality on aid, Western donors played an important role in the repeal of section 2A, the return of multiparty elections, and the creation and reform of a number of political institutions and offices via a separation of powers. But although these changes were supported by the political opposition and much of civil society in Kenya, they did not rise organically from the national struggle over political power. Nor did these reforms lead to a determination in the country to hold the political elite accountable for their transgressions. This article argues that modern Kenya's history of economic and political inequality has resulted in a population whose very divisions make it difficult for politicians to be disciplined. Accountability has two dimensions: the horizontal accountability among branches of government that is assured by checks and balances, and the vertical accountability of the state to its citizens. Vertical accountability depends on a constituency of like-minded citizens defending broad national interests, or an electorate with a collective identity or set of identities attached to the Kenyan nation. But in the absence of such shared goals and demands, narrow personal and local interests prevail, and politicians remain unaccountable to the nation as a whole.

Résumé: Le Kenya traverse une période de réformes politiques depuis 1991, lorsque la section 2A de la constitution, qui avait jusque-là fait du Kenya un état à parti unique de droit, a été révoquée. Cette réforme est arrivée à la suite d'un long

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Mwangi wa Gĩthĩnji is an assistant professor in the Department of Economics at the University of Massachusetts Amherst. E-mail: mwangi@econs.umass.edu.

Frank Holmquist is a professor of politics emeritus in the School of Critical Social Inquiry, Hampshire College. E-mail: fwhSS@hampshire.edu.

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combat impliquant les citoyens à l'intérieur et à l'extérieur du pays, leur appel à la démocratie ayant été soutenu par les pays occidentaux après la chute du mur de Berlin. Avec l'appui d'une pression diplomatique et de conditions placées sur l'aide humanitaire, les donateurs de fonds occidentaux ont joué un rôle important dans le rejet de la section 2A, le retour aux élections multipartites, à la création et aux réformes d'un certain nombre d'institutions politiques via le principe de séparation des pouvoirs. Mais bien que ces changements aient été soutenus par l'opposition et la plupart de la société civile du Kenya, ils n'ont pas été l'aboutissement naturel d'un combat national pour la prise de pouvoir politique. Ces réformes n'ont pas mené non plus à un engagement déterminé dans le pays d'exiger que l'élite politique rende des comptes sur ses transgressions et abus de pouvoir. Cet article postule que la présence d'inégalités économiques et politiques dans l'histoire moderne du Kenya a engendré des divisions au sein de la population kenyane qui n'aident pas les pouvoirs politiques à faire preuve de discipline. La notion de responsabilité se présente sur deux dimensions : la responsabilité horizontale à l'intérieur des branches du gouvernement qui est assurée par un système de vérifications et de comptes-rendus, et la responsabilité verticale de l'état envers ses constituants. La responsabilité verticale dépend d'un ensemble de citoyens unis par des intérêts larges qu'ils défendent, ou sur un électorat avec soit une identité collective, soit un ensemble d'identités attachées à la nation kenyane. Or, en l'absence d'une vision unifiée et d'attentes communes, les intérêts locaux et personnels prennent le pas sur l'intérêt commun, et les pouvoirs politiques ne sont pas tenus de rendre des comptes à la nation dans son ensemble.

> "To set up a state is easy, but to create a nation is extremely difficult. We are still suffering the consequences."
>
> – Murat Belge (2008) (speaking of Turkey)

Introduction

On August 4, 2010, in a national referendum with a 72 percent turnout, Kenyans overwhelmingly voted "yes" by a margin of 67 to 31 percent for a new constitution. This constitution was then promulgated on August 27, 2010, accompanied by fanfare not seen since the Union Jack was brought down in 1963. The event marked the end of a struggle that had preoccupied Kenyans at least since 1982, when section 2A was inserted, making Kenya a de jure one-party state. This act was the last of a series of constitutional changes that moved Kenya away from the devolved multiparty political system that existed at independence to a highly centralized single-party system with most powers controlled by the presidency.

The referendum on the constitution was almost unique in the way it brought together a national constituency, and in the process it occasioned something of a popular victory. But the victory was an anomaly. The political opening of the early 1990s had brought important democratic changes in the form of transparency. The end of the de jure single-party system in

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favor of multiparty competitive elections led to greater freedom for citizens to speak out and organize, and it also brought transparency as citizens gradually gained unprecedented political knowledge about the state and the behavior of the political elite. More Kenyans than ever before knew what was going on, and that knowledge recharged the debate over Kenya's future that was beginning just after independence but was extinguished in the late 1960s. But at the same time that these reforms made the political process more transparent, they brought very few changes in the form of accountability—and this is a discrepancy that requires explanation.

What do we mean by accountability? A common definition of accountability in the political science literature is the requirement that public servants both inform the public about what they are doing and face sanctions when their activities do not conform to the law (Schedler 1999) or, we would add, to popular expectations. We are suggesting, however, that the first half of this definition should more properly be thought of as transparency, while the second half, related to enforcement, is the meaning of accountability. This failure of enforcement is generally consistent with the popular notion of accountability, and this is the element that we focus on in this article. In our view accountability means the end of the political elite's impunity in matters of corruption, violations of human rights, and the encouragement of political violence.

Following O'Donnell (1999), we distinguish between two dimensions of accountability: vertical and horizontal. A state that has vertical accountability is a democratic state; vertical accountability, in other words, refers to the relationship between the state and its citizens. Horizontal accountability connotes constitutionalism and the legal framework of democracy—how branches of the state relate to each other, including the operation of checks and balances. As Sklar (1999) points out, in practice these two dimensions are both conflicting and mutually reinforcing. In our work we point to why the weakness of one renders the other ineffective.

For vertical accountability to be effective, there must be a great degree of coincidence between the desires or demands of an elected official's constituency and the issues for which that official is held accountable. In most electoral systems, only contests over the head of state involve a national electorate; most other elections are regional, and most voters identify most closely with their regional constituency. Therefore, one could say that on a national level constituency and electorate differ, and elections do not function automatically as a means of ensuring or empowering leaders over national issues.[1] At the national level, therefore, vertical accountability requires more than just elections; it requires elections by a constituency that prioritizes the national over the sectarian, or at least treats them as of equal importance. Divisions within a country by ethnicity, region, religion, and class militate against the formation of a national constituency.[2]

The head of state is the representative of the national electorate who legally shares the powers of the state with locally elected and nonelected

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officials. These officials, as O'Donnell (1999:38) says, "are legally enabled and empowered and *factually willing and able* [our emphasis] to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified or unlawful."[3] We argue that "factually willing and able" is a crucial and complicating element in the political sphere. Agencies or individuals are a reflection of the support that they get from other agencies and the population more generally. Ultimately it is the population in the form of a national constituency that can make it possible for agencies to be "factually willing and able to take actions" and that hold the head of state accountable; an official who performs his duties according to the mandates of his constituency is one who operates according to vertical accountability.

This creates a contradiction between the executive branch and the existence of a national constituency. Ideally the executive wants a national constituency that is large enough to elect him and that agrees with him and his vision of the country. But the ideal constituency is not *so* united that it can restrict the political and policy space of the executive. To maintain power an executive can either cultivate a national constituency that it leads, or limit the strength of the national constituency. In the case of Kenya, we argue, the latter option was the most convenient and effective. In a young capitalist state in the process of primitive accumulation, social classes are not firmly established and the capitalist class has no established hegemony. The executive, therefore, has wide latitude in determining who can accumulate and thus who is part of the elite. We argue that in the Kenyan case in particular, the executive found it easy to limit the operation of vertical accountability by limiting the rise of a national constituency. And in effect, the absence of vertical accountability also nullified horizontal accountability. The political reforms of the 1990s were intended to enhance horizontal accountability by creating institutions and offices that were legally empowered to hold the political elite accountable. The problem was that they were not "factually willing and able" to do so. The annual reports of the Auditor General routinely spotted malpractice at the top echelons of the political system, but they were ignored. The Kenya Anti-Corruption Commission identified corruption among top politicians but did not proceed any further. Government commissions pointed out grave abuses of power but the courts did not issue indictments. Parliamentary statutory committees pointed out questionable behavior on the part of the executive, but nothing happened. Clearly the Office of the President trumped other arms of the state. In terms of horizontal accountability, there was little check, and no balance.

In order to reduce vertical accountability, the centralized all-powerful presidency in Kenya almost had a ready-made solution: to exacerbate the already existing divisions in society—that is, inequality along ethnic lines. Ethnic politics militated against the development of a national politics and a national constituency that would operate as a check on the presi-

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dency. The interests of the executive were best served by perpetuating and strengthening politically loyal regional elites. This was accomplished by providing them with special access to national resources that propped up their power and elite status and also guaranteed the fragmentation of any possible national constituency.[4]

A number of writers have seen the failures of nation-building in Kenya and the fragility of its democratic transition as both causes and effects of the episodic conflict and violence that have plagued the country (see Branch 2011; Branch & Cheeseman 2010; Kanyinga, Okello, & Akech 2010; Lynch 2011; Murunga & Nasongo' 2007). Our focus on the fragmented nation as a key to understanding unrealized political reform is meant to add another variable to these explanatory schemas. We explore the question of accountability via an analytical description of the postcolonial political change in Kenya from a multiparty devolved system at independence to a highly centralized one—a process that, after a brief opening immediately after independence, saw a closing down of both transparency and vertical and horizontal accountability. In doing so we highlight the structural features of a political economy of impunity. We briefly discuss how both the Kenyatta and Moi regimes benefited from and enhanced these features. We follow this with a discussion of political elites, civil society, and the relation between donors and the reform agenda. We end with a brief note on the possible impact of relatively new social forces and of the recent constitutional and socioeconomic changes for the creation of a national constituency and hence of accountability in general.

The Political Economy of Impunity

The ink was barely dry on the independence constitution negotiated at Lancaster House when the first postindependence government of Jomo Kenyatta began to rewrite it. The Lancaster House constitution was in many ways a compromise to safeguard Britain's continued interests in the country while allowing for self-rule. This was accomplished by means of a constitution that sought to limit central government. In an imaginary where a nation truly existed, the "social infrastructure" was inclusive, and conflict was managed effectively, this might have been ideal. But that was not the Kenya of the day. Kenya existed more as a legal unit than as a nation, and the constitution did not offer the government the space to create the new nation. Under Tom Mboya, the Minister of Constitutional Affairs in the first six years of independence, the constitution was changed ten times. Many of the changes were fairly crude, made with the purpose of centralizing power around the executive branch of government. But some subtler changes were initiated to articulate a legal document that unified a fragmented society from above through administrative power (see Okoth-Ogendo 1972).

At independence in 1963 the country inherited four key pillars of the political economy that were central to the path that was followed. All four

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posed challenges to transparency, but they posed even greater challenges to the vertical accountability of the political elite. The first pillar was a top-down administration originating in the President's Office that was based around the provincial administration and reached every village via the village headmen and administrative police.

The second pillar was a politics that was national only in the mechanics of holding elections. National political parties were allowed to exist only in 1960, three years prior to independence. Before this, political organizations were limited by the colonial government to the district level. In addition, the first national election to the Legislative Council in 1957 saw a narrow class-based electorate defined by income, education, and government service (see Anderson 2010). Because districts were designed to coincide with ethnicity, the longest-lived Kenyan political organizations were ethnically based, led by "big men," and lacking in internal democracy. The creation of national parties in the 1960s was therefore a coming together of coalitions of ethnic and regionally based leaders for the purpose of competing in national elections.

The third pillar of the political economy at independence was the absence of a prolonged and broad national debate during the struggle for independence over the future of Kenya and its political economy.[5] This occurred because first, as we noted above, the only political organizations allowed during colonialism were at the district level. Second, the independence struggle involved the primary imperative of getting rid of colonialism. And third, little time elapsed between the realization that independence was imminent and the actual onset of independence. The struggle for independence, in other words, was just that—an anticolonial struggle with a limited vision of what would replace the colonial system. The new postcolonial government filled in the blanks and, from the point of view of the new political class, kept radicals, with visions of redistribution of wealth, including land, from gaining power and leverage. Former fighters and allies of the Land and Freedom Army of the so-called Mau Mau war of the 1950s were seen as a threat to the political elite and well-to-do allies.[6] The "African crowd" was no longer allowed to form and was demobilized, while the political left was eliminated from the Kenya African National Union (KANU) branches (see Branch 2009; Furedi 1973). In 1965 trade unions were brought under the umbrella of the Congress of Trade Unions (COTU) and supervision of the government (see Chege 1987; Sandbrook 1975). The repression and banning in 1969 of the Kenya Peoples Union, the former left wing of KANU that had split off in 1966, marked the end of the political left in aboveground Kenyan political life (see Mueller 2010). Without an extended national debate about the consequences of colonialism, the nature of the Kenyan state, and especially the role of the powerful provincial administration answerable only to the president, the debate about the new Kenya resembled that of the Lancaster House conferences: short-sighted deliberations about how to build minimum political coalitions to keep the country together and manage the spoils of political power.

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The fourth pillar of the political economy at independence was the extreme social inequality that the colonial system had shored up. The Kenyan African elite who took the place of white administrators, farmers, and business owners, as well as aspiring Africans looking to match the wealth of members of other racial groups at the top of the national distribution, had no desire to share the rights and privileges of citizenship with those at the bottom. In the context of an economy still in the process of primitive accumulation, and under an administrative style of economic management, control of the state was essential to creating and maintaining this group of elite Africans in the same manner that the colonial state had created and maintained the colonial elite. While the new national elite was initially broadly representative of the country ethnically, it quickly narrowed to domination by members of the Agĩkũyũ as political and economic powers were consolidated under the Kenyatta presidency.[7]

The combined result of these pillars of inheritance was a highly centralized presidency affording little transparency or vertical or horizontal accountability. The strength of the presidency and the inability of any other state institutions or political forces to effectively challenge it led to their further weakening.[8] The checks and balances envisaged in the original Lancaster House constitution—horizontal accountability—had completely disappeared both by actual constitutional change and by the power that the presidency gave itself. In addition, the presidency and the nation were conflated. Criticism of the president was seen by officialdom as criticism of the nation—as antipatriotic—and was severely repressed.[9] Under the Kenyatta administration a hyper-centralized Gĩkũyũ-dominated government became even stronger when the regime engineered a crossing-of-the-floor by the opposition Kenya African Democratic Union (KADU), thus mitigating political challenges and enhancing the right wing of the ruling party.[10] As the formal opposition evaporated, KANU, too, became divided and weakened, and the breach was filled by the powerful presidency in a de facto single-party regime that ruled through provincial administrators reporting directly to the president. With the death of Kenyatta in 1978, Vice-President Daniel arap Moi came to power. To a country that had grown disillusioned with the Kenyatta regime, Moi's humility, populist touch (free milk for primary school students and freedom for political prisoners), apparent reform agenda, and relative youth were initially welcomed. At the time of Moi's ascendancy his greatest threat came from close associates of Kenyatta who were Gĩkũyũ from central Kenya and were dominated by individuals from Kenyatta's home district of Kiambu. Moi quickly outmaneuvered this group by appointing Mwai Kibaki as his vice-president and keeping close counsel with Charles Njonjo and G. G. Kariuki. With these three senior central Kenyan politicians by his side, the Kiambu cabal was checkmated since they had no national popular base.[11]

Despite his initial popularity and his outmaneuvering of the Kenyatta elite, things rapidly went south for Moi. The political economy that Moi

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inherited had three aspects that left him in a precarious position. First, since he came from a small and poor subethnicity of the Kalenjin, the Tugen, he had a relatively weak political base. He was not even universally popular with the Kalenjin because he was seen as having acquiesced to Gĩkũyũ settlement in the Rift Valley, alleged "home" of the Kalenjin, after the exit of European settlers. Among sections of the the Kalenjin elite who were large grain farmers, he also was perceived as relatively uneducated and unpolished.[12]

The second weakness was that Moi's Kalenjin elite was not Kenya's economic elite. In the context of an ethnicized politics, this was important. Kenya's economic elite was made up of foreigners, Kenyan Asians, or Kenyan Africans who were mainly members of the AGĩkũyũ. Foreigners kept a low political profile, as did Kenyan Asians who tended to ally with the powers that be. Many if not most of the members of the Gĩkũyũ political elite owed their positions to the Kenyatta regime. Among this group, and especially a small group that had made up the former president's inner circle, there was the view that because of his ethnic origin and lack of advanced education, Moi was a "passing cloud." In their minds he was simply keeping the seat warm for another Gĩkũyũ to take over.[13]

Moi's third weakness stemmed from the world economy that was buffeted by shocks early in his presidency. The second oil shock of 1978–79 and the Iranian revolution of 1979, followed by the Iran–Iraq war, led to substantial oil price increases and another period of stagflation. This was followed by the U.S. Federal Reserve's raising of interest rates to hitherto unprecedented levels, which amplified the slowdown in demand worldwide and led to the debt crisis. Initially Kenya seemed to evade the crisis as economic growth continued from the Kenyatta era. In 1979 and 1980 growth was above 5 percent and above the population growth rate. But in 1981 the growth dropped below 4 percent and below the rate of population growth. By 1982 growth was only 1.5 percent, less than half the population growth rate. Per capita incomes were dropping drastically, while inflation reached a then all-time high of 20 percent.[14]

Both circumstances and structural conditions, then, led to an ever-centralizing presidency, and by 1981 the beginnings of the Moi dictatorship were in place. By 1982 the pressures on Moi included the need to put down rising opposition and to preempt the formation of a new socialist opposition party that was to be led by the doyen of opposition politics, Jaramogi Oginga Odinga. In June 1982, with Section 2A as a constitutional amendment, Kenya became a de jure one-party state, with political participation open only to members of KANU. The party was weak in reach, but it was the perfect vehicle for disciplining errant members of the political elite. Those seen to be in opposition to the president faced suspension or expulsion from the party, which effectively ended, or put on hold, their political careers. At this point political and economic conditions were so bad that there were a number of active coup plots against the regime, one of

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which took place in August 1982 with an attempted coup led by noncommissioned officers of the Kenya Air Force.

The Moi regime responded by further compromising transparency and accountability. Moi rotated ethnic favorites and tried to build a Kalenjin economic elite to rival the AGĩkũyũ while inhibiting the political strength and economic growth of the Gĩkũyũ bourgeoisie (see Throup 1987:61). Meanwhile, all institutions of state were weakened by fiscal limitations, corruption, and uncertain management, while health and education services declined. The result was widespread disillusion with the regime that embraced a large portion of the Kenyan citizenry and transcended both social class and ethnicity. This was reflected in the growth of both aboveground resistance, particularly at the university, and underground resistance, of which Mwakenya became the most well-known organization (see Amutabi 2002, 2007; Klopp & Orina 2002; Mwangola 2007). This resistance was met in turn by an authoritarian regime that resorted to torture and imprisonment via a draconian security machinery and compliant court system.[15]

By the end of the 1980s the Moi regime was in difficulty. The economy was flat as growth barely matched population growth rates. Further, in order to win elections the government resorted to printing money, leading to inflationary surges around elections in a country that previously had had relatively low levels of inflation. For example, in 1991 inflation reached 20 percent, the highest it had been since 1982. Over the next three years it would reach an all-time high of 45 percent in 1993 before falling to 28 percent in 1995 and being brought below 10 percent in 1996. During this period income per capita growth was negative, reaching –4 percent in 1992.

Meanwhile, post–Cold War donors looked at Kenya and President Moi in new ways. No longer was this authoritarian regime vital to donor interests. Donors could move from "hand wringing" over the perceived failures of the Moi regime—corruption, human rights abuses, and the failure to fully take up structural adjustment policies—to acting on them. In late November 1991 the Paris Group of donors said that economic and governance reforms were necessary in order for the Kenyan government to receive $350 million in new aid. This came in the year when, for the first time since 1970, the economy had a negative rate of growth. Moi soon pushed through Parliament the lifting of Section 2A of the constitution, and the de jure one-party state was no more.[16]

The Political Opening

High expectations attended the opening of politics to multiparty electoral competition. Transparency and vertical and horizontal accountability were expected to arrive more or less in tandem in the train of democratic electoral practice. The dominant theory of democratization and reform in Kenya went something like this: broad-based reform—transparency

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and accountability—would emerge due to a combination of competitive multiparty elections, neoliberal economic reforms celebrating markets with curbs on ineffective and dysfunctional state intrusions into market activity, a vigorous civil society voicing popular interests, and a supportive donor environment. There were regular elections (1992, 1997, 2002, and 2007), with each of the first three more fair than the previous one, as well as a 2005 constitutional referendum on a draft favored by President Kibaki that was defeated—but whose provisions were upheld judicially. The Electoral Commission gained considerable independence from the president, and citizens put more faith in it until just before the 2007 election, when President Kibaki abandoned the practice of consulting the opposition and instead unilaterally appointed the commissioners as well as several judges who might hear election petitions.

Research on African elections suggests that the very fact of repeated elections gradually consolidates democracy (Lindberg 2006). But politics in Kenya, as noted earlier, had become heavily ethnicized, with no compelling alternative ideology of popular mobilization, and no real history of national parties competing in elections. Thus the newly emerged parties after 1991 simply became vehicles for regional barons to bargain for spoils at the national level.[17] Foul play in the conduct of Kenya's fourth multiparty election in 2007 triggered extreme violence, with about thirteen hundred fatalities and more than a half-million people driven from their homes. Even the existence of the state was threatened. Key players intended to win at almost any cost—a clear indication that despite a string of somewhat improved electoral exercises, elite mistrust was rife, popular grievances were deep (especially over land in the Rift Valley), and democracy was not the only game in town (see Gĩthĩnji & Holmquist 2008; Kanyinga & Okello 2010). The violence also signaled that electoral democracy and the transparency flowing from it were not sufficient to generate accountability or to bind up the severe divisions of the nation (see Gĩthĩnji & Holmquist 2009). While the social wounds of inequality and poverty remained, elite impunity for corruption and the encouragement of violence was complete. No members of the political elite were prosecuted for the various instances of election-related violence in 1992, 1997, and 2007–8, nor was any member of this elite successfully prosecuted for the various financial transgressions such as the Goldenberg and Anglo-Leasing financial scandals. Investigations of the postelection violence yielded the Waki Report that called for a Kenyan legal process. But the local legal process failed and only external accountability remained, with six individuals summoned by the International Criminal Court (ICC) to answer questions regarding crimes against humanity. In January 2012 the ICC indicted four of the six, including two prominent presidential contenders: Uhuru Kenyatta, son of the first president, and William Ruto a member of parliament, along with Francis Muthaura, head of the civil service, and Joshua arap Sang, head of a vernacular language radio station.[18]

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Although the political opening of the 1990s did not fulfill expectations in terms of vertical or horizontal accountability, it did bring about increased transparency in the political sphere, especially in the realm of the media. Prior to the political opening the media was crippled. Newspaper editors might receive calls in the night from State House warning off certain stories, reporters were sometimes harassed, print runs could be confiscated, and even presses attacked and owners threatened. Transparency came with the gradual expansion of media voices no longer hamstrung under a state umbrella: print media, new private sector–owned television channels and, very importantly, the growth in the number and listening radius of FM radio stations. The flowering of the media came gradually and not without struggle and setbacks, but the result was the emergence of new collective and public reform agenda.

Nevertheless, the three main local constituencies active in the reform process—reformers among the political elite, civil society, and donors—remained hampered in their ability to mobilize and lead a national constituency. Civil society was dependent upon donor funding, and in subtle ways it became as responsible to donors and their perspectives and demands (as well as the demands of donor funding cycles) as it was to the demands of Kenyans they were "representing" (see Michael 2004; Mkandawire 2010). It also lacked an organized membership base apart from popularly based religious institutions.[19] In addition, as the economy slowed down and structural adjustment conditions barring government hiring took their toll, many educated Kenyans turned to the creation of often externally funded civil society organizations as effective self-employment mechanisms. As a result, Kenyan civil society, though large by comparative reference on the continent, was extremely heterogeneous and included some well-run professional organizations but also many less effective "brief case" NGOs.

Another impediment to reform, paradoxically, was a consequence of the use of instruments of horizontal accountability put into place by the Moi regime. The favorable response that Moi received when he released all political detainees in 1979 led the regime to attempt to suppress dissent through ostensibly legal means. Unlike his predecessor, who relied on patronage, cooptation, detention, and assassination to keep opponents in check, Moi attempted to deal with dissent by charging opponents with crimes in the courts. But when the regime realized that brave lawyers now had a stage to argue for their clients, it was forced to go after the lawyers. This, in turn, radicalized the legal profession as lawyers were no longer defending only abstract rights or the rights of others, but also their own right to work and practice their profession. With this radicalization the Law Society of Kenya moved to the front of civil society and became extremely important in shaping the reform agenda. However, as one might expect, the agenda set and driven by lawyers focused on laws as the problem. The more abstract idea of the law as a social contract with the population that

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needed their consent as well as their support for implementation more or less fell to the wayside.

The lack of an effective national reform constituency and the failure of accountability continued through to the new Kibaki regime in 2003. Although staffed by some reform bureaucrats and some reform-minded politicians from the 1990s, the Kibaki regime inherited the same political economy and limitations of the previous regimes (lack of a nationwide vision and a national constituency, a top-down administration, and extreme social inequality). For these reformers the failure of the past regime was tied narrowly to the perceived inability of Moi to run a modern nation (neatly captured in the election chant "Yote yawezekana bila Moi," "All is possible without Moi"). This blinded them to the structural constraints of the Kenyan political economy. In addition, the first half of the 1990s was dominated by the remarkably apolitical and all too "easy" theory that change would automatically come through the election of new (often, it was said, better educated, less tainted, and sometimes younger) Members of Parliament and local officials. But despite the high turnover of MPs in the three successive elections, impunity reigned. The electoral coalition that ousted KANU quickly frayed, and the government split over constitutional reform. New and heightened corruption occurred, and the regime increasingly relied on "homeboys" from the presidential backyard to staff a kitchen cabinet. The fallout was a highly divided and ethnicized politics that led to the rigged elections of 2007 and the postelection violence of 2008.

Donors, for their part, supported vertical accountability—multiparty competition, fair electoral practices, and civic education around elections. But their long-term focus was on horizontal accountability. This outcome was at least partly a result of some erroneous presuppositions, including the idea that vertical accountability was assured by the regular and free elections that donors had come to support with the end of the Cold War. Implied by this assumption, however, was the existence of an electorate that represented the national constituency—which was compromised in Kenya. A related misconception was that notions of liberty and democracy are trans-cultural and therefore easily adopted across nations (see Sklar 1999) and also guaranteed by the reform of formal institutions (anticorruption commissions, more autonomous parliaments, independent central banks, and a cluster of new laws, etc.). But a truly accountable democratic environment is much more contingent on historical circumstances and the balance of political forces within a society, and is quite resistant to external "guidance." Furthermore, truly democratic environments may be alarmingly unpredictable and more nationalistic vis-à-vis foreign interests.[20] From the perspective of outsiders it is preferable to deal with an elite, whose behavior is more malleable and predictable than that of truly grassroots reformers. This kind of thinking was likely a part of the motivation of neoliberal structural adjustment reforms and reform donors during the period that

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managed to decrease the policy space of the state by demonizing it as both wasteful and autocratic.

On the eve of the 1997 election, constitutional change was the major issue, and a civil society–led progressive faction emerged that engaged the population in a fundamental manner. But reform momentum threatened to bring about a crisis when a demonstration in July led to more than a dozen deaths (see Mutunga 1999). The regime responded to the tension with a compromise intending to divide the political elite—which it did—and from the regime's perspective, bring the issue into the more manageable arena of Parliament. Donors applauded the move. In conversation donors sometimes alleged that civil society leadership was borderline irresponsible when it encouraged popular demonstrations that might get out of control.[21] Some reforms were enacted, and fears of a "political meltdown" did not materialize. After the 1997 election the constitutional reform movement went into decline.

Moi's shaky position vis-à-vis donors in 1999 resulted in an attempt at reform from above. Moi opened talks with the head of the World Bank, James Wolfenson, about how to regain donor aid. The answer was the so-called Dream Team of top-level technocrats from the World Bank and Kenya's private sector charged with the task of getting the state working again. Richard Leaky was appointed secretary to the cabinet and head of the civil service. Members of the team have argued that they made initial progress. But when it appeared that aid was about to flow again, Leaky and most of his team were dismissed in March 2001 and the reform effort was at an end (see Holmquist & Oendo 2001:204–5). This was a case of reform from above lacking a popular national constituency and proving to be unsustainable.

Reforms through law and institutions—the Kenya Anti-Corruption Commission (KACC); anticorruption initiatives; constitutional reform; neoliberal economic policies; parliamentary autonomy from the executive, and so on—were crucial reforms for donors. Donors' efforts were supported by many Kenyan politicians and most civil society leaders and organizations, virtually all of which—except for religious institutions—were dependent on donor funding. But not all the laws and organizations functioned as expected. This was noted by Kenyans who wondered why presumably universal institutions "worked" elsewhere, but not in Kenya. Although newfound transparency through the freer press revealed high-level corruption, political elite impunity remained firmly in place (see Mutua 2008). Neither vertical nor horizontal accountability was in operation.

The reason Kenya's formal institutions, sometimes initiated by donors, did not work as expected—the reason vertical and horizontal accountability did not happen—has to do with the fact that institutions and their leadership were not embedded within a reasonably united population. Reform from above was not enough. Except for rare occasions, reform lacked a mobilized national constituency. Neither the donors nor civil society orga-

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nizations had a mass base, except periodically and especially in 1996–97 over the issue of constitutional reform.

Conclusion

While our analysis points to the failure of much of the reform agenda, we note that the agenda partially fulfilled its goals by the imposition of transparency on the elites that led to important changes. The expansion of civil society and a freer media have created a vibrant sense of transparency. Social media and urban–rural civil society links (see Orvis 2003) have inevitably created new sources of knowledge and transparency.[22] At the same time, while the presidency still wields great power, as was evident just before and after the 2007 election (see Branch & Cheeseman 2010), the post-2002 administration of Kibaki has tended to decentralize power to ministries and to civil servants, while Parliament has found considerable autonomy from the executive (see Barkan & Matiangi 2009). The appointments of a chief justice and deputy chief justices as well as the attorney general in 2011 were not solely a presidential decision. There is also a recent tendency to name and shame persons involved in scandals, and there has been recovery of most missing money in the case of the Anglo-Leasing scandal.[23] Thus advances in transparency may be seen as investments in accountability, even if accountability does not automatically follow in its train.

The Kenya nation is an unfinished project. There is no formula for successful construction and it may be long in coming. According to Branch and Cheeseman (2010:256), any "pretence towards a nation-building project has long been abandoned and, if to be resurrected, will require a new intellectual framework." A new framework will also require new configurations of social power based on groups situated differently in the political economy, and bearing different interests. The process behind the referendum for the new constitution and the new constitution itself was a good first step. We are aware that implementation of the constitution could be derailed in big and small ways, but we are heartened by the fact that it has accomplished part of the task of diminishing the power of the presidency.

There are three important social forces that may contribute somewhat to new notions of nationhood. One is the growth of a relatively better educated (compared to its predecessors) population during a period of transition. Here we include two groups of the population under 50 years of age. The first is an emerging professional middle class, some with international experience and a vision of Kenya informed by broader experiences and somewhat less unencumbered by Kenya's historical experience. They have different occupational and accumulation locations—less in agriculture and land, and state employment, and more in services. Although individuals among them may not single-handedly reform institutions (see the critique above of "easy" reform with a better educated crop of elected officials), collectively they may articulate new national political visions and

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organize around them. The second group is the youth under 35 who have pushed for a youth agenda that is based on their inability to get meaningful employment. It is difficult to co-opt and defuse these two groups. Unlike the situation during earlier transitions, available economic spoils are limited. Where this situation will lead we cannot predict, but these are incipient social forces constructed around material concerns as well as ethnic and other identities.[24] At the other end of the demographic spectrum are older educated and experienced individuals who are retiring to their rural homes. Because of the relatively early retirement age until 2009 (55 years), this cadre is still active in business and NGOs and represents an influx of heretofore heavily urban skills and various material interests into the rural areas. This means that rural institutions and counties will have access to a level of human capital that they previously lacked.[25]

The devolution of power and spending to the counties as envisaged in the new constitution may also engender more vertical accountability. Local-level elections have always been highly competitive in most areas, and erstwhile contestants who have not nurtured development have found their seats in jeopardy. The newly formed counties may come to be the space in which this kind of accountability is practiced. There is of course the question of whether the counties will just decentralize corruption without accountability. This is a possibility, but because any money lost at the local level will mean less money for tangible local projects, there is a chance, with expanding transparency, that the electorate will hold local officials more accountable. County-level devolution of power may also diminish the role of ethnicity. This may occur along with the declining powers of the executive, the declining ability of the executive to hand out goodies, and the provision of substantial sums based on a fixed formula to the counties. Management of resources, rather than primarily the ability to effectively fight over the pie, will become a more important measure of good leadership. Further, in many counties considerble ethnic homogeneity will mean that ethnicity will not be an issue in local-level elections.[26] This will give space for a local politics of ideas and service delivery to take place. If national politics builds on this likely local shift, the prominence of ethnic politics may diminish at the national level as well. Electoral discourses and issues differ from region to region, and they change over time (see Oloo 2010). The demand side of politics is not frozen in ethnicity and patronage provision. Recent research in Ghana, for example, suggests that among other matters at election time citizens are looking for candidates who speak to the condition of the national economy (see Lindberg 2011). Kenyan voters may do the same.

Our argument is that the failure of vertical accountability and the consequent failure of horizontal accountability rests on the pervasive inequality that exists within the country. Political elites as guardians of access to state resources depend on this inequality to maintain their position (see Gĩthĩnji 2011). Crafting a nation therefore requires the creation of a more inclusive

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national economy. If citizens do not have access to the national dream, they will be less inclined to feel part of the nation or a constituency for vertical accountability. The challenge is great, since Kenya is one of the most unequal countries in the world. With the vast majority of people living in rural areas, the issue of land distribution and past malpractices in acquisition of land will be prominent political issues. In urban areas nothing less than a transformation of the Jua Kali (so-called informal) sector—from a reserve sector where individuals bide their time waiting for formal-sector employment, to a highly productive and decent employment sector—is needed (see Gĩthĩnji 2010).

We end by returning to the statement of Murat Belge quoted at the beginning: "To set up a state is easy, but to create a nation is extremely difficult. We are still suffering the consequences." The reforms of the 1990s in Kenya were a process of state building. For accountability to reign and the suffering to stop, Kenyans must go beyond creating the state to creating the nation.

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Notes

1. We use the word *electorate* to mean those who are legally empowered to vote for specific offices and the term *constituency* to denote those who may be affected by the actions of an elected official.
2. The lack of a national constituency due to ethnic diversity is often portrayed as destiny in the African case. We are not of this persuasion. As stated in the text, any number of cleavages militate against a national constituency. This is a universal phenomenon and not unique to African countries. Our argument is that in the case of Kenya, the executive and most of the political elite use ethnicity to ensure that a national constituency that may check executive power and privilege does not coalesce.
3. We accept, as Sklar (1999) suggests, that the institutions of horizontal accountability are not limited to public or constitutional institutions. Parts of civil society such as professional organizations may play a role. However, for these institutions to enforce accountability, more often than not they have to go through the formal constitutional institutions such as the courts. There are, of course, a few instances in which accountability may be enforced by public shaming leading to resignation. This, however, is often not the case in a society where vertical accountability is weak.
4. Gabrielle Lynch (2010) notes that historical ethnic inequality may create a profound sense of moral grievance giving it, in turn, great moral power.
5. There was a debate over land after the colonial defeat of the Land and Freedom Army gave way to a possible reversal of verdicts as Kenya attained independence. But those Kenyans fearing a reversal actually won out as loyalists during the Mau Mau war triumphed in Gĩkũyũ areas and at the national level with the help of Kenyatta and his close confidants (see Branch 2009).
6. Crucial here was the desire to maintain stability and also protect the interests of the U.K., which up to 1975 was the single largest donor to Kenya.
7. For detail on the ethnic makeup of prominent state positions over time, see Kanyinga (2006).
8. See Branch and Cheeseman (2006, 2010); Nasongo' (2005); Nyong'o (1989). Moi's habit of making policy declarations literally on the roadside illustrated the extreme weakness of formal policymaking institutions.
9. Murunga (2007:269) describes Kenyan presidential power, "The president was above the law; he appointed and fired the cabinet, top civil servants and the provincial administration at will, reigned over the bureaucracy, and determined judicial tenure and the parliamentary calendar." The provincial administration was the representative of the president down to the grass roots, and the security and police apparatus was under presidential control, as was higher education.

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10. KADU represented small ethnic groups fearing rule by the more populous Gĩkũyũ and Luo.
11. This call for ethnic unity had been utilized by the Kenyatta regime through oathing practices following the assassination of the popular Luo politician Tom Mboya in 1969 (see Knighton 2010). Oathing may have contributed to Gĩkũyũ solidarity, but it came at the expense of isolation from the Kenyan nation as non-Gĩkũyũ were fearful.
12. The rise of Moi as a political "big man" is spelled out in Lynch (2011).
13. The relatively "advanced" position of many Gĩkũyũ on education and income criteria, and the elevated position of a few of them in the Kenyatta regime, created a self-defined rationale for their relative high standing around the ideology of "ethnic merit"—that Gĩkũyũ were more advanced, they earned it, and they deserved it. Needless to say, this created resentment among non-Gĩkũyũ.
14. Unless otherwise stated, all economic data referred to in the paper have been obtained from the World Bank's World Development Indicators database.
15. The court system was far from independent from the executive due to a centralized system of appointment out of the President's Office, a variety of perks, and the fact that judges were occasionally "advised" by the President's Office in the form of invitations to the State House prior to their making of important decisions (see Holmquist & Ford 1994:10).
16. The regime dragged its feet on structural adjustment demands, for both good and bad reasons. Among the better reasons were some objections on the part of some technocrats and politicians that the economic reforms were not appropriate, were too harsh on the most vulnerable, or that they would not work as expected (Murunga 2007:277). Multiparty elections were not a priority for the donors at the meeting of the Paris Group, and they were not mentioned in the communiqué of the Paris meeting. The priority concerns for the donors were economic reforms (see Press 2006:126–7), and the donors certainly had leverage: In 1990 donor aid amounted to nearly 30% of the Kenyan budget (Throup & Hornsby 1998).

    To some extent, the Somalia crisis and its aftermath—the August 1998 bombing of the U.S. Embassies in Nairobi and Dar es Salaam, the post–9/11 U.S. declaration of the global war against terrorism, and the creation of the African Command and the flow of considerable U.S. military aid to Kenya—have created a situation that supercedes the post–Cold War adjustment. Kenya is now seen, in terms somewhat analogous to the Cold War era, as vital to U.S. interests. Whether the growing de facto aid alliance with Kenyan security forces will affect Kenyan politics and political alignment remains to be seen. In recent years tensions have risen between the Kibaki regime and Muslims (see Bachman & Honke 2010; Prestholdt 2011).
17. Initially the opposition coalesced around the Forum for the Restoration of Democracy (FORD). This, however, soon split up as Jaramogi Odinga and Kenneth Matiba were unable to agree on which one of them would be the presidential flag bearer in the elections.

    The dominance of ethnic identity in voting choice does not mean that religion, age, and gender are of no consequence. Adams Oloo (2010:40) argues that those identities have played a greater role in recent years, but "large part[s] of the emergent religious, gender and youth identities are conflated with ethnicity and rarely mature into distinct character of their own." Michael Bratton and Mwangi Kimenyi (2008) look at survey data and show that while

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ethnic voting dominates, there is a growing nonethnic category of voter that stems from voters' defining their interests in different and perhaps new ways.

18. The violence of the 2007 election was stopped with the involvement of African Union and donor-supported mediation efforts by Kofi Annan and an external Panel of Eminent Persons. An agreement was signed on February 28, 2008, that set up the scenario for the subsequent coalition government.

    Galloping corruption and a steep decline of merit criteria in civil service recruitment contributed to a weakening and informalization of state institutions even as there were donor efforts to repair old and rebuild new formal institutions as part of the reform agenda (Branch & Cheeseman, 2010). One of the most egregious examples of state personnel undermining institutions, in this case the police, was the practice by which politicians backed private militias for "work" at times of elections (see Mueller 2008).

    The scale of corruption by Kenya's political elite was considerable. The infamous Goldenberg scandal involved illicit payments to the politically connected through an export incentive scheme and extended export credit. In early 1993 the funds transferred from the Central Bank amounted to $120 million, or 7% of Kenya currency in circulation at the time (Branch 2011:219). The Kroll risk consultants group did a study alleging that Moi, along with his relatives and political friends, grabbed about $2 billion (Branch 2011:252). Some members of the Kibaki regime also connected with past grafters who practiced their craft with the prior regime and looted over $1 billion from the government. John Githongo, the regime point man in the fight against corruption, got wind of the fraud, looked into it, had his life threatened, and, realizing that the president knew all about it and did nothing, fled the country (Branch 2011:252–54). Needless to say, the demise of KANU party rule with Kibaki's election in 2002 did not bring an end to political elite impunity any more than did the end of single-party KANU rule in 1992.

19. Many religious leaders and institutions that were rooted in the population pressed hard for democracy (see Gifford 2009; Knighton 2009; Sabar 2002).

20. Kibaki came into office with a wide electoral margin and a popular reform mandate that amounted to a more critical stance toward donors among some top Kenyan politicians and civil servants. A few conversations with donor officials at the time suggested that some were not pleased, and may not have expected it.

21. Civil society leadership frequently discussed the question of order in demonstrations. It is clear that "people in the streets," the "African crowd," were central to most of the major reform efforts in Kenyan history—in protests ranging from opposition to settler power going back to the 1920s, the Land and Freedom Army, agitation for independence, and the 1991 Saba Saba demonstration and the subsequent end of single-party rule. Stephen Brown (2007:325) argues that while ultimately useful in the political opening, "donor intervention since 1992 actually impeded further democratization on several occasions, most notably in instances of opposition boycotts and large-scale protest movements. Each time, donors appear to be motivated by concerns for stability and risk-avoidance, even though the uncertainty and violence that could accompany more rapid and radical change can produce a more robust democracy." One cannot help noting that arguably the most important world event, or process, since the fall of the Berlin Wall, is itself a product of crowds on streets—the 2011 Arab Spring revolt challenging autocracies.

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22. We do not know how newly available political knowledge was distributed among the population across the urban–rural divide, social classes, genders, and age.
23. However, we note at the time of writing no one has been successfully prosecuted.
24. Politicians such as Uhuru Kenyatta and William Ruto have tried to position themselves at the front of a youth movement, as has the son of President Kibaki and the brother of Kibaki's first vice-president, Kijana Wamalwa.
25. The new constitution brings devolution of local government via the creation of 47 counties which will have elected government and receive substantial resources to spend independently of central government.
26. We are of course aware that a politics of subethnicity and clan may become quite dynamic.

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