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Transparency without Accountability

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Transparency without Accountability: the Case of Political Reform in Kenya

by

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ABSTRACT

Kenya has been going through a period of political reform from 1991 when section 2A of the constitution that had made Kenya a *de jure* one party state was repealed. The reform followed a prolonged struggle by citizens both within and without the country. Their call for democracy was one that, post 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 multi-party elections and in the creation and reform of a number of political institutions and offices. In the main these changes were pushed by the donors and though supported by the opposition in Kenya they did not rise organically from the struggle over political power in Kenya. In this paper, we argue that although these reforms led to a heightened awareness of the ills of the political class, they failed to actually hold members of this class accountable for their transgressions. We argue that these institutions presupposed the existence of an electorate with an effective set of identities that belonged to the larger Kenyan nation. This broader construct of society did not exist. A history of economic and political inequality from the inception of modern Kenya had resulted in a divided population that was unable to exercise this mandate, and could ultimately discipline politicians when they failed. In actuality, since the politics was not based on broader Kenyan national interests but rather narrower personal interests construed as ethno-nationalist, the political class was not accountable to the larger Kenyan constituency.

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**“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 4th in a national referendum with 72 per cent 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 in fanfare that commentators described as not having been seen since the Union Jack was brought down in 1963. This event marked the end of the struggle for a new constitution that had pre-occupied Kenyans at least since 1982 when section 2A of the constitution was inserted making Kenya a *de jure* one party state. This insertion was the last of a series of constitutional changes that moved Kenya from a devolved multi-party political system at independence to a highly centralized single party system with most powers controlled by the presidency. The struggle for a new constitution, which ran from the 1980s to the present, produced a series of notable changes beginning in 1991 with the removal of section 2A, and culminating in the August 2010 referendum approving far-reaching constitutional change. After over twenty years of resistance to a new constitution by different segments of the political class, and the failure of broad-based reform efforts to make the political class more accountable despite the democratic form, popular hopes loaded on to a desire for a new constitution. The major players eventually agreed to support the new constitution as a result of this pressure.

The referendum on the constitution almost uniquely brought together a national constituency and in the process occasioned something of a popular victory. But the victory was an anomaly. It is true that the political opening of the early 1990s brought important changes in the form of transparency – here defined as freedoms to voice and organize. But accountability was another thing. For us accountability means the end of political class impunity for corruption and encouragement of political violence, as well as a concerted effort by the political class to respond to popular demands for a better material life by dampening inequality and poverty. Accountability has made little progress under the multi-party electoral frame of rule.

Transparency reforms led to a heightened awareness of the ills of the political class but failed to hold members of this class accountable for their transgressions.³ We argue that expectations of accountability presupposed the existence of an electorate that “belonged” to the larger Kenyan nation, and was able to “voice the nation” in demands for legislation and other state practices, and

³ We loosely define the political class as top politicians and civil servants.

could therefore hem in and discipline the political class when they failed. In actuality, politics was not based on broader Kenyan national interests but rather on narrow personal interests construed as ethno-nationalist positions. Politicians were not accountable to the larger Kenyan constituency.⁴ Both the donors and members of the Kenyan civil society expected that transparency and accountability would come out of the legal reforms that were instituted. What they seemed to forget was that for the law to work institutions would have to work, and in this regard those persons directing institutions would have to have an incentive to act in the national interest. But the political economy of inequality and exclusion militated against institutions acting in the national interest as effectively there was no nation in whose interest they would act.

It is often forgotten amidst anxiety about the unaccountable political class that successful transparency reforms amounted to major changes. People gained the opportunity to “see into” political structures and “view” political class performance in ways that were previously all but opaque. With these reforms more Kenyans than ever before knew what was going on and re-charged the debate over Kenya’s future that was beginning just after independence, only to be extinguished in the late 1960s. The success of the reforms in entrenching transparency but failing to establish accountability requires explanations.

On the following pages we begin by describing the change from a multi-party devolved system at independence to a highly centralized one. This is the period that, after a brief opening immediately after independence, saw a closing down of both transparency and accountability. We then turn to the coming of multi-party competition in the early 1990s and a discussion of the major political sectors and players that both advanced the transparency agenda and held back the accountability agenda – the political class, civil society, donors, and also the managerial entrepreneurial class that has been growing in number and influence.

History of Changes to 1982

⁴ A considerable and compelling literature has grown discussing the trials of national identity in Kenya and on the continent with the coming of international debt, neo-liberal economic policy celebrating markets, fiscal crisis, shrinking roles for the state in the economy, the rise of civil society in service provision, economic insecurity and the necessity of pursuing multiple livelihoods. (Boone 2007; Bryceson 2000; Geshiere 2009; Kanyinga and Katumanga 2003; Kelsall 2005; Mbembe 2000; Mungai 2010) This material suggests how very difficult it is to generate forceful national constituencies for accountability.

The ink was not dry on the Lancaster house constitution before the first post independence government of President Jomo Kenyatta began to re-write the constitution. 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 made to crudely centralize power around the executive branch of government, but some of these were initiated to try and articulate a legal document that unified a fragmented society from above through administrative power. (Okoth-Ogendo 1972) 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 writing a constitution that in many ways sought to limit central government. (Okoth-Ogendo 1972) In an imaginary where a nation truly existed and the "social infrastructure" was inclusive and managed conflict effectively this might have been ideal. But that was not the Kenya of the day. Kenya existed more as a legal unit rather than as a nation, and the constitution did not proffer the government the space to create the new nation.

At independence the country inherited five key pillars of the political economy that were central to the path that was followed. All five posed challenges to transparency, but they posed even greater challenges to political class accountability. 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 style of colonial rule lacked a democratic practice of listening to citizens and debating policy and law, but rather was characterized by top down instructions from the Governor with some advice from those appointed to his cabinet. This pattern changed only slightly with the limited European and then Asian franchise in the legislative council in the 1920s and much later with the inclusion of a selected African in 1944. It was not until 1957 that Africans were elected and had significant numbers in the Council⁵. Despite the existence of the Legislative Council the Governor and colonial office still had the final say on matters of policy.

The second pillar was a politics that was national only in the mechanics of holding elections. National political parties were only allowed to exist in 1960. Prior to this, political organizations had been limited to the district level by the colonial government. Because the districts were designed to coincide with ethnicity, the longest-lived Kenyan political organizations were ethnically based. 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 was the absence of a national debate over the future of Kenya and its political economy. This occurred for three reasons. One, the only political organizations allowed during

⁵ We should note that this was still a very limited franchise because to qualify to vote Africans had to have a yearly income of £120. This was more than twice the average income of Africans Ten years later in 1964 a vast majority of African workers (66%) still earned less than £119 a year.

colonialism were at the district level. Two the imperative of getting rid of colonialism was clear, and three there was little time between the realization that independence was definitely on and the actual onset of independence. The struggle for independence was therefore just that, an anti-colonial struggle with a limited vision of what would replace the colonial system. The new government filled in the blanks and, from the point of view of the new political class, required keeping radicals, with visions of re-distribution of wealth on social class lines, from gaining power and leverage. Former fighters and allies of the Land and Freedom Army were a threat to the political class and well-to-do allies. This meant that the "African crowd" would no longer be allowed to form and indeed was demobilized while the political left was eliminated from KANU branches. (Branch 2009; Furedi 1973) In 1965 trade unions were brought under the umbrella of the Congress of Trade Unions (COTU) and government direction. (Chege 1987; Sandbrook 1975) Repression of the Kenya Peoples Union (KPU), the former left wing of the Kenya African National Union (KANU) that split off in 1966 and was banned in 1969, marked the end of the political left in above ground Kenyan political life. (Mueller, 2010) Without an extended national debate about the nature of the Kenyan state, and especially the provincial administration, the debate about the new Kenya was similar to the Lancaster house conferences. It amounted to short run questions of how to build minimum political coalitions to keep the country together and manage the spoils of political power.

The fourth pillar was colonial social path dependence. The elite that took over was heavily indebted to the British colonial structure and the benefits it bestowed upon them. Those taking the place of white administrators, farmers or owners of business had no real drive on their part to allow the vast majority of those at the bottom to enjoy the rights and privileges of citizenship. A modicum of debate did occur with the rise of a freer press, but that brief opening was soon cowed into submission by the end of the 1960s.

The fifth pillar was the highly unequal economy along racial and class lines with few, if any, Africans at the upper end of both wealth and income distributions. Aspiring Africans were looking to match the wealth of members of other racial groups at the top of the national distribution. This was partially a political imperative as the ruling African elite had to match the resources that other groups may bring to the political table. 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 African capitalists. While initially the new national elite was broadly representative of the country it quickly narrowed to being dominated by members of the Agĩkũyũ as political and economic powers were consolidated under the Kenyatta presidency.

The combined impact of these pillars of inheritance was a highly centralized presidency. (Nyong'o 1989) The strength of the presidency and the inability of any of the other state institutions

or social forces to effectively challenge it led to their further emasculation. Indeed during the height of the Moi dictatorship, the President's every utterance became law.⁶ The checks envisaged in the original Lancaster house constitution had completely disappeared both by actual constitutional change and by the power that the presidency abrogated to itself when faced with no other institution to check it. In addition, the presidency and the nation were conflated, and as a result criticism of the president was seen by officialdom as criticism of the nation, as anti-patriotic, and was severely repressed.

The Kenyatta Presidency

There were several reasons for the hyper centralization of power under President Kenyatta. As with all immediate post-colonial contexts, the unity required to boot the colonial power gave way to a new question at the time of independence: what interests will dominate? In the process of deciding this question, nationalist ruling coalitions often fray. The Kenyatta regime responded to the fraying by limiting dissent in order to keep a firm hold on the presidency. In the period immediately after independence the left wing of KANU numbering about 40 out of 100 Members of Parliament (MPs), threatened to vote with the opposition if KANU did not move to the left on motions. Kenyatta reacted by engineering the crossing over of Kenya African Democratic Union (KADU) MPs into KANU in 1964. This effectively countered the left in KANU and further bolstered the right.

Centralization of power was aided by the regime use of development as the dominant state ideology. The idea of development was popular because it promised a better material life, but the regime formulated the task as a technical matter heavily assisted by foreign aid. In this formulation, development was not a political matter, and managing it effectively did not require political mobilization or participation because, it was said, politicians of all stripes agreed on what needed to be done. Debate for its own sake in the Westminster tradition was seen as a waste of time.

In the late 1970s near the end of the Kenyatta presidency, Kenya was ruled not by a multiparty parliamentary system as envisaged in the Lancaster house constitutional talks, but by an imperial presidency through a provincial administration answerable only to the president and hitched to a de facto single-party system with regular competitive elections for MPs every five years. All national institutions put in place to check the president were either cowed or emasculated. Political opposition had been silenced via detention, jailing and assassination and even the ruling party was moribund. In the words of a MP of the day, KANU was dead. KANU was used as an instrument of the

⁶ Moi's habit of making policy declarations literally on the roadside graphically illustrated the extreme weakness of formal policy-making institutions.

President, and any popular base of the party capable of talking back to power was gone. After the official opposition of the KPU was proscribed and all its leaders were either put under house arrest or detained the government pushed its agendas at will. For a while the University of Nairobi students and lecturers were the only national opposition. However even this opposition was limited because of the detention and firing of lecturers and the ubiquitous security system that kept an eye out for any signs of dissent. (Klopp and Orina 2002; Amutabi 2002) In the context of a growing, though very unequal, economy the regime cast the opposition as spoilers who did not appreciate what the government had accomplished since independence. Although the immediate post-independence expansion of peasant production slowed down, even the oil shocks of 1973 were not sufficient to derail the economy. Shortly after the first oil shock a frost destroyed much of Brazil's coffee. This sharply increased the price of Kenyan coffee that was then the main export of the country. In 1975 the economy briefly tanked but growth resumed immediately after and by the year of Kenyatta's death in 1978 annual GDP growth was 6.9 per cent per annum.

The Kenyatta regime consolidated all five pillars of Kenyan political economy and in doing so all but eliminated opportunities for transparency and national accountability to develop. (Branch and Cheeseman 2006) There was centralized power around the President; the de facto single party, KANU, was cleansed of any independent popular base; debate over the national future was closed down; and class and ethnic divisions grew.⁷

The Moi Era to the Return of Competitive Politics at the Turn of the 1990s

With the death of Kenyatta, Vice President Daniel arap Moi came to power as the country was growing tired of the Kenyatta regime. Moi's humility and populist touch as well as his relative youth endeared him to the broad majority of Kenyans. The presidential transition had an element of popular reform about it. At the time of Moi's ascendancy his greatest threat came from close associates of Kenyatta who were Gikuyũ 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. Their only recourse would have been an ethnic based call to the Agikuyũ and related groups.⁸

⁷ Ethnic bias in top political and administrative appointments in the Kenyatta and later Moi regimes is spelled out in Kanyinga (2006)

⁸ 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. (Knighton 2010) Oathing may have

Despite his own initial popularity as President, and his outmaneuvering of the Kenyatta elite, things went south rapidly for Moi. By 1981 the beginnings of the Moi dictatorship were in place. Both circumstances and structural conditions led to an ever centralizing presidency and eventually the attempted coup of 1982. Moi inherited a political economy with three aspects leaving him in a precarious position. The first was that he had a relatively weak political base. Moi came from a small and poor sub-ethnicity of the Kalenjin, the Tugen. He was not universally popular with the Kalenjin because he was seen as having acquiesced to Gĩkuyũ settlement in the Rift Valley after the exit of European settlers. Among the Kalenjin elite who were large grain farmers, he was perceived as relatively uneducated and unpolished. In a Kenya which, after 1969 and the elimination of the KPU, had increasingly turned to an ethnicised politics, what was advantageous as a vice president, namely being unassuming and coming from a small community, was a liability as a president because in the absence of inheriting a large well organized political party or array of interests, one relied on an ethnic base as a political foundation.

The second weakness was that Kenya's economic elite was not a Kalenjin elite. In the context of an ethnicised politics this was important. Kenya's economic elite was made up of foreigners, Kenyan Asians, or Kenyan Africans who were mainly members of the Agĩkuyũ. Politically foreigners kept a low profile, as did Kenyan Asians who tended to ally with the powers that be. Many if not most of the members of the Gĩkuyũ elite owed their positions to the Kenyatta regime. Amongst this group 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 Gĩkuyũ to take over.

Moi's third weakness stemmed from the world economy that was buffeted by shocks early in his presidency. The second oil shock, the Iranian revolution of 1979 followed by the Iran-Iraq war led to substantial oil price increases leading to another period of stagflation. This was followed by the US Federal Reserve raising interest rates to hitherto unprecedented levels, which amplified the slowdown in demand worldwide and led to the debt crisis. Initially Kenya seemed to have evaded the crisis. Growth continued from the Kenyatta era and in 1979 and 1980 it was above 5 per cent and population growth. In 1981 the growth dropped below 4 per cent and below the rate of population growth. By 1982 growth was only 1.5 per cent less than half the population growth rate. The impact of this was that the per capita incomes were dropping drastically. At the same time inflation reached a ten all time high of 20 per cent.

contributed to Gikuyu solidarity, but it came at the expense of isolation from the Kenyan nation as non-Gikuyu were fearful.

In June 1982 Kenya became a *de-jure* one party state in order for Moi 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 order to participate in politics one now had to be a member of KANU. The party was weak in reach, but it was the perfect vehicle for disciplining errant members of the political class. Those seen to be in opposition to the president could be suspended or expelled from the party thus effectively ending, or at putting on hold, their political careers.

By this point political and economic conditions were so bad that there were two to three active coup plots against the regime, one of which took place in August of 1982 when there was an attempted coup led by non-commissioned officers of the Kenya Air Force. The immediate result of the attempted coup was hundreds of lives lost, property damaged, destroyed and looted amounting to millions of dollars, the disbanding of the airforce and, most important politically, a peek into the abyss for the Kenyan middle class which willingly gave Moi a freer hand to impose order and stability.

Post-1982 the Moi regime became increasingly authoritarian. Faced with a hostile population, the government began to rely more on the provincial administration and the security machinery to remain in power. Individual rights were effectively suspended. Those who were seen as political dissidents were arrested and often jailed for sedition or for being a member of an outlawed underground organization, in most cases Mwakenya, after undergoing torture in the now infamous Nyayo house cells. The paranoia of the regime led to extreme measures. For example in 1984 in Wajir district the security forces killed hundreds of unarmed Kenyan citizens of Somali descent who had been herded onto an airstrip and were shot while restrained. Opposition to the draconian measures was muted. What little opposition there was came from the university community who year in and out would demonstrate against the regime, and from the growing community of exiles centered in Dar es salaam, Harare, London and New York. These groups raised the profile of the human rights abuses in Kenya via two newsletters published in London and New York. While the appeal to the international community gained some traction in Kenya the opposition did not take hold outside the university and was therefore somewhat marginalized. The government painted those in opposition as enemies of the peace and stability that Kenya enjoyed unlike many of its neighbors that were racked with violent internal conflicts.

As the 1980s wore on there were two major political economic trends. The first was the effort to build a new⁹ Kalenjin economic elite loyal to Moi as a counter to the Gikuyū elite that prospered under Kenyatta. The second trend was the continuing poor economic times. These forces conspired to make Moi's rule ever more difficult. During Kenyatta's regime the growing economy and the

⁹ New because much of the old Kalenjin elite had prospered under Kenyatta and were not particularly trusted by Moi and his inner circle.

departure of a number of settlers and Kenyan Asians meant that the new African elite could be built at relative low cost as they took over the farms and business enterprises of those departing. In addition there was an explicit Kenyanization process particularly of senior civil service and parastatal positions that allowed some Africans to join the high income classes. By the time Moi took charge, all the low-lying fruit for building an African economic elite had been picked. Given the general lack of economic growth,¹⁰ in order to build an economic elite that rivaled the existing elite the Moi regime had to take even more advantage of state resources than the previous regime. The period therefore saw an increase in corruption via procurement schemes that had a history going back to the colonial era and the building of Ofafa Jericho Estate in Nairobi (Anderson 2005: 224-229).

As the economy deteriorated, households were forced to engage in numerous economic activities in order to survive. Economic identities were fractured as individuals engaged in multiple livelihoods. This was the case particularly in the rural areas where close to eighty per cent of the population resided. Here individuals were forced to engage in farm work, wage work and nonfarm informal activities to make ends meet. In practically all households there were individuals engaged in different kinds of economic activity resulting in households not having singular economic identities. (Githinji 2000, 2003 2006) This set of economic and political conditions also prompted Moi to perfect his own political economy of ethnicity. Moi controlled the country through a group of ethnic regional barons many of whom were, like him, of low education achievement but with reasonably popular rural bases. These barons were responsible for ensuring that only pro-Moi politicians ran or won elections in their respective areas.¹¹ The rewards to ensuring this were that either the barons or their protégés received ministerial appointments, and with these came the opportunity to be at the feeding trough. Beyond ensuring that only pro-Moi politicians were elected, the barons also had the task of ensuring that their community was loyal to Moi.¹²

The Moi regime reached its authoritarian apex in 1988, the year of the *Mlolongo* elections. In a bid to further control the electoral process Moi decided that there was no need for secret ballots. Instead, supporters of a candidate would line up behind the candidate or his/her name card and the candidate with the longest line would be declared the winner. This was clearly an attempt to

¹⁰ Under Kenyatta the economy grew on average at 7.1 per cent per annum while the population grew at 3.5 per cent per annum allowing for a 3.5 per cent increase per year in income. During the Moi period the economy just managed to match the population growth rate at 3.3 per cent resulting in no growth in average incomes. (World Development Indicators)

¹¹ Kenyatta tended to let regional barons come up through electoral measures of popularity. Moi tended to micro-manage the arrival of particular regional barons, often through positions and standing in KANU.

¹² This applied to Kenyan Asians as well as Kenyan Africans. Certain persons were understood to be regime favorites who had an inside track on government contracts, and in return they were expected to keep members of their sect communities in line politically.

intimidate voters to ensure that they voted for the politically preferred candidate. But despite these efforts there were reports of the administration declaring a winner who did not have the longest lines.

Political resistance was galvanized in 1990 with the call for a mass rally at the historic Kamukunji grounds by Charles Rubia and Kenneth Matiba, members of the Gĩkuyũ political and economic elite. While this elite was outmaneuvered politically in the early days of the Moi regime, they were allowed to retain their business and participate in politics as long as they remained loyal to Moi or at least did not challenge him.¹³ With slow to no growth during this period and the continued pressure on their businesses by the new elite, they were left with no choice but to fight back. Government resources such as land – a new frontier of corruption – were increasingly privatized and awarded to individuals close to the president who were then able to divide the properties and sell them off. But given the limited number of easy to dispense economic opportunities this new elite eventually clashed with their forerunners as the new elite started using government pressure to acquire the business interests of the old, and largely Gĩkuyũ, elite. It was at this point when both the political and economic interests of the old elite were threatened, that they joined the opposition to Moi.

The Political Opening

The Moi regime further consolidated the five pillars of the colonial political economy as Moi rotated ethnic favorites and inhibited the political strength and economic growth of a Gĩkuyũ bourgeoisie. But those moves helped trigger a broader pan-class and pan-ethnic disillusion with the regime. By the end of the 1980s the Moi regime was in difficulty. The economy was flat. As noted earlier, during the entire Moi regime growth barely matched population growth rates resulting in no increases in income for the population. Further, in order to win elections the government resorted to printing money leading to inflationary surges around elections in a country that previously had relatively low levels of inflation. For example in 1991 inflation reached 20 per cent the highest it had been since 1982. Over the next three years it would reach an all time high of 45 per cent in 1993 before falling to 28 per cent in 1995 and being brought below 10 per cent in 1996. During, this period income per capita growth was negative, reaching negative 4 per cent in 1992. Political repression was also severe in the late 1980s. But the collapse of the Soviet Union and the rise of democratic movements and new democracies in Eastern Europe gave heart to the democracy movement in Kenya. The movement developed before the end of the Cold War and it grew without a blueprint or an expected sequencing of events. There was underground activity that was ruthlessly repressed, but there was also above ground action by individuals, often lawyers and churchmen, who took great risks by acting

¹³ In the late 1980s there were efforts by Gikuyu business people to start banks. Some observers allege that the banks were targeted for bureaucratic harassment by the regime and they all failed.

in court cases and in the media. This activity was followed by public rallies that were crucial to gaining a popular constituency. The rallies often saw harassment by the state and repression that only brought on greater public support. Meanwhile post-Cold War donors looked at Kenya and President Moi in new ways. No longer was this authoritarian regime vital to donor interests.¹⁴ Donors could move from “hand wringing” over the perceived failures of the Moi regime – poor management of the economy, corruption, human rights abuses – to acting on them. In late November 1991, the Paris Group of donors said that economic and governance reforms were necessary if \$350 million in new aid would be forthcoming.¹⁵ 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. The de jure one-party state was no more. Parties were formed, and civil society organizations expanded in number. Multi-party electoral competition was at hand.

Multiparty elections bore high expectations. Transparency and 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 and accountability – would emerge due to a combination of competitive multiparty elections, neo-liberal economic reforms celebrating markets with curbs on ineffective state intrusions into market activity, a vigorous civil society, and a supportive donor environment. There were regular elections (1992, 1997, 2002, and 2007) with each of the first three fairer than the prior one, as well as a 2005 constitutional referendum on a draft favored by President Kibaki that was defeated. Regime misbehavior before and during elections also receded over time – misbehavior such as regime candidate dominance of media time, harassment of reporters, use of regime money in elections, use of the provincial administration to “encourage” certain results, and cancelation of opposition meetings and arrests of leaders for various alleged misdeeds. Prior to the 2007 election the Electoral Commission also gained considerable independence from the executive and citizens put more faith in it.

Although research elsewhere in Africa suggests that the very fact of repeated elections gradually consolidates democracy, (Lindberg 2006) foul play in the conduct of the 2007 election

¹⁴ The Somalia crisis and aftermath along with 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, has created a new situation. 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 alignments, and compromise democratic practice remains to be seen. Tensions have risen between the Kibaki regime and Muslims in recent years. (Bachman and Honke 2010)

¹⁵ Multiparty elections were not a priority for the donors at this meeting and they were not mentioned in the communiqué of the Paris meeting. The priority concerns for the donors were economic reforms. (Press 2006: 126-127) Donors had leverage. In 1990 donor aid amounted to nearly 30% of the Kenyan budget. (Throup and Hornsby 1998)

triggered severe violence with about 1300 fatalities and with over 300,000 people driven from their homes, and threatened the existence of the state. Upending the election was a project of a segment of the political class and particularly those around President Kibaki. Key players intended to win at almost any cost – a clear indication that despite a string of somewhat improved electoral exercises, mistrust was rife, and democracy was not the only game in town. (Githinji and Holmquist 2008; Kanyinga and Okello 2010; Republic of Kenya 2008) The violence also signaled that electoral democracy and transparency flowing from it were not sufficient to bind up the severe divisions of the nation. (Branch, Cheeseman & Gardner 2010; Githinji and Holmquist 2009) Impunity in corruption and regarding encouragement of violence was complete, while the social wounds of inequality and poverty remained. No members of the political class were prosecuted for the various instances of electoral related violence in 1992, 1997 and 2007/8¹⁶, nor was any member of this class successfully prosecuted for the various financial transgressions such as the Goldenberg and Anglo-Leasing financial scandals. Transparency did not yield accountability.

Political Classes and Political Parties

Once the political system opened up a crucial question for the future of transparency and accountability was the relation of the political class to citizens. The parts of the reform that involved transparency began to stick. The freer press exposed one scandal after another and citizens often anonymously informed sympathetic members of parliament of scandals occurring in their places of work. However ensuring accountability for these misdoings would depend upon the nature of constituencies built to press for it. When members of the political elite were exposed as participating in scandals they often hid behind their kinsmen claiming that their political enemies were out to get them because they came from such and such community. Much like after independence, the political class divided as the political system opened. The coming of multi party elections heightened the use of ethnicity by members of the political class as a consequence of competition for public office and their efforts to find supporters.¹⁷ Moi in opposing the reforms cynically argued that Africans were not ready for multi-party systems because the parties would be basically “tribal”. Often using violence and sometimes carrots to lure some politicians he created the conditions to make this a self-fulfilling

¹⁶ This is despite the comprehensive reports by the Akiwumi and Kiliku commissions with respect to 1992 and 1997. Some of those suspected with being behind the post election violence of 2007/08 have been named by the ICC. However the section of the government loyal to Kibaki along with rebels from the Odinga section have rallied to their aid, and the President via the Vice President has lobbied the African Union to support him in shifting any trials from the Hague to Kenya under the guise that the judiciary in Kenya is being reformed and is able to handle the cases. Critics have pointed out that powerful individuals are unlikely to be held accountable by the Kenyan judiciary which has no history of standing up to the political class.

¹⁷ Opening up the political system, the Moi regime’s production of a violent political context by sponsoring ethnic clashes, and the process scattering the opposition as politicians competed against each other for office, made it difficult for anti-Moi sentiment to congeal politically. Moi may have bought himself more years in office by opening up the political system rather relying on a rejectionist stand.

prophecy. Political violence seemed to expand between elections as state violence was privatized and youth gangs become militias for political hire. (Branch and Cheeseman 2010; Kagwanja 2006; Katumanga 2010 (a and b); Mueller 2008 and 2011) State sanctioned ethnic cleansing occurred before and after the 1992 and 1997 elections. The incentive was to chase out members, who were also voters, of ethnic communities suspected of opposing Moi, and then allowing the newly vacant land to be used as a reward for regime supporters. In reaction a process of “political involution” ensued. Rather than people uniting across historical divisions to resist a predator state, growing mistrust across ethnic lines – a partial product of the violence – forced people into ethnic identities for safety.

After over two decades of increasingly illegitimate single party rule, coupled with the limited historical life span of political parties during the late colonial struggle, when party competition was suddenly declared there were few cherished national party memories that might bring parties rooted in the population back to life.¹⁸ The parties created in the early 1990s had no historical organizational roots. With the exception of the original Forum for the Restoration of Democracy (FORD) the major parties were created as vehicles for their leaders to compete for office or to leverage their control over an ethnic block for access to some power, normally in the form of a cabinet appointment. Where they gained popularity they did so largely under the umbrella of ethno-regional sentiments. None of the new parties had a national reach apart from momentary coalitions of ethnic leaders. The consequence was that Kenya’s political parties were not vehicles for accountability. They rarely mobilized constituencies over important social and economic questions and as result they did not deepen democracy or nurture a reform culture. (Elishcher 2010; Mutua 2009:3; Oloo 2007 and 2010)

Despite the legal and political reforms that occurred from 1991 on, impunity reigned for the political class. Old and new laws were on the books and formal institutions existed, but they were weak and quarantined. Many of these initiatives came from donors, and although there was usually support among the managerial entrepreneurial class (MEC) and civil society organizations, effective broader constituencies were not developed through political party programs or independent popular organizations. Hence the reforms were hostage to political class machinations. The fortunes of reform policy and institutions have everything to do with the strength of specific constituencies of support. If the beneficiaries are not powerful – if they are not in a position to enforce accountability on the powerful, and if the leadership – usually of the upper reaches of the middle class – do not find it in their interest, and lack the capacity, to lead and organize an accountability constituency, reform policy and the reform institutions do not take effect. For the constituency of the reforms to be strong

¹⁸ When South American political systems opened up in the 1980s and 1990s many historical parties bearing a variety of ideologies sprang back to life after disappearing during years of repression. Kenya lacked that history.

enough to take on the elite it must also, of necessity, be national if it is to be effective. Kenya's historical political economy, we have argued, has largely not provided that constituency. The "national" is notable by its ephemeral nature.

Civil Society

Political analysts expected a lot from civil society when multiparty elections came into being. With the coming of democracy civil society was to act as a watchdog and a check on executive power. It was also expected to encourage broad-based reform, mediate between state and society and, most important of all if usually unsaid, civil society was to represent society as a whole. But society in Kenya was deeply divided along ethnic and class lines and those divisions were reproduced by members of the political class who did not wish to see the development of power out of civil society that might create national constituencies for their accountability. Ethnic divisions and fears were also a product of competition for office among the political class. (Ngunyi 1996:277-273) Civil society divisions reflected societal divisions that, in turn, compromised the ability of civil society to exert accountability power at the national level.

Civil society was also hampered by its own origins in two particular ways. First, civil society was dependent upon donor funding and in subtle ways became as responsible to donors and their demands (as well as the demands of funding cycles) as to the demands of Kenyans they were 'representing'. Second, the rapid expansion of civil society itself had to do with bad economic conditions and the need for individuals to find remunerative employment. As the economy slowed down and the structural adjustment conditions against government hiring took their toll, many educated Kenyans found the creation of civil society organizations to be an effective self-employment mechanism. The result was that the Kenyan civil society, though large by any standard on the continent, was extremely heterogeneous and included well run professional organizations as well as the so called brief case NGOs.

The theory that the democratic form of rule would unleash forces of reform was true to a point. Some transparency reforms did "stick" and those included a relatively free press, new freedom to voice and organize including freedom to debate, criticize, and offer policy suggestions. The 1990s saw a gradual opening to dissenting organizations, although the path was occasionally blocked by government harassment of particular organizations and persons, with refusals to register some organizations while others were de-registered. (Nasong'o 2007; Ndegwa 1996; Ngunyi 1996) Newspaper reporters were relatively free to report and interpret reality although they were

sometimes harassed, while libel laws created great caution in the world of print.¹⁹ But threatening telephone calls from State House to newspaper editors in the middle of the night that occurred in the 1980s, appear to have stopped. Also at an end was torture of political detainees in the basement and on the 24th floor of Nyayo House, a large government building on the end of downtown Nairobi. Transparency put in motion by multi-party elections helped create a quite vital collective public agenda long frozen by a hovering, censoring and repressive executive. In the early 1990s anecdotes were frequently told of copies of government documents mysteriously turning up in the Parliamentary boxes of MPs detailing fraudulent activity on the part of government officials. The political opening meant that, in an unprecedented fashion, people came to know what was going on in their political world.

Reform optimism missed an understanding of the political forces that brought on some reforms but not others. Transparency was thought to be necessary and coterminous with accountability. Yet transparency alone was not enough to bring on accountability. At the national level effective accountability of elected and appointed officials to the letter of the law was not at hand. But the local level was a different matter. Indeed even under the prior one-party electoral system, elections were a means by which a local accountability was encouraged.²⁰ This was evident in the Harambee movement that was quite popular especially in earlier post-colonial days. It set up a dynamic where citizens, in effect, said to elected officials and aspirant leaders, that they would be evaluated politically on the basis of their ability to “bring development”. That delivery required interventions with higher-level officials to channel resources to communities, and here we are speaking mainly of rural communities. Leaders were also expected to act as initiators and catalysts in the construction and maintenance of collective goods like secondary schools, health centers, village polytechnics, roads and bridges. Good performance – accountability to local project demands – was all but necessary for election.²¹ (Holmquist 1984) There were, of course, other pressures for accountability including the delivery of private goods such as money for school fees, employment, and hospital costs. But while elections provided incentives for local collective and private good accountability, there was no advance of national level accountability.²² Indeed the localism of project

¹⁹ The fact of occasional out-of-control police is a worry. Extra-judicial police killings are quite common. In addition, threats of violence remain from unknown forces when dissidents challenge powerful political forces. Two leaders of a civil society group (the Oscar Foundation) were assassinated in broad daylight in the heart of Nairobi, and it is alleged that over 30 individuals who gave testimony to organizations inquiring into the post-2007 violence had to flee the country for safety.

²⁰ This practice was evident in the colonial era in the form of demands for more education and education of a particular kind in the form of Kikuyu Independent Schools. The development of a primary school infrastructure usually came through popular initiation and participation.

²¹ Staffan Lindberg (2010) shows a similar pattern of local accountability in Ghana.

²² Kenyatta saw Harambee as a way of turning the political class away from national level issues and down to the local level. The move found popular approval that was gradually undermined in the late Kenyatta era and especially in the Moi presidency as “big men”, and the President in particular, used the provincial

development offered the political class a convenient means of gaining a modicum of popularity while avoiding issues surrounding their own national level accountability. Further, the cost of this local level accountability was often mitigated by the relationship between the politician and state house. Where a friend of State House was thrown out of office, they would often land softly in a well paying job either as a chairperson of a parastatal board or as a managing director of a state corporation.

Civil society leadership did, however, successfully define a new collective public agenda (demands for a new constitution; women's rights; children's rights; anti-corruption; the hazards of ethnic antagonism, etc.) and in the process helped create unprecedented public policy debate, if only limited policy results. The leadership pressed for reforms, and expanded and consolidated practices that had a particular appeal to them as professionals. They wanted the relative freedom to speak, organize, and practice their skills as lawyers, academics, religious leaders, and sometimes as business people although the latter were very cautious as some had state contracts while others wanted them. (Holmquist 2002; Knighton 2009; Mutua 2009b: 2; Sabar 2002) The ideology of the political left all but disappeared among this cadre. The language of legal rights and the call for democracy replaced the call for socialism as the major ideology of dissent. The rights ideology and the prominence of civil society in reform efforts also found favor with donors to the point that human rights civil society organizations became intellectually dependent upon donors and a western model of rights protections. (Mutua 2009b) Donor funding also meant that neo-liberal ideology tended to trump the socio-economic issues that were central to many Kenyans. (Kanyinga 2009)

The domination of the reform movement by the discourse of legal rights was also due to the particular historical conjuncture. At the global level donors were more comfortable with this discourse as it suggested duplicating the historical experience of their own societies.²³ Great effort was put into crafting laws and getting them passed. It was assumed that laws and the institutions they embraced, would translate almost automatically into real implementation and accountability. Initially, and particularly among the exile groups, opposition organizing took place at two levels. There were attempts to organize political and armed resistance like Mwakenya while at the same time create distance between the Moi regime and the donors via the publication of information on human rights abuses. But the collapse of the Soviet Union and other attempts at socialism made radical change a harder sell. The changing world circumstances and particularly the need to appear as a reasonable law abiding government, plus the favorable response that Moi received when he released all detainees in 1979, led the regime to attempt to suppress dissent through ostensibly legal means and

administration to levy a virtual regressive tax on project contributions in localities (as opposed to usual locally generated progressive tax in early post-colonial years) to raise funds for "giving" by notables in huge public rallies. The rallies became opportunities for them to display power and wealth while undermining local initiative and leverage. (Holmquist 1984; Transparency International 2001)

²³ Whether donor understanding of their historical experience was accurate is another question.

the courts. This was novel. The Kenyatta regime had depended on both detention and assassination to keep opponents in check and out of the way, but now times were different. The use of courts had an unintended consequence. Brave lawyers now had a stage to argue for their clients. When the regime realized this, it was forced to go after the lawyers. This radicalized the law profession as lawyers were no longer defending abstract rights but rather their very ability to work and practice their craft. With this radicalization the lawyers and the law society moved to the front of the civil society caravan and became extremely important in shaping the agenda for civil society. As one would expect an agenda set driven by lawyers would focus on the law itself as the problem and not the more abstract idea of the law being a social contract with the population and needing their consent as well as support for implementation.

With notable exceptions, reforms other than civil rights and the rule of law held less interest for most civil society leadership, namely issues focused upon the material interests of the poor and hence policy dealing with poverty – especially land reform – and equity. Yet these were the very policies if implemented correctly may have had a chance at creating a national constituency and solidifying the nation and thus giving a backbone to the legal reforms. (Githinji 2010) Many key persons in civil society supported efforts to end political class impunity, but while they were instrumental to making abuses more transparent, they lacked the institutional capacity or will to mobilize national popular opinion to effectively reign in abuses via formal institutions of state that were failing “to work”.

For all the celebration of civil society there was little attention given to the question of how deeply the wider society was enmeshed in formal civil society institutions. But as time passed it became clear that civil society was often a “zone apart” because of its largely urban base, the absence of mass-membership, its dependence on donor funding, its tenuous link to popular organizations, its frequent project – as opposed to broad policy – focus, its rights-based as opposed to material based emphasis and, the extreme diversity of focus within the category of civil society ranging from professionally led urban groups to spontaneous actions in neighborhoods and communities and a variety of action and organizations that rise and fall without gaining the attention of observers.²⁴ (Maina 1998) Kenyan civil society involved organizations operating in several different sectors ranging from religious promotion to progressive community-based organizations.²⁵ There was little linkage

²⁴ Many civil society organizations have tried to develop rural footholds, but it is not clear that popular organizations advocating accountability agendas have emerged. (Orvis 2003) A study in a low income area of Nairobi suggests that participation in civic education has not generated autonomous citizen political activity. (Bodewes 2010)

²⁵ The Bunge la Wananchi is one of the progressive community-based organizations. It has gained a degree of visibility in public discourse, but although it has had very limited national impact, the potential is signaled by the fact that the state takes them seriously enough to harass them. (Kimari and Rasmusson 2010)

among the groups in different sectors which undoubtedly compromised their collective and national impact should they agree on a common agenda. In addition, each sector embraced organizations that became prominent in politics at different points in time. For example, in the period 1993 – 1997 democracy/governance organizations were in the forefront of agitation for a new constitution, but after 1997 much of that drive and unity faded as constitutional action – really inaction – moved into formal state institutions.

The 2002 Kibaki election enhanced a process that began in the early 1990s and marked a shift of state relations with civil society. These relations gradually grew more comfortable.²⁶ In the early 1990s, even after the political opening, civil servants took a risk if they entered into formal, or sometimes even informal, discussions with civil society representatives. Civil servants were careful to check the daily newspapers and radio news reports of what President Moi happened to be saying because “road-side” policy-making was the real policy. But as the public agenda opened up in the 1990s, and perhaps as the regime realized that it could survive in the multiparty electoral format, relations between government and civil society gradually improved. The election of Kibaki – dubbed at the time a reform election – moved that process further along. Some civil society organizations and leaders joined the Kibaki campaign and in the aftermath of election victory relations between the state and civil society further thawed. (Mutua 2008) Relations moved from face-off to dialogue, and even to a degree of real integration as civil society personnel were brought into some policy-making forums, and effectively gaining a seat at the table.²⁷ (Brass 2010) It is far from clear, however, that the more comfortable relations between state and civil society mark the likelihood of greater accountability in the future.

We have argued above that civil society, which was often treated as representative of the society as a whole, was unable to advance the complete reform agenda. While its efforts were key to the creation of laws against corruption and those that opened up the political space and resulted in transparency, because it was not actually representative of the nation these laws did not result in accountability. The reasons for this are varied. First, civil society effectiveness was limited by its lack of a mass base and by internal divisions that reflected divisions in the wider society. Second, the above was compounded by the fact that in the slow economy characteristic of the Moi era, civil society organizations became a jobs program attracting both those truly committed to the social causes that the organizations advocated as well as those that just wanted a decent job. Three, the lead by the legal fraternity led to a focus on the law itself rather than the social and political organization needed

²⁶ Stephen Ndegwa (1996) discusses the pained negotiations surrounding the NGO Act of 1992 in which the state only grudgingly allowed civil society autonomy.

²⁷ Gyimah Boadi (2004) argues that a similar pattern has occurred elsewhere in Africa, a process he calls “complex engagement”.

to sustain any reform process. Lastly, the role of the donors as the major funders of civil society initiatives, further focused the changes on a rights and a legalistic approach rather than on social mobilization. The donor connection also tended to encourage the importation whole cloth of ideas rather than the construction from the ground up of laws and institutions that took the Kenyan political economy into account. In the next section we turn in more detail to the role played by donors.

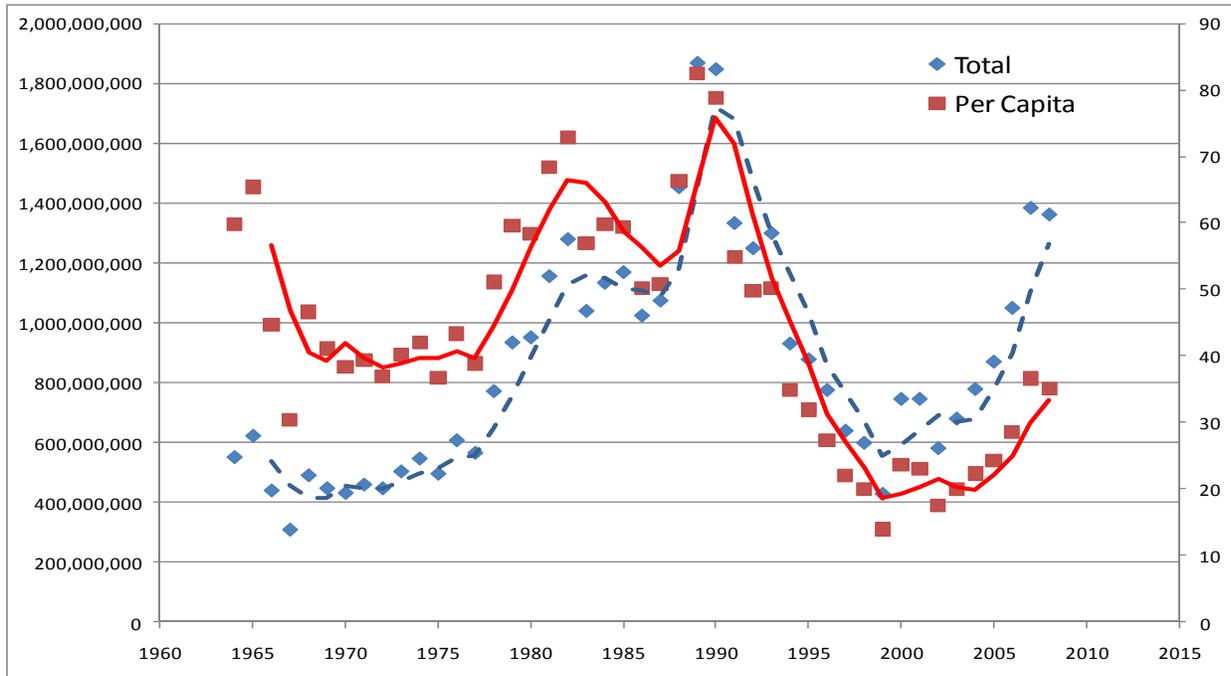
The Donors

To the late 1980s, donors were not in pursuit of reform in Kenya so much as trying to create a strong, legitimate and predictable Cold War ally in the wider Eastern Africa region. Western aid to the Moi regime was considerable although there was hand wringing among donors because the Moi regime abused human rights and was saying “yes” to neo-liberal economic reforms – stabilization and privatization especially – only to dodge serious follow through. An examination of the trend in aid bears out the shifting donor and aid regimes. In Chart 1 we present measures of Net Official Assistance and Official aid received both in total terms and per capita terms. In Chart 2 we present Net ODA as a percentage of Gross National Income.

A number of trends can be observed from these two charts. The first is that foreign aid went up substantially during the first half of Moi’s reign by all three measures. During the Kenyatta era with the exception of 1965 and the year in which he dies, 1978, aid was never above a total of \$600 million or \$45 per capita. During the early days of Moi’s regime there was a substantial increase in aid, with the total moving from just below \$800 million in 1978 to around \$1.3 billion in 1982. After a small fall post the attempted coup of 1982 aid rose rapidly to its high of over \$1.8 billion in 1990²⁸ and remained at this level before falling to approximately \$1.3 billion in 1993. We should note that the period when the Moi government received most aid was the same period of the *mlolongo* elections when the government was at its repressive worst. In per capita terms the aid reached a high of \$80 in 1990, an over 90 per cent increase from the highest years under Kenyatta. Post 1991 as the donors got tired of the stop and go efforts with economic reforms and gained more policy flexibility with the collapse of the Soviet Union, aid fell dramatically to a low of around \$600 million in total but much lower in per capita terms from prior years because of the increase in population. During the Kibaki era while aid total amounts have somewhat recovered reaching \$ 1.4 billion in 2007 and 2008, they are smaller in per capita terms and as a per cent of GNI than during any other period.

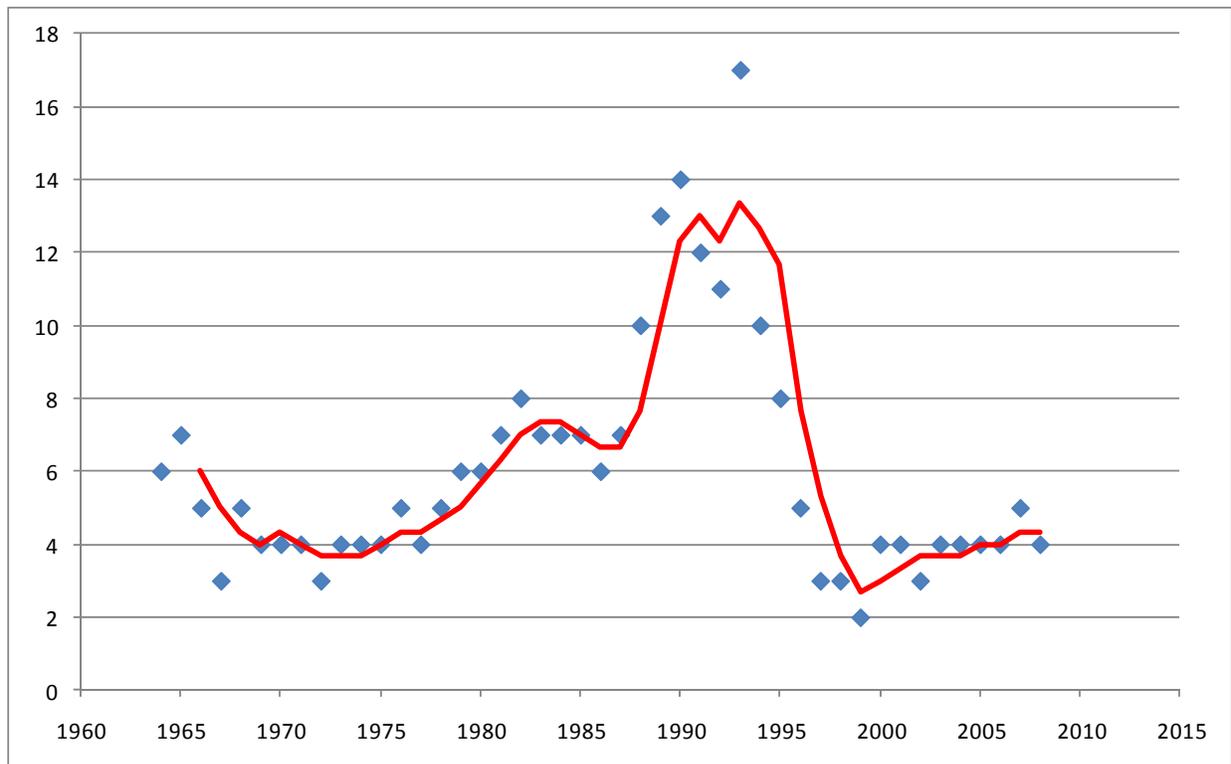
²⁸ Aid remained above \$1.8 Billion in 1991 a year when the economy recorded a negative growth rate of 0.7 per cent. One wonders what the growth rate would have been without this massive amount of aid which was approximately 14 per cent of GNI

Chart 1: Net Official Assistance and Official aid received in constant \$ (2008)



Source: World Development Indicators Database, World Bank

Chart 2: Net ODA as Per Cent of GNI



Source: World Development Indicators Database, World Bank

Apart from the shift in the volume of aid there was also a shift in donors. This shift in donors we would argue dampened the demands for accountability as stability and Kenya's geo-political position became more important. In appendix chart 1 and 2 we present data on aid flows from bilateral donors belonging to the Development Assistance Committee (DAC). As is clear from appendix chart 1 the DAC funding accounts for over 80 per cent of aid with the exception of the period 1989-98, when the IMF/WB provided a bigger portion of the funding. In appendix chart 2 and 3 we present the shares of all the DAC members from 1964 to 2008. In chart 2 for clarity of exposition we have summed together the Benelux and Nordic countries, and grouped the minor European donors together. A full listing of the groups can be found in the appendix. A couple of shifts are worth noting. The most important being the growing dependence on USA aid during the early and late parts of the Moi regime. At independence the US was the distant second largest donor after the UK which provided over 90 per cent of aid. During the Kenyatta regime the USA and UK shares of total aid decreased from close to 100 per cent of all aid in 1964 to about 25 per cent in 1978. After the death of Kenyatta, we see a huge increase in USA aid that lasted until 1985, after which it decreases to 1996. It is around this time that total aid was falling (see charts 1 and 2 above). Since the share of the USA aid increased it means its total volume was increasing or at least not falling as fast as other countries. The share that the USA gained in this period was at the expense of particularly the Nordic and Benelux countries, which after increasing their share from independence saw their shares drop both to the USA and Japan. Given the very different set of interests and approaches between these donors one would expect to see a difference in the degree of demands and follow through on the reform agenda. The Nordic and Benelux were more enthusiastic on reform and issues of equity than the USA which was more interested in regional stability and Kenya's role in it, as well as anti-communism in the early 1980s. Japan on the other hand tended to be silent on the "internal affairs" of a country.

As the Cold War was drawing to a close and there was an explosion of talk of democracy and protest in Eastern Europe. Kenyans increasingly protested above ground as they had previously been protesting below ground, while the call for democracy encouraged the formation of an inclusive pan-class and pan-ethnic democracy movement. In November 1991, the Paris group of donors suspended aid to the Moi regime pending governance reforms. The move reflected donor frustration that Kenya's economy was weak, corruption was rampant, and the regime was illegitimate and repressive. There was an implicit understanding that while democracy may introduce a note of political uncertainty, future regimes were not likely to be worse caretakers of the economy, or less legitimate, than the current regime. From the donor point of view the end of the Cold War also meant that western democratic values could be advanced with little risk of negative strategic outcomes. Within two weeks of the Paris Group announcement Moi called an end to one-party rule. Political parties

could now be formed and civil society could organize, all of which generated pressure for less repression and for greater freedom of voice and organization. Some donors played prominent roles in support of leaders of the democracy movement, and there were donor attempts to help mediate divisions within the opposition. (Brown 2007) Some donors were also decidedly partisan in the struggle for multi-party elections and democratic infrastructure. As Moi feared, they were virtually a part of the political opposition. (Maina 1998)

In a 1992 major policy shift, the U.S. withdrew much of its aid to the Kenyan government, and instead aimed it toward civil society. (Press 2006; Brown 2007) But from 1992 to 1997 as donors talked up democratic reform, they tended to stand back from sanctions against poor regime reform performance. (Brown 2001 and 2007) Donors regularly met to discuss and monitor reform progress, but there were divisions and policy shifts among them, and maintaining Kenyan political stability became a growing concern for the U.S. This became obvious as civil society organizations led a popular movement for constitutional reform coming up to the 1997 election. Growing popular interest in the issue caught the attention of the political class, but politicians did not lead the constitutional reform movement. They were ambivalent about it. From the perspective of politicians, if their coalition's chances of assuming the powers of the president in the next elections were good, one might offer only tepid support for constitutional change that would almost certainly weaken the powers of the president. Those with limited short-term prospects might be more vigorous advocates of reform. The political class as a whole became more engaged with the issue only as the issue became more popular.

On the eve of the 1997 election, constitutional change was the major issue, and a progressive faction emerged in the movement that engaged the population in a fundamental manner. But reform momentum threatened a crisis with a demonstration in July that led to many deaths. (Mutunga 1999) The regime responded to the tension with a compromise intending to divide the political class – which it did – and from the regime perspective bring the issue into the more manageable arena of Parliament. Donors applauded the regime move. In conversation donors sometimes alleged that civil society leadership was borderline irresponsible when it encouraged popular demonstrations that may get out of control.²⁹ Some reforms were brought on and fears of a “political meltdown” did not materialize. After the 1997 election the constitutional reform movement went into decline.

²⁹ Civil society leadership discussed the question of order in demonstrations frequently. But it is clear that “people in the streets”, the “African crowd,” was central to most of the major reform efforts in Kenyan history – in protest 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 donors were central to Kenya’s political liberalization, “... 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

Reforms through law and institutions – the KACC; anti-corruption initiatives; constitutional reform; neo-liberal economic policies; parliamentary autonomy from the executive, etc. – were crucial reforms for donors. Donors efforts were supported by most civil society leaders and organizations, virtually all of which – except for religious institutions – were dependent on donor funding.³⁰ 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. Meanwhile the press revealed high-level corruption, but political class impunity remained firmly in place. (Mutua 2008; Wrong 2009) Where the new laws and institutions “worked”, as with growing Parliamentary independence from the executive, new practices did not look like reform when parliamentarians voted themselves extraordinarily high salaries and benefits.³¹ Thus while benefits accruing to the political class were expanded and were perhaps more widely distributed within that class than during the hyper-centralized pre-Kibaki era, material life benefits for the majority were hard to find. Perhaps because of the lack of improved material lives, and the obvious political “distance” between the state and citizens, the latter relied more on informal than on formal institutions. Formal institutions were less likely to have popular trust than informal institutions of religion or community. (Maina 1998) This finding is echoed by similar findings elsewhere in Africa. (Bratton 2007)

The reason Kenya’s formal institution, backed and sometimes initiated by donors, did not work as expected – the reason accountability did not happen – was the fact that institutions and their leadership were not embedded among a reasonably united population. Reform lacked a mobilized national constituency. Neither the donors nor civil society organizations had a mass base, except periodically over the issue of constitutional reform. Donors were supportive of the reform in general but were not in a position to impose their will on the institutions that were supposed to impose accountability. But aid continued to flow to the regime despite accountability shortfalls. (Brown 2001 and 2007) And when popular momentum developed around constitutional reform, donors were uneasy with mobilization efforts and the potential emergence of broad popular movements over which they would have little control.

accompany more rapid and radical change can produce a more robust democracy.” One cannot help but note that arguably the most important world event since the fall of the Berlin Wall, itself a product of crowds on streets, the 2011 revolt challenging Arab autocracies was created by crowds in the streets of Middle East towns and cities.

³⁰ Sarah Micheal (2004) asks why African NGOs are less powerful than those in Asia and Latin America. She cites donor fund dependence as a major cause of weakness.

³¹ The first act of parliament in April 2003 after the so-called reform election of 2002 was to raise the total package of MP remuneration to over \$89,000 per year. By 2008 parliament raised the total package to an eye-popping \$157,000 per year, second in Africa only to Nigeria while ranking among the highest in the world. (Barkan and Matiangi 2000: 57)

The Managerial Entrepreneurial Class

The array of political forces is ever changing, and one element deserving more attention to their role in the transparency and accountability agendas is the MEC. They are interesting for several reasons. They are highly educated and skilled; they are not rooted in state employment; they are less likely than prior elites to accumulate wealth from the land; they are frequently employed in service provision; and they are less dependent on the state for contracts and advantage. (Githinji & Holmquist, 2009) As an elite, or elite in the making, they “sit” in different places than their predecessors. Also, as their numbers expand they are likely to play a greater political role in the future.

Like civil society and the donors, this cadre’s notion of political and institutional reforms was not based on a broad popular mobilization but an assumption that getting the right laws and properly trained people in place would result in both transparency and accountability. They would be happy to see corruption reigned in, but they were generally not engaged in a politics that might create the necessary national constituency to do so. Elements of this cadre were above ground leaders of the struggle to open up the authoritarian state. As we noted lawyers, churchmen, and some businessmen were particularly prominent, but the absence of popular organization and political parties was also evident – indeed it was inevitable given the regime repression of the time.

The Kibaki election in 2002 initiated optimism among the (MEC) parallel to that of their much fewer numbers soon after independence when government employment opportunities were abundant. Government employment opportunity was now minimal, but with Kibaki as a less micro-managing President who did not feel threatened by wealthy business people, many of them Gikuyū, the class could move business agendas with greater freedom than they could under Moi. They could also pursue jobs in the media, finance and service sectors that opened up in the 1990s with the help of transparency reforms.

There were new political realities associated with “the popular” in the new millennium including what appeared to be an increasingly hostile poverty-stricken element that the broad middle class was uneasy with. Perhaps foremost among them was Mungiki, a social movement begun in the late 1980s by young Gikuyū with a cultural critique of westernization. It had a love hate relationship with President Moi, and later was a supporter of Moi’s anointed heir – Uhuru Kenyatta, the son of the first president – prior to the 2002 election. Mungiki became more involved in extortion, offered muscle for hire by politicians and gained some political cover in the process, and it accrued real power in certain rural and urban locales. (Anderson 2002; Kagwanja 2006; Knighton 2009) The growth of Mungiki and other similar, if less sizeable, organizations meant that in the eyes of some in the

middle class, the poor were fearful and out of control. Mungiki is an example of a counter-ideology to the “way things are,” but it is also unprogrammatic, opportunist, and thuggish. Meanwhile the economic ideology of the donors, many in the regime, civil society and the MEC was neo-liberalism, although it was challenged by a minority in civil society and government. The point is that there was no ideological discourse that might turn the MEC, civil society, or the political class, to the political left and a politics addressed to the accountability agenda.

The combination of rights gains made in the 1990s, and a growing rapprochement between the state, civil society, and indeed the broad and optimistic MEC, meant that a popular politics of accountability would not necessarily find leaders from the class that led or supported the struggle for transparency. Transparency rights required frequent defensive action due to occasional attacks on them such as the attack one night on the Standard newspaper, as well as the post-election violence of early 2008. But, notable exceptions notwithstanding, the dam of crude state repression was breached, and with the relative success of the transparency agenda the value of a mobilized population was suddenly devalued in the eyes of the MEC and many other reformers. Rights won remain, to be sure, somewhat uncertain, but the defense of them does not require popular mobilization in advance, nor an extension of those rights into the realm of social welfare. Given the absence of Kenyan social movements making effective national claims of that sort – with the possible exception of the women’s movement – or of political parties doing the same, advancing the accountability agenda will find it tough going. (Githinji and Holmquist 2009)

Conclusion

While our analysis points to the failure of the reform agenda we note that the agenda partially fulfilled its goals by the imposition of transparency on the elites. This has led to some changes. For example, whereas the perpetrators of the Kenren fertilizer scandal under the Kenyatta regime got away scott free, many of those involved in the Goldenberg scandal of the 1990s have been named by a series of commissions, though none have been successfully prosecuted and no money was recovered. In the largest financial impropriety under President Kibaki, the Anglo-leasing Scandal, most of the money was returned, though no one has been prosecuted. This is no mean achievement, and may be a necessary foundation for an evolutionary process of building an accountable society. Our main aim has been to point out the necessity in a multi-party electoral framework to have a national constituency that provides pressure to hold elites accountable at the national level. It is only with advances toward creating a Kenyan nation that we can expect reforms of the type we have seen to lead to accountability.

Where does this leave us? We believe that central to this process of forming a nation is the creation of political and economic equity that then allows for political processes not to be defined by ethnicity but rather by political and economic identities. The process of the referendum for the new constitution and the new constitution itself is a good first step. We are of course aware that it could be derailed, but we are heartened by the fact that it has accomplished part of the task of diminishing the role of the presidency and increasing the resolution of problems between sectors of society not by presidential fiat, cajoling or bribing but rather through the court system. The recent climb down by the president in the appointment of a new Chief Justice, Attorney General, Director of Public Prosecutions and Controller of the Budget and prior to that the resignation of a number of ministers implicated in graft augurs well. The process of the referendum was also important because it was a national debate without the immediate control of government largess at stake - unlike elections – and therefore it engendered a deeper discussion of ideas rather personalities and ethnicities. It was the first step in creating national leaders who appealed to people on their ideas.

There are also two important demographic changes taking place. One is the burgeoning of a relatively better educated (compared to its predecessors) youth, who have started to push for a youth agenda which is based on their inability to get meaningful employment, rather than an ethnic division of spoils that may come from holding power. Where this will lead we cannot predict³² but it is an incipient social force that is constructing itself around material concerns first and foremost. At the other end of the demographic spectrum is the retirement of educated and experienced individuals to their rural homes. Because of the relatively early retirement age until recently (55 years), this cadre are still active and represent an influx of human capital into the rural areas. This means that rural institutions and counties will have access to a level of human capital that they previously did not, and no longer will the political elite be the sole conduits of information and expertise in these areas.

The devolution of some power and spending to the counties as envisaged in the new constitution may also engender more accountability. We argued earlier that at the local level elections in most eras have been very highly competitive and those who have not delivered have in most instances lost their seats. The counties may come to be the space in which this kind of accountability is practiced. There are of course questions about whether the counties just decentralize corruption. We argue that while this is of course a possibility, because any money that is lost at the local level will be less money for tangible local projects there is a decent chance that the electorate will hold local officials accountable. We must note here that part of the reason why corruption at the national level is pervasive is the fact that the national level is distant from the population and losses of funds there (especially if they are pocketed by one of your own - who is then

³² Politicians such as Uhuru Kenyatta and William Ruto have tried to position themselves at the front of this movement as has the son of the president and the brother of Kibaki's first vice president Kijana Wamalwa.

expected to deliver locally) do not seem to directly affect what local projects get from central government. The funding of local projects is much more a function of your local leader's ability to extract concessions from the center. In many ways this perceived distance from the central government and the implication of corruption there is akin to the fact that in the U.S.A the population and politicians claim to be against earmarks in budgets except of course for those in their own constituencies. The county level devolution may also diminish the role of ethnicity as it occurs both with the diminishing of the role of the executive and the 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 ability to fight over the pie will become more important in this context. Further, because in many counties the near homogeneity by ethnicity will mean in elections at the local level it will be off the table³³, this will give space for potential of a local politics of ideas and service delivery to take place. If the national politics builds on this expansion into the politics of ideas then ethnicity will be diminished at that level as well.

With the exception of the one party era, political parties have been unable to hold their members of parliament (MPs) accountable. This is because MPs could always join or even create another party as an electoral vehicle at the next elections. The new rules governing political parties and MPs make this more difficult. This means that parties are likely to become more stable and over time this may allow for the emergence of parties of ideas, as their role simply as an electoral vehicle is diminished.

At the economic level steps must be taken to create a more inclusive national economy. If particular citizens do not have access to the national dream then they will be less inclined to feel as part of the nation and the constituency for accountability. The challenge here is large. With Kenya being one of the most unequal countries in the world (Githinji 2010) and the vast majority of people being in the rural areas the issue of land distribution and the past malpractices in acquisition of land will be central. In the 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 will suffice.

We end by returning to the quote of Murat Belge 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 the creating the state and create the nation.

³³ We are of course aware that a politics of sub ethnicity and clan may be or become quite dynamic.

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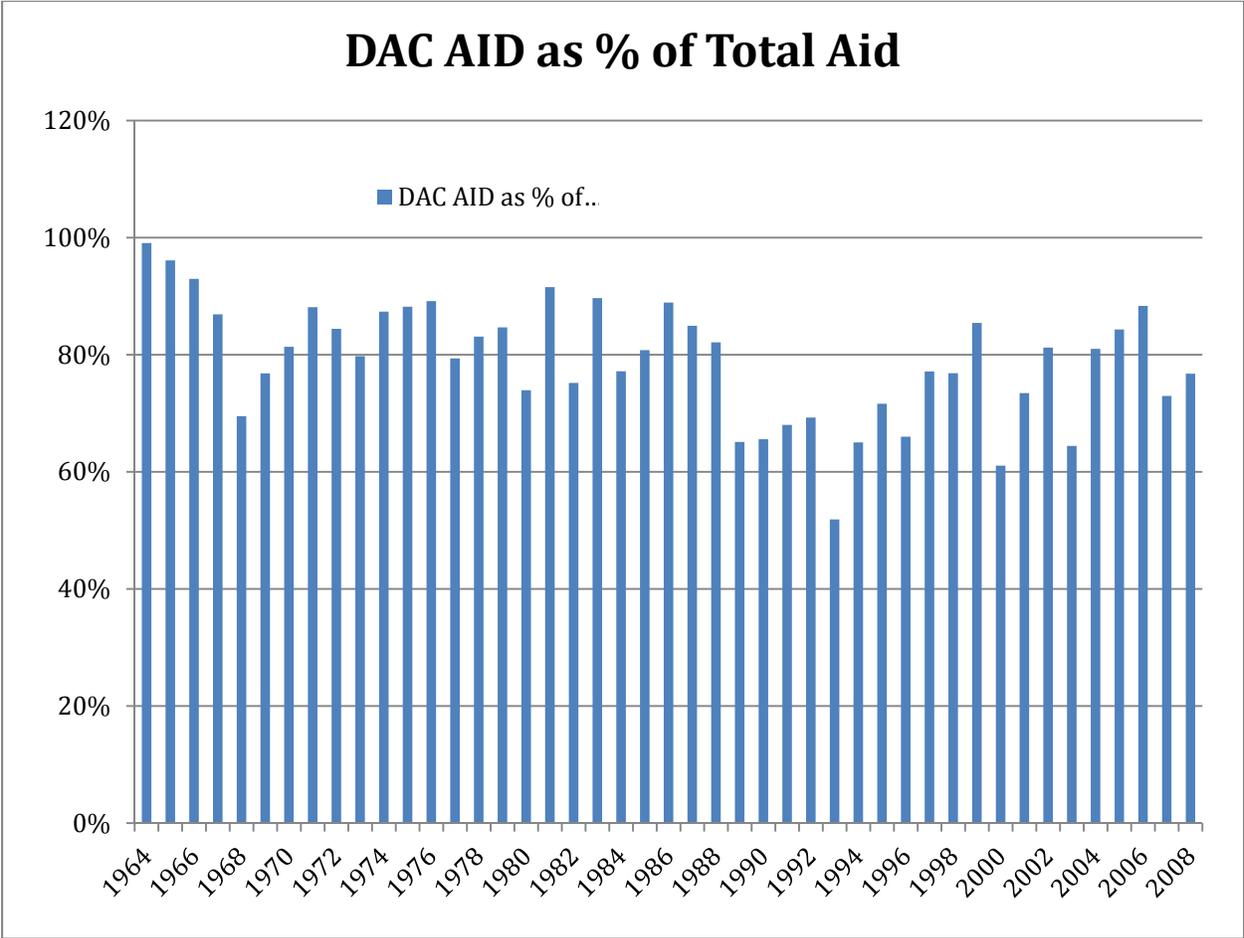
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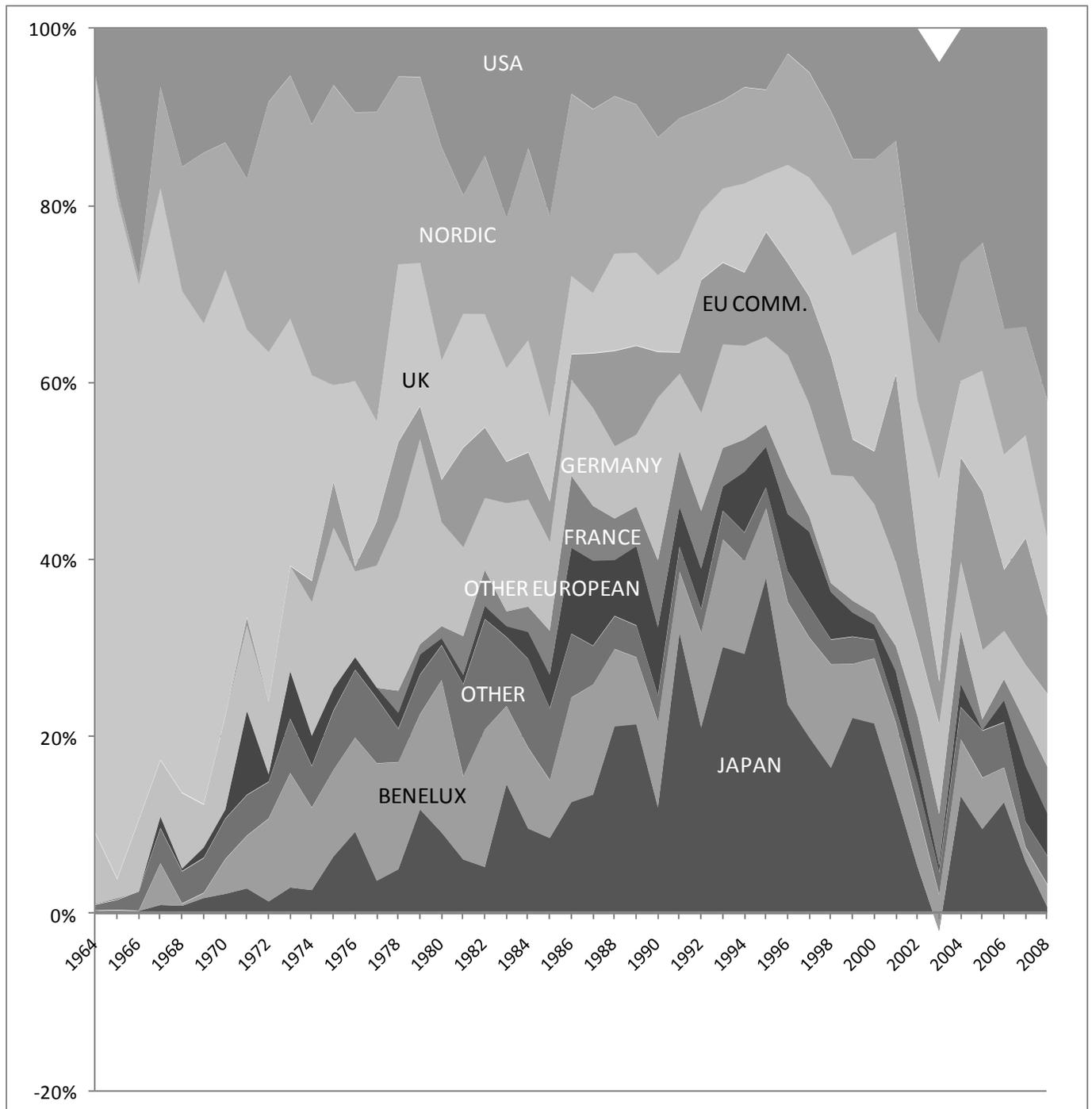
Appendix Charts and Figures

Appendix Chart 1



Source: World Development Indicators Database, World Bank

Appendix Chart 2: Shares of AID for all DAC Countries 1964-2008



Source: World Development Indicators Database, World Bank

KEY: OTHER EUROPEAN : Italy, Greece, Austria, Ireland, Spain, Portugal, Switzerland

OTHER: New Zealand, Korea, Australia and Canada