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CIVIL SOCIETY'S INFLUENCE ON THE INTERNATIONAL TRADE REGIME: IMPLICATIONS FOR AFRICAN COUNTRIES

Jude Kongyu Tah

Abstract

The last decades have witnessed an increasing participation of civil society organisations in different areas of global governance. The international trade regime under the WTO has over the years been criticised as being unfavourable to the developing countries and has thus witnessed a significant interest from the part of the NGOs. This article examines how NGOs attempt to influence policies formation within the international trade regime and what implications they have on Africa. The article identifies and discusses the different strategies employed by these NGOs and carves out how they have shaped and strengthened Africa's participation in international trade politics, as well as how they contributed to the introduction of the key issue of sustainable development within the discourse of international trade. The article concludes by pointing out that African states should view NGOs as important support partners and not as equally powerful or more powerful actors.

INTRODUCTION

In the last decades of the post Second World War, the international trade regime has been characterised by multilateral attempts of cooperation. An international trade regime can be largely non-cooperative, or it can be characterized by significant efforts of international cooperation (Staiger, R.W 2004). International trade agreements have been the out-put of trade cooperation. Institutionally, the GATT (The General Agreement on Trade and Tariffs) and then the WTO (The World Trade Organization) have constituted the institutional framework for the international trade regime. The birth of the WTO from the ashes of the GATT reflected and reinforced an important structural shift, in the face of large-scale globalization, from statist to post-sovereign governance (Scholte & al 1998).

The recent years have witnessed a transformation from state-centrism to a new form of global governance with multiple other actors besides states. Governance has become spread across different levels from sub-state – i.e. municipal and provincial - to state, and to supra-state ones such as regional and trans-world institutions, private organizations such as credit-rating agencies and foundations, as well as civil society organisations. (Scholte & al 1998). This type of governance has challenged significantly the traditional Westphalian conceptualisation of world politics. But it would be too much to say that it has broken or shattered state-centrism. Nonetheless, the unprecedented globalisation in

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trade, environment, communications and other areas has challenged *sovereign* statehood. As such, regulators have devised numerous sub-state, supra-state and private-sector mechanisms to supplement or even, in some respects, to supersede the rule of states (Hart, M 1997). International constitutions of global governance are therefore faced with the challenge of this decentralized governance. It is at this juncture that the global governance of trade gains precedence.

The WTO's realm of influence has expanded considerably over the years to include not just the international trade of goods and products but also services, intellectual property, competition policies, foreign direct investments, environmental questions, etc. The WTO as a constitution for the international trade regime is an instance of super-state governance, yet over the years the civil society has become engaged more than ever before in the governance of global trade. Probably its expanded influence on diverse areas, as well as its expanded membership explains civil society's interests in the WTO. This paper is interested in examining the civil society's influence on the international trade regime and its implications on the third world countries, from an African perspective. This issue gains increased importance as the policy issues, policy agencies and policy formulation processes have been highly criticised, especially from a Third World perspective. This paper will examine the participation of civil society in the international trade regime, the influences it exerts and their implications for African countries.

CONCEPTUALISING CIVIL SOCIETY WITHIN THE TRADE REGIME

Civil society's participation in internal governance is embedded in areas such as the environment, human rights, democracy, health, and development. Many international organizations have included NGOs into their decision-making process, even allowing the NGOs to become "part of their international legal personality." (Charnovitz 1997) Civil society here is understood as a group of organisations, which are non-governmental, non-profit making and are more or less formalised. Civil society has over the years shown significant increase in the global trade law and policy formation processes in the WTO. The relationship between the civil society and the WTO can be somewhat traced by looking at how trade rules began to encroach upon non-trade areas (Gray, R 2008), as well as by examining the growth of civil society across the world. As an important influence on the distribution of resources worldwide, the WTO has come to occupy a prominent place on the agenda of numerous civil society organisations (Scholte & al 1998). But then what types of civil society do we find operating within the realm global trade governance? To examine civil society movements within international trade governance as a single entity with shared interest, will be very short-sighted and

inaccurate. The trade regime is of interest to several types of agencies spanning from the business or corporate world, to farmers, women organisations, labour unions, consumer groups, and think tanks. It is therefore important to categorise these different civil society movements in order to show how they pursue different interests and how they impact differently on the international trade regime.

Civil society understood as a more or less formal set of organizations encompasses all those groups that pursue objectives that relate explicitly to reinforcing or altering existent rules, norms and/or deeper social structures (Scholte & al 1998). Civil society represents a plurality of interests and constituencies' institutional structures that make up its cosmopolitanisms in reference to its participation in the WTO. (Charnovitz 2001) A classification of civil society groups within the trade regime could be done in terms of their diverse interests. Some have used a two scale categorisation of "insider"/ "outsider" groups (John Foster, 2008). The insider groups represent those civil society groups that are mainly connected to corporate instances that support the WTO and are engaged in fostering its agenda. The outsider groups are those that are particularly in opposition to the WTO's agenda. Yet, on particular issues some of them represent either the "north" or the "south". Scholte & al (1996) distinguish three types of civil society groups in terms of their approach to the WTO. One group, that can probably be called 'conformers', accepts the established discourses of trade theory and broadly endorses the existing aims and activities of the WTO. A second group, that might be called 'reformers', accepts the need for a global trade regime, but seek to change reigning theories, policies and/or operating procedures. A third category of civic associations, whom we might call 'radicals', seek to reduce the WTO's competences and powers or even to abolish the institution altogether (Scholte & al 1998).

These denominations of civil society organisations involved in the international trade regime underpin the specific power and interest relations. For example, the business and corporate world and western farmer's associations have adopted the conformist approach. This group has often supported WTO in its broader objective of trade liberalisation through lobbying, but has sometimes sought revision of current agreements to foster its commercial interests. Scholte & al (1998) argue that conformists "Speak the same language" as WTO staff and most national officials. According to them, arguments about trade regulation do not go beyond issues concerning the balance between free trade and protectionism and the degree and speed of liberalization. Conformists question the output of existing global trade regimes and not the foundations. As opposed to the first two groups which more or less show some favourable tendencies towards the WTO, the reformist group of civil society organisations, aim to change the thinking, rules and procedures of the WTO (Scholte & al 1998). The reformists are dissatisfied with the current international trade order, its foundations and structure as well as its

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functioning. They express concern and anguish at the exiting trade regimes and its negative impact on development in the South, gender imbalances, environmental concerns, as well as other issues.

This threefold categorization of civil society organisations is particularly interesting to me, especially with a focus on “the reformers” who are mainly represented by the NGOs. These groups have been trying to change the face of international trade to a more human and environmental friendly one. If one considers that most of the negative effects of trade policies to date affect primarily the people in the South, then the impact of these civil society organisations will not just trickle down to the people of the South but also support and strengthen the governments of the South at negotiation rounds. With this in mind, it is important to first disentangle how and to what extent the civil society has managed to become involved in the international trade regime under the WTO.

CIVIL SOCIETY AND THE WTO: ORIGINS AND STATUS

Tracing down the origins of civil society organisation’s participation in the global trade regime under the WTO goes back to the establishment of the WTO. As a matter of fact, the agreement establishing the World Trade Organisation states that “The General Council may make appropriate agreements for consultations and cooperation with non-governmental organisations concerned with matters related to the WTO.” (Article V, paragraph 2) But this in itself offers a very restricted role to civil society organisations - they were to be contacted only if need be, with the rights to consultation remaining solely with the WTO. However, in July 1996 the WTO General Council adopted the Guidelines on Arrangements of Relations with Non-Governmental Organisations. This document intimates the enhancement of transparency within policy formation processes at the WTO and promotes a direct contact with NGOs as a mean *par excellence* to promote accuracy and richness of the public debate (WTO 1994). The 1996 Guidelines still left much to be desired, as it specified that it would not be possible for NGOs to directly participate in the work of the WTO and its meetings. (WTO 1994) This shows how the NGOs limited operations within the WTO were established, even though NGOs were allowed to participate at ministerial meetings which were held at least once every two years. (WTO 2009)

The above-mentioned institutionalisation of civil society organisations within the WTO might not be exhaustive, but it puts into perspective the early relationship between the CSOs and the WTO. Civil society organisations were taken into consideration during the establishment of the WTO, but they have enjoyed very little leverages due to the very limited and restricted role they were assigned. However, as

the saying goes - power is not given, it should be fought for - and that is exactly what civil society organisations struggled to achieve.

The NGOs raised concerns about the implications of local development promoted by international negotiations at the Uruguay round of the World Trade Organization, in an effort to establish themselves. (WTO - 1995) Later on in 1997, they aborted the Multilateral Agreement on Investment (MAI – 1997/8). (Malby 2006) and this led to the turning point of this issue and its manifestation during the WTO Ministerial Meeting in Seattle, December 1999. The protest of the NGOs caught the eyes of the media and the attention of the policy-makers. Malby (2006) intimates that Seattle now symbolises the revolt of developing countries and civil society organisations against the negative consequences of globalisation in general and of global governance in trade in particular. Seattle was thus the first major victory of civil society organisations against the WTO and set an unprecedented trend or interest into the redefinition of the global trade regime. It became obvious that the bi-polar power structure between large transnational corporations and powerful nation states within the WTO could not remain unchallenged. It is however not the aim of this paper to describe all the different instances in which civil society organisations have stood its ground against the global trend regime, but, instead, it attempts to show the different ways in which the NGOs have used to influence the world trade regime.

NGOs INFLUENCE ON THE WORLD TRADE REGIME: HOW AND WHAT?

The basic tenets of NGOs' participation in the WTO rely on the assumed importance of NGOs' attempts to influence the policy outcomes and processes and to offer an alternative way of thinking within the WTO. NGOs' participation in the WTO has influenced the international trade regime in many ways and to various extents. This section focuses on how this has been done and on the exact influences the NGOs have had on the WTO. In order to do this the problem is divided into several aspects ranging from understanding the type of participation the NGOs have had to the presentation of the different methods and strategies they have employed in achieving their ends. For this purpose, the paper also presents the aims of the NGOs' participation in the international trade regime and an evaluation of their current status of achievement. Some of the NGOs' influences are direct influences and some are indirect influences. Direct influences refer to those NGOs' attempts to influence policy outcome directly and indirect influence refer to NGOs' attempts to influence policies via influencing processes and via introduction of issues like environment and gender in trade negotiations.

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The first part of this section examines the different ways and processes that the NGOs have employed in order to influence the international trade regime under the WTO. The NGOs employ various influencing strategies amongst which worth mentioning are lobbying, advocacy, promotion and mobilizing public pressure. (Arts & al 2003) These different strategies are sometimes problem-oriented and time-specific and they are therefore specifically chosen for concrete times and for specific problems. However, most of the strategies cut across different specificities and for this reason this section approaches them from a holistic perspective.

Lobbying and advocacy

This is a very common strategy used by NGOs in a bid to influence decision making and policy outcomes within the WTO. Lobbying here points to a more informal way of approaching policy-making. (Malby 2006) The NGOs meet with policy-makers and try to win support for their positions. Lobbying is more or less individual and requires a high level of social capital from the NGOs, as policy-makers are usually approached on the terms of already established personal relations. Lobbying is therefore an important tool for influencing policies, as it brings the NGOs closer to the policy-makers. Advocacy refers to a more formal process whereby NGOs advocate their views within a formal political setting, such as official meetings. But with the limited access to formal processes of decision-making within the WTO, NGOs have most often resorted to the use alternative formal settings to advocate on different issues. As a mean to promote positions and disseminate information, NGOs write and publish press releases, research findings, position papers, etc. In this way, they hope to reach a wider segment of the population and not only the policy-makers. These actions are hoped to steer the debate within public spheres, which, in turn, could summon public pressure.

Mobilisation of public pressure

The NGOs have used unconventional means to influence policy outcomes and to set agenda regarding trade governance. Such strategies involved the mobilisation of the public to protest against “bad” policies or to set agendas for consideration to policy-makers. The public mobilisation is done through public education, communication and campaigns. The NGOs hold meetings, rallies and produce material for general public consumption. They are formulated in a very simple language and they usually show with limited but clear figures the negative effects of policies and the need for an alternative approach. This strategy is being employed by NGOs in all global trade meetings. One could for example find groups of protesters with banners against existing trade policies. A glaring example of the use of this strategy and its effectiveness is the Seattle ministerial meeting in 1994, but there are

many other successful examples of public protests and mobilization. However, it is difficult to evaluate or to show the extent to which this strategy has had an impact on policy outcomes, but this strategy works nonetheless, as it captures the attention of the media. It is via media that it penetrates the wider population and it increases political awareness.

Research

Knowledge is one important tool that the NGOs use in their attempt to influence international trade policy. NGOs sponsor research and then their findings are later disseminated as means to garner support. However, the quality of the research conditions the ability to influence policy outcomes. Malby (2009) intimates that research must provide policymakers with facts, figures and technical analysis, as well as present viable solutions to real policy problems. He suggests the criteria of a good research that could influence policy should be 1) timely in its analysis, 2) nonpartisan in tone, 3) inclusive of all points of view, especially Southern perspectives, 4) constructive, 5) accurate and based on evidence of the effect policies will have on people and communities, and 6) focused on current topics of negotiation. According to him, a good research must take into account the political context and the external influences that impact the issue and the players involved.

Capacity building

The NGOs have had over the years an increased participation in the WTO in Geneva. A good example is the WTO initiation of the Symposia - a broad-based forum where the NGOs are consulted on specific issues that are of interest to the NGOs, such as the environment and sustainable development. The “Day-to-day Contact” is another example of such initiative and it plays the role of an information bridge between the NGOs and the WTO, at the WTO Secretariat. Along the same lines of initiatives, one should also mention the “New Initiative” from 1998 which permits the WTO Secretariat to provide regular briefings to the NGOs and to establish a special NGO Section on the WTO’s web site. This section is to provide specific information for civil society, such as announcements of registration deadlines for ministerial meetings and symposia. In addition, a monthly list of NGOs’ position papers received by the Secretariat is to be compiled and circulated among the Members (WTO 2009).

All these initiatives are meant to provide information and initiate discussions between the WTO and the NGOs. However, capacity building reflects not just the informative dialogue between the WTO and the NGOs, but also the NGOs initiative in passing on vital information to delegates and policy-makers of the South. Through its research findings, the NGOs often meet with the policy-makers from the South in order to provide sufficient, consistent and applicable technical knowledge and support to them on

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specific policy issues during negotiations. (Alavi 2007) The main argument of capacity building as an ingredient in influencing policy lies in the idea that the more access to information the NGOs have, the better they can influence policies. This extends to the capacity building of negotiators from the South through knowledge nourishment from the NGOs. But what are the end products of all these strategies? In other words, what have the NGOs achieved in concrete terms within the framework of the international trade regime?

Democratisation of the WTO

Some authors claim that the civil society's participation in international governance has been the key to democratic governance. (Bichsel 1996, Esty 2002) This has been the case with the governance of international trade under the WTO. One of the most important results of NGOs' participation in the WTO has been the achievement of some form of democratisation of the WTO. The democratisation of the international trade governance is located at the level of processes, for example, in bringing global governance to public scrutiny. This has been done by introducing and channelling political debates from the local level to the global spheres, as well as by putting on scrutiny political choices to the global audience. This is an important aspect of democratisation of policy formation processes, as a form of *de facto* deliberative democracy is introduced. As an outcome, all stakeholders have the possibility to participate even though the extent their participation influences policy outcome remains unclear.

The NGOs often provide counter arguments and alternative thinking during policy-making. This enriches the public debate as the NGOs disseminate their arguments and perspectives to the grassroots. What is important to note here about democratisation of the international trade regime is the issue of increased participation – the citizens are provided with the opportunity to be involved and share opinions on issues through NGOs within the global decision making set-up. Furthermore, it could be said that some form of global public sphere has been developed due to the NGOs participation (Steffek, J & Ulrike, 2005). Another important aspect of democratisation of the trade regime is that of legitimacy - a global public sphere enables the expression of a myriad of opinions and arguments on trade issues, thereby allocating more legitimacy to the trade regime. One could therefore conclude the democratising role of the NGOs has to do with the introduction of some form of public deliberation. This is rendered possible by the NGOs ability to access and disseminate information, to encourage transparency in policy formation processes and finally to attempt a more inclusive debate that allows all stake holders from local to global to have a say.

Introduction of new related topics related to trade

Another important contribution by NGOs and the civil society into the agenda and considerations of policy-makers during deliberations on policies is the implication of trade on other related areas of human concern like the environment, gender, and public health. The initial trade regimes were not particularly friendly to these issues and the Third world countries, which had very limited and weak institutional support, often felt the negative implications of trade regimes on these areas. But with the NGOs keeping an open eye on these issues some improvements have been registered. A good example is the formation in 1999 of a coalition that includes MSF, Oxfam International, Consumers International, ActionAid International, Third World Network, Health Action International, and many others. This coalition came into being because WTO's rules regarding intellectual property rights (patents) were perceived by developing countries and by the NGOs as major impediments to developing country access to medicines, and to deal with grave health crises. The members of the Coalition produced research and advocacy materials, and mobilized a global campaign. The pressure from developing countries and NGOs was so strong during the Doha meeting of the WTO ministers in November 2001 that the meeting was obliged to issue a statement affirming that "the TRIPS Agreement does not and should not prevent members from taking measures to protect public health". This happened after a global campaign of the NGOs had forced 39 pharmaceutical companies to withdraw a suit against South Africa for passing a law allowing the importation of cheaper drugs from other countries in order to address its HIV/AIDS crisis. This also led the US to withdraw a complaint at the WTO against Brazil for similar legislation. (Malby 2009) As concerning the environment, the NGOs insist on environmental assessment of trade regimes. As Gray, K (2008) says environmental NGOs (ENGOs) serve as examples of civil society actors that have been at the forefront of non-trade movements challenging the international trading system. Some authors claimed that the WTO has usurped the necessary policy areas from national legislature, particularly those related to the environment. (Schaffer 2000) Others go even further and say that the liberal nature of international trade promotes production for export rather than home consumption. This in turn promotes unsustainable levels of natural resources exploitation. (See Scholte & al 1998)

Some NGOs argue that trade regimes should take into consideration their possible effects on the environment. This issue has led to a good number of conflicts between environmental NGOs and trade regimes. A good example of such conflict is the Tuna-Dolphin dispute which summoned the international environmental community into reacting. There have also been attempts to bring awareness

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of gender issues within the WTO. Some NGOs expressed concerns that the global trade regime, like the modern economy in general, contains structural biases against women. (Joekes, S and Weston, A1996) Some feminist movements called *inter alia* for gender assessments of the WTO rules aim to raise awareness of gender issues in the WTO's trade policy reviews. (Women Working World 1997)

These are briefly some of the ways the NGOs have influenced the trade regime. Some of the influences have been more direct, such as the introduction of an alternative thinking around trade policy formation processes to take into consideration other important issues related to trade like, the environment and gender. Some have been more indirect, such as capacity building. Nonetheless, all these influences have had certain implications for the weaker nations within the trade regimes, even though it is difficult to assess the actual extent of success.

WHAT ARE THE IMPLICATIONS FOR AFRICA?

We have seen in a nutshell how the NGOs impact on the trade regime under the WTO, but what does this mean for Third World countries, especially for African countries? This section briefly examines the implications for Africa of the NGOs' influence on the international trade regime. One should note that there is no single African front at the WTO and that African countries follow different agendas. However, there are different groups within which African countries participate and they are clustered around different interests. In spite of this, it is possible to consider Africa as a whole because the implications of the NGOs participation in world trade are located in the broader perspective of sustainable development, which is a matter of concern for each and every African country.

It is no secret that African countries are generally dissatisfied with the current international trade regime. (Draper, P and Khumalo, N 2006) Mshomba (2008) intimates that some elements of the WTO make African countries guarded or even resentful towards its policies. Pressure, political manoeuvring, and, at times, paternalism from the part of the developed countries towards African countries seem to be salient features of the WTO, yet the NGOs' influence is a source of rebalancing the system. (Draper, P and Khumalo, N) 41 African countries have currently full membership status in the WTO, while 9 have observers' status. It is only Somalia and Eritrea that do not participate in any way. (Mshomba R. 2008) One could wonder why Africa feels marginalised taken into consideration this massive participation and the voting principles within the WTO. Why isn't this sufficient to secure key policy changes? Whatever the answer may be, African countries have found a new partnership with NGOs to strengthen their positions as well as to summon potential bargaining power when needed.

Partnership for change

The first implication of the NGOs' participation in the international trade regime is that Africa has a partner for change. Over the last few years, African countries have formed a strong partnership with the NGOs in order to influence policies formation or to change existing structures, which were highly unfavourable to its sustainable development. There is a number of examples that attest this partnership and its effectiveness. For example, the WWF's pivotal role in getting the fisheries subsidies issue on the negotiating agenda, recruiting numerous countries representing a variety of levels of economic development. Similarly, the efforts of Oxfam International could be seen as providing the necessary stimulus for West African countries to call for a sector specific solution to the problems of agricultural subsidies that their cotton farmers face in the international marketplace. Finally, the successful campaigns of securing greater access to medicines under the compulsory licensing provisions of the *TRIPs Agreement* is a product primarily of a partnership between northern NGOs and the developing countries. (Gray K 2008) A glaring example of NGOs' intervention in global trade is the case of the cotton subsidy dispute around the "cotton 4" states - Burkina Faso, Benin, Mali and Chad. In this case, four main NGOs - the Oxfam, ENDA Tiers Monde, ICTSD, and IDEAS - joined forces in negotiating with the US to erase the massive cotton subsidies for farmers. (Ibid) Another example is the partnership between the G-33; a coalition of 33 African countries and the International Center for Trade and Sustainable Development (ICTSD) currently pushing the WTO to accept the concepts of Special Products (SPs) and a Special Safeguard Mechanism (SSM) that seek to protect food and livelihood securities which are trampled upon under the existing agricultural regime. (Malby 2009)

These examples illustrate that the partnership between NGOs and African states has an impact on global trade negotiations. Herrick (2006) coins the intervention of NGOs in world trade as "relative power" unlike the "structural power" of the larger states. The "relative power" of NGOs is defined as the ability to constrain or affect the actions of other actors. Herrick explains further that the effects of the relative power of well funded, "powerful" NGOs could be seen in their partnerships that do not always require consent and in their objectives that are not achieved in a democratic way. Such power can also be demonstrated by these actors through "speaking for a community" – actions that sometimes exclude important social groups. (Ibid) In this light, African countries could use the relative power of NGOs to strengthen their political bargaining power during trade negotiations. Considering the immense "structural power" of the larger nations in the WTO, the relative power of the NGOs in combination with the African states can be a balancing force at the WTO. However, the question remains - Is this an equal balance of power? This is an issue to be examined in further research, but for the time being we aim to delve deeper into the nature of this partnership.

Capacity building and public support

Another way in which African countries are impacted upon by NGOs is through dissemination of information and the participation of the wider public. As explained above, the NGOs are knowledge brokers when it comes to attempting to influence trade policies. Through research publications, NGOs disseminate important information regarding different policies and the consequences they might have. This creates a knowledge base from which African countries can tap from to support their positions during trade negotiations. As knowledge brokers, the NGOs share technical knowledge, expertise and resources with States in specific domains. This is a very important capacity building for African countries, as they often do not have the resources to carry-out this very specific research in order to discredit others positions or to strengthened their own stances. The dissemination of knowledge by NGOs has unequivocally led to the creation of a strong public sphere and of an opinion base vis-à-vis trade issues. Herrick (2006) calls this group of NGOs “public opinion shapers” and she defines it as an organization or actor that uses information campaigns, strategic positioning, media communications and indirect or direct lobbying to attempt to sway public opinion and State opinions in a specific subject area. These NGOs transmit the information to the wider society and thereby they create a strong public opinion which tends to influence States positions. In African countries, it is important to mobilise the public opinion which more often than not is not even aware of the issues at stake. By so doing and by creating a favourable public opinion, the African states will in time feel the backing of the population in its fight and the desire to strongly defend its position as it has a massive grassroots support base. It could therefore be said that, NGOs dissemination of information works as a resource base for African countries to draw from and to support their positions. By shaping public opinion, the NGOs provide good grassroots support base for the African countries, especially when the public opinion is in line with the position of the State. This results to African countries going into trade negotiations with more adequate knowledge and a stronger support at home. This, in turn, builds confidence in presenting and defending their positions.

Trade and sustainable development

Another important implication of the NGOs’ participation in the international trade regime has been the introduction of issues central to sustainable development. Scholte & all (1998) write that WTO’s rules severely restrict the autonomy in trade policy of weak states in the South. Therefore, the civic groups were worried that the Uruguay Round and subsequent accords might well compromise further

possibilities for equitable human development. The NGOs try to push forward a trade regime that with a human face that takes into consideration the long-term welfare of mankind and the environment.

According to Williams (1996) some of the most persistent efforts of civil society to reform the WTO have come from environmental NGOs. These NGOs have been active in pushing forward environmental considerations during the formation of trade policies. This is particularly important for African countries as they rely mostly on natural resources as a source of economic development and livelihood. By encouraging production for exports rather than for local consumption, the trade regime is more environmentally damaging and poses an important challenge of sustainability in the long run. Another important aspect that the NGOs have taken up is the fight against the trade of toxic wastes. These wastes usually end up in the back yard of some Third world countries.

A handful of NGOs are seeking to bring gender awareness to the WTO. They argue from a feminist political economy perspective that the current trade regime contains structural biases against women. (Scholte & al 1998) They are calling for an assessment of trade rules so that gender equality could be maintain. This is significant to Africa countries as women form the poorer segments of the population are likely to be those most highly affected by unfavourable trade policies. It is therefore crucial for the fight against poverty that trade policies are gender friendly especially to the Third world women.

It could be said here the NGOs have given more strength towards introducing concepts of sustainable development in international trade. This has a broad impact on African countries which are struggling to achieve sustainable development and that do not need trade policies that negatively affect human development and the environment.

CONCLUSION

It is important to say that this paper is not exhaustive on civil society's participation in international trade governance, but selective to the particular context of Africa and the issue of sustainable development. It therefore does not claim to have exhausted the explanations of how NGOs influence the international trade regime. This paper has tried to show how the civil society represented by the NGOs has emerged and insured their participation in the international trade governance under the WTO and to highlight the effects of this participation to African countries in particular and the Third World at large. The African countries stand out to benefit largely from the participation of NGOs in the international trade governance, since most of these NGOs seek to introduce alternative thinking in the formulation of trade policies based on sustainable development. Through partnership with NGOs, African countries have the opportunity to garner more political strength within the structures of policy

making in the trade regime. African countries understand they have a partner that is watching and is ready to raise an outcry to the global community in case of foul play. African countries through research publications by these NGOs develop their capacity to sustain powerful arguments during negotiations to support their positions and to discard unfavourable policies. Knowledge is the key to powerful arguments and African countries have access to this knowledge through NGOs that function as “knowledge brokers”. This would certainly not have been the case if African countries had to finance the research themselves. Thus, the NGOs participation in the international trade governance is a positive asset for African countries. Nonetheless, it is crucial that African countries take responsibility and work together with these NGOs while being careful not to surrender their power and prerogatives of influence to the NGOs. NGOs should be seen mainly as support structures and not as central pieces. Upon fulfilling and fostering this condition, Africa’s participation in the WTO could be strengthened, its issues would be brought to the limelight for discussion, and trade could at last become an important tool for real sustainable development.

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ABBREVIATIONS

GATT	General Agreement on Trade and Tariffs
WTO	World Trade Organisation
NGO	Non-Governmental organisation
CSO	Civil Society Organisations
MSF	Médecins Sans Frontières
ENGO	Environmental Non-Governmental Organisation
ICTSD	International Centre for Trade and Sustainable Development

The Post-Election Violence in Kenya The Jua Kali and the Policy Failures of the Elites

Yuki Asaka

Abstract

This article investigates the reason behind the violence after the 2007 election in Kenya. Assuming that its neo-liberal policies and incapability of controlling the informal sector led to one of the world's highest cases of inequality, this paper investigates why the Kenyan government has continuously failed in its policies concerning the informal sector, and how ethnic unrest is connected to the issue. This paper analyses Kenyan macro-economic reform and the empowerment approach, which the government has pursued in its informal sector policy. Furthermore, it examines the reasons behind political failures in connection with ethnocentrism, using social capital theories.

INTRODUCTION

KENYA BEFORE AND AFTER THE PRESIDENTIAL ELECTION ON DECEMBER 27TH, 2007

The December 27th, 2007 general and presidential election became a historic event in Kenya and in Africa for the violence that followed, which resulted in the deaths of 1600 people and the displacement of 60,000 people. Kenya enjoyed its position of a leading figure of Africa and, as an outcome, the unrest after its presidential election challenged both national and international society in its understanding of the economic success and the political stability in Kenya. The political stability in Kenya was essential in the 1980s and early 1990s when Kenya was forced to adopt the Structural Adjustment Programme (SAP) in return for receiving development aid from international organizations and from neo-liberal Western nations.¹ Despite two decades of low economic growth, Kenya, with its multi-party democracy, was considered one of the more successful African nations in establishing

¹ Neo-Liberalism promotes free market and democracy through international institutions. It predicts that free market will encourage further economic integration among public and private actors in the economy, and that globalization is a positive force. It is argued that it has even made human rights and values into market commodities. (Baylis and Smith: 2005: ch9)

political stability (Seierup 1994: 5) followed by economic growth, at the beginning of the century. This political stability was achieved through the “relatively strong bureaucratic institutions for policy development and management, providing state leaders with considerable ability to intervene in the market and in society”. (Grindle 1999:13) The central government’s concentration of political power, however, nurtured corruption and the dictatorship of Kenyatta and Moi, the first and the second presidents of the nation, respectively. They secured the power of the presidency through constitutional amendments, which granted the president the power to appoint and to dismiss civil servants, power over issues of public security and justice, and power over election and voting rules². (Ibid. 97-98) In the 80s and 90s, Moi’s regime, “one of the two most corrupt [regimes] in Africa” (N’Diaye 2001:141), faced the economic crisis, which brought about the coup attempt in 1982 and numerous other strikes and demonstrations during that period. However, despite the deepening corruption and instability, “Kenya was touted (particularly in the West) as an example of an African economic success story and a showcase for capitalism”. (Ibid. 2001:136)

The election in 2002 gave a symbolic victory to Mwai Kibaki, who promised to fight against corruption and to establish a fair democracy. However, the issue of corruption remained and still is a critical factor in Kenya. (Kenya Review, 2007:16) The election ended the nearly 40-year leadership of KANU³ and brought the opposition coalition party, NARC,⁴ into power. This was “the most significant political event in the history of Kenya since British colonial rule formally ended in December 1963” (Ndegwa 2003:145). It ended Moi’s 24-year dictatorship, and stood as a lesson for other authoritarian states like Cameroon, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. (Ibid. 145) However, Kibaki’s unfulfilled promises to make comprehensive reforms and to fight against corruption still keep “the

² Kenyatta made 16 amendments, and Moi made 11. For more information, see Grindle, 1999.

³ Kenya African National Union: the party created by former Mau Mau members, mostly from the Kikuyu tribe, with Kenyatta as its leader. The constitutional amendment in June 1982 made Kenya a one party state and operation of opposition parties illegal, which basically made KANU Kenya’s only legal party until 1992. (Kenya review, 2007, p.8)

⁴ NARC (National Rainbow Coalition) is the opposition coalition party against the Moi, led by Mwai Kibaki since 2002.

legacy of the bureaucratic-executive state⁵ [...] intact”. (Branch & Cheeseman 2006:28) Moreover, the Kibaki regime has further extended the tribal monopoly of the Kikuyu within the central government, causing ethnic tensions to spill over and to contribute to the violence following the election of December 27th 2007.

As a consequence of continuing corruption, the World Bank suspended aid and the IMF delayed loans to Kenya in 2006. However, Kenya has achieved an annual 6% growth in GDP since 2002, and the growing middle class has created a hospitable political and economic atmosphere for foreign investors, leading to an increase in foreign import. Kenya’s growth is mainly explained by governmental stability and sufficient infrastructure. More specifically, a stable government obedient to Western demands has been important for both the Western neo-liberalism agenda and for Kenya to achieve economic development – a situation that has ultimately allowed Kenya to serve as a role model to fellow African nations.

In spite of the role-model status that Kenya enjoyed, the violence following the 2007 elections indicates that there were problems lurking beneath the surface of a seemingly successful case of democracy and liberalism. The violence was concentrated in the slums and in the informal sectors of both rural and urban areas, where people did not hesitate to show their anger and frustration against the Kibaki regime and his tribal fellows, the Kikuyu⁶. The major unrest was reported in Eldoret, Riftvalley; Kisumu, West Kenya; and Nairobi. The fact that most of the assailants and victims were both from the slums in Nairobi and part of the rural poor indicates not only a growing inequality, but also a complete division between the poor, which have been marginalized while Kenya achieved economic growth and political stability, and the economic elites.

⁵ Kenya’s bureaucracy has a powerful combination of executives and provincial administration strengthening and legitimating their positions continuously. For more information, see Branch and Cheeseman, 2006.

⁶ Kikuyu is the largest ethnic group in Kenya, which accounts for about 20% of the population. They have been the central actors in the political arena since independence due to their dominant role in the independence movement and to the first president, Kenyatta, who was a Kikuyu.

THE GROWING ECONOMY AND THE ENLARGING GAP BETWEEN THE POOR AND THE RICH

Large parts of the foreign media together with Kenyan political elites were quick to conclude that the reason for the violence was ethnic conflict. They focused on the unfulfilled promises of Kibaki regarding power sharing and on the power monopoly of the Kikuyu tribe in the Cabinet. The media reported on the degree of violence in the slums and informal sectors, but did not mention that the rich middle class was not directly affected by the violence, nor did they focus on the growing disparity between the rich and the poor. Despite this concentration on ethnic cleavages, local Kenyan journalists were able to report the truth behind the violence. They wrote that the Western media:

“failed to see that the main reason for the upheaval was not that one ethnic group wanted to forcibly take over the presidency from another ethnic group, but that Kenyans perceived the elections to be unfair and rigged. More importantly, they failed to realize that the root causes of the violence had more to do with Kenya’s economic and political reality than it did with ethnic chauvinism -- although all three are linked.” (Warah⁷ 2008: 7th paragraph)

Kenya’s economic and political reality is the growing gap between the rich and the poor, burgeoning slums, an unresolved unemployment rate and higher dependency on the informal sector, which has developed alongside the 6% annual economic growth. The liberal policies of Kenya, enforced by the World Bank and by the IMF, created a welcoming environment for foreign direct investment (FDI) and it encouraged the privatisation of state-owned enterprises. For example, Kenya’s Export Processing Zones (EPZs) were established in 1990 with the objective to promote export-oriented industrial investment, job generation, technology transfer, development of backward linkages and diversification of products and market. Government policies were established to offer fiscal, physical and procedural incentives to facilitate investors’ operation, seeking an increase in FDI. (KHRC 2007) Although the performance of EPZs in the 1990s is observed to be rather poor (Mireri 2000:149-150), the government under Kibaki has strengthened its liberal policies by formulating the Private Sector Development Strategy to support the EPZs, small and medium-sized enterprises and entrepreneurs. (KEPSA 2005)

⁷ Rasna Warah, a columnist with Kenya’s Daily Nation newspaper, works as an editor for the United Nations.

Despite Kenya's achievement of 5% annual GDP growth in the period 2004- 2006, the percentage of population living *under* the poverty line increased from 40.3% in 1994 to 45.9% in 2006 and was above 50% during the late 1990s (KNBS statistics). Although the percentage of absolute poverty had lessened by 2006 in comparison to the late 1990s, the number of the population living in poverty had not decreased. As a consequence, the number of slums and their attendant populations had in fact increased. The growing number of slums is one among many of the negative consequences of the neo-liberal policies Kenya has been following. These policies have resulted in a growing informal sector and a growing population of impoverished citizens. The slums - especially Kibera⁸ and Mathare - the two largest slums in Nairobi, became the main battlefields of the violence following the 2007 election. The unrest could be understood as a reflection of the anger and frustration of people who were forced to cope with inequality, which, seen from a neo-liberal perspective, is "the inevitable *short-term* effect of the market-led growth process." (Petras and Veltmeyer 2002: 21) How long the neo-liberalists assume the *short-term* to last is however unclear and the 40-year existence of the informal sector in Kenya, largely based in the slums, should not be dissimulated as a *short-term* effect behind Kenya's economic growth. Since independence, the Kenyan government has been conscious of the informal sector and has tried to reduce its size together with foreign aid assistance. However, it has consistently failed to control the growing slums and informal sectors, which has also meant growing poverty and inequality. Bearing in mind that both inequality and ethnic rivalry played a role in the post-election violence, this article investigates why the government has continuously failed in its policies concerning the informal sector, and how this is connected to ethnic unrest. By investigating these problems, this paper explains some of the reasons of the post-election violence.

⁸ Kibera is the biggest slum in Nairobi with a population estimated between 600,000 and 1.2 million (the population of Nairobi is about 3 million).

INEQUALITY, REPRESENTATIVE DEMOCRACY AND NEO-LIBERALISM IN KENYA

Entangled in a dependent relationship with foreign donors, Kenya followed the neo-liberal policies prescribed by the World Bank, the IMF, and the WTO, including structural adjustment programmes. The principles of neo-liberal economics fall under the concept of neo-liberal capitalism, which promulgates the modernization theory of development—that economic growth will solve poverty, and help to achieve electoral representative democracy.

This paper assumes that the largest flaw of neo-liberal capitalism is “the inevitable *short-term* effect” of inequality and class division, which can also be observed in Kenyan capitalism, which was established by the British during the colonial period. Indeed, Western capitalist nations ensured that their capitalist system would survive before the postcolonial period began, in order to maintain and increase their status as the centres of global political-economy. (Sennet 2006, Robotham 2005, Robbins 2005, Petras and Veltmeyer 2002) Under neo-liberal auspices, the global and national class divisions are

“largely and increasingly polarized; peasants and workers are exploited as never before; the number of impoverished grows; and above all, directing the process, is an omnipresent, arrogant and intrusive Euro-American empire with incredible resources but few saving graces of virtues.” (Petras and Veltmeyer 2002:163)

From this perspective, the marginalized in Kenyan capitalism suffer from both global and national inequality. Inequality is a crucial issue both nationally and globally because it “leads to discrimination and exclusion, thereby becoming not only a matter of social injustice, but also a matter of human rights and governance.” (SID 2004:iii) Furthermore, although the argument is still controversial,

“There is growing evidence now that greater equity is associated with faster economic growth. It is now widely believed that lower inequality can create faster growth (...) What matters for poverty reduction is not the rate of growth but the distribution corrected rate of growth.” (Ibid. 4)

This paper does not analyse the relationship between inequality and economic growth; however, it acknowledges a relationship between the two and believes the assumption regarding inequality as one of the worst vices of neo-liberal capitalism. Furthermore, it signals how the growing inequality leads to unstable governance and a rise in the crime rate, factors which disturb the social and economic

development of a nation. In this sense, “it is significant that the top three most unequal countries are from Africa; two of which have been involved in social and political conflicts [Sierra Leone and the Central African Republic].” (ibid. 7)

This paper briefly analyses why representative electoral election is a key issue in neo-liberalism and why its failure could lead to instability. This highlights the importance of the 2007 election in Kenya for both the elites and the marginalized. Considering that SAP demanded democracy and human rights in return for foreign aid, the paper argues that representative electoral democracy is a strategic ideology for neo-liberal capitalism to legitimate inequity and class-biased processes, especially in the developing and underdeveloped countries. Western countries are excluded from this understanding of the relationship between democracy and neo-liberal capitalism because they have been the promoters of democracy and have achieved democracy from within, compared to developing countries where democracy has been imposed from the outside. Fair electoral democracy is indispensable for neo-liberal capitalism because the notion of “democracy” itself infers the fulfilment of human rights. Thus, even if a nation does not protect and promote human rights, simply declaring itself to be a “democratic” nation, or, more specifically, maintaining the image of electoral democracy ensures that people/citizens believe their human rights are secure. As the UNDP claims, “democracy builds the institutions needed for the fulfilment of human rights.” (UNDP 2000:59) It is important to note that although there are many types of democracy, it is hoped that democracy as an ideology overall promotes human rights and that therefore the word ‘democracy’ contains hope for development and the fulfilment of human rights.

However, there are nations that underwent changes of regime during the wave of democratisation in the 1980s-1990s, as a reaction to both the end of the Soviet Union and SAP. In most of these nations, democratisation did not occur from within, but was a result of international pressure. Hence, these countries have the trappings of democracy, usually in the form of elections, but cannot be said to fully fulfil basic democratic qualifications—in the sense of majority rule or people’s participation. Yet the Western neo-liberalists are eager to acknowledge the *form* of democracy in developing nations, which blinds people to the negative consequences of neo-liberal capitalism. Indeed, Kenya falls into this category: embracing a form of electoral democracy, but maintaining a *de facto* authoritarian regime functioning in favour of certain tribal and elite interests.

Furthermore, the conditionality of democracy gave political elites legitimacy because the mere ability to receive loans implicitly meant approval for being on the right track to democracy. Van de Walle (1997:32) points this out clearly:

“We can expect that political leaders [in Africa] will adapt to changing international circumstances by seeking new methods for obtaining or retaining power. In an international context where liberal ideas are hegemonic, all political leaders – regardless of their true beliefs and objectives- will attempt to cloak themselves in the legitimating mantle of democracy and make themselves available as candidates for elected office.”

Consequently, a *form* of democracy—of which electoral democracy has been the most commonly implemented—was needed by both neo-liberal capitalism, to veil its responsibility for widening inequality, and by political leaders, to legitimize their regimes. Nonetheless, this charade works only when political leaders are capable of convincing their nation that they are carrying out fair elections. Because Kenya failed to do so in 2007, violence broke out immediately following the electoral process.

Adopting this view, this paper assumes that the violence in Kenya would not have occurred had the neo-liberal capitalist mechanism favoured a fair and transparent electoral representative democracy—as it does in most Western countries. In other words, the lack of fair and transparent electoral representative democracy revealed the vices of the liberal economy and of the political elites. Thus, the violence following the presidential election in Kenya is not a case unique to that country alone, but may occur in any neo-liberal capitalist country led by corrupt political elites, where a fair and transparent electoral system is yet to be established. This includes countries like Egypt, Uganda, and Malawi. The question is: why did the violence flare up in Kenya at this particular time, especially as electoral fraud is nothing new for the Kenyan government?

In the last section of analysis, this paper applies two concepts of social capital in order to address this question: first, social capital as network and civic participation, as articulated by Putnam, and second, social capital as trust, as formulated by Fukuyama. This analysis explains the irrelevance of these concepts to the case of Kenyan development and concludes that the complex (dis)connection between the elite and the informal sector, which can be captured via social capital theory, is the reason for political failure, while simultaneously ensuring the continuity of a corrupt regime.

CONCEPTUAL CLARIFICATION: THE INFORMAL SECTOR, JUA KALI AND THE SLUMS

In this paper, the term ‘informal sector’ is used interchangeably with the word ‘slum’ and ‘Jua Kali’. It does not distinguish the different activities within the informal sector because the focus of this paper is not concerned with micro-level issues, such as “different demands in the nature and level of skill requirements”, or different income opportunities and state regulation and control. (Barasa & Kaabwe 2001:332) Therefore, differentiating the multiple activities in the Kenyan informal sector is not appropriate for this paper and the criticism such as “studies which draw generalizations about the informal sector, without contextualizing the activities in question, may end up concealing more than they reveal” (ibid. 332) would be inappropriate. The main focus of this paper is to understand the relationship between the political failure of the central government in remedying the growing informal sector and the violence following the election; therefore, it does not delve further into the plurality of activities in Kenya’s informal sector, such as:

shoe-making and repair; street hawking; tailoring; hair-caring (salons); traditional medicines and healing; matatu (taxi) businesses; textile trading, especially second-hand clothes dealers; grocery and food kiosks; and skilled occupational activities such as carpentry, motor mechanics, electrical/electronics and masonry, among others (ibid. 2001:332).

The term ‘Jua Kali’ was accepted and re-discovered by the Kenyan government in the *Development Plan 1989-1993*, in 1988. (King 1996:14) It originally “refer[ed] to hard work done predominantly by male blacksmiths and metalworkers out of doors, in the open air,” (ibid. 24) as derived from its meaning of “hot sun” in Swahili. However, “the term broadened to stand not just for a particular form of micro-enterprise, but for a Kenyan/African version of capital accumulation to be contrasted with that of the multinationals or Kenyan/Asians”. (Ibid. 24-25) The term was then used interchangeably with the term ‘informal sector’ by international organizations and NGOs to distinguish it from the private and the public sectors. The term also includes small and medium size enterprises (SMEs) as well as the self-employed in development policy dialogue—which is not necessarily informal in terms of legal status. However, the “high-level policy makers in Kenya regard self-employment, Jua Kali and micro-enterprises as ‘manifestations of underdevelopment, and not as a sector to which Kenya’s future is inextricably linked”. (Ibid. 41) The Kenyan government considers these economic actors to collectively constitute an isolated sector that remains “much more part of the fragmented world of self-help (*harambee*) than they are of any partnership with government, with the formal private sector or with other sections of a self-confident micro-enterprise constituency.” (King 1996:203) Therefore this paper uses the term Jua Kali interchangeably with the term informal sector.

By understanding the causes behind the violence following the 2007 election, this paper hopes to cast Kenya as an example of countries facing large inequalities, which only offer an illusion of democracy. This paper does not seek to justify fair and transparent electoral democracy as a virtue *per se*, because it could serve modern capitalism to conceal class division and inequality. However, as already discussed above, the paper recognizes democracy as one of the possibilities towards achieving human rights. The following section analyses the reasons why Kenya failed in its policies towards the informal sector followed by a discussion of the role of ethnicity in political development.

The Macro-Economic Approach to Reform the Jua Kali Sector

King (1996: xiv), the leading scholar on the Jua Kali, has argued that the concept of ‘informal sector’ “was originally developed in 1972 as part of recommendations of a World Employment Programme mission” in Kenya. This report was significant because the ILO “recognized that the informal sector was here to stay and to expand, whatever policies the government did or did not adopt.” It further acknowledged that “[the informal sector] also was the provider of employment, goods and services for lower-income groups, for which there was no alternative source of supply.” (ibid. 112) As predicted, the informal sector in Kenya remains a powerful economic sector despite governmental intervention and NGO’s projects targeted on this sector. The activities of the informal sector are diverse, but a limitation in size, resources and education/traineeship restricted their activities to certain types of businesses (King 1977, 1996) which left the sector highly competitive despite low income and scarce resources. Although the growth of the informal sector was prominent only after the economic stagnation in the 1980s (Grindle 1999:7), it has been a national policy issue since 1972, when the ILO published its research paper concerning the informal sector in Kenya. The government policies aimed at addressing the Jua Kali sector could be split into three policy phases: negative intrusion, passive indifference, and positive intervention (Barasa & Kaabwe 2001:334).

Despite the ILO recommendation to simplify the trade licensing system to build “much closer ties between formal and informal sector through subcontracting,” the Kenyan government maintained its negative intrusion and passive indifference policies during the 1970s. This was no longer possible after the economic stagnation in the 1980s, when the number of slums increased and the poverty grew. Following the growth of the informal sector during this period, the government’s *Development Plan 1989-1993*, gave special attention to the informal sector, where it first introduced the term ‘Jua Kali’ in the official documents. (ibid. 334-5) In the plan, “the relative neglect of the Jua Kali sector that had prevailed over time was acknowledged; the enormous potential contribution of the sector to job

creation and income distribution was affirmed; and [outlined] specific policies for its growth and development.” (ibid. 334-5)

This Development Plan was written in collaboration with the ILO and the UNDP for a project on entrepreneurship, which began in 1987. The collaboration was:

“broadened, in 1989, into a small enterprise development policy project, and was organized in a highly participatory manner, involving all the relevant ministries, the aid agencies, representatives of industry and commerce, and with targeted seminars and workshops focused on small-scale exporters, the banking sector, NGOs and many other interested parties.” (King 1996:15)

The results of this collaboration were introduced into the official plan in 1988 and in three volumes of a strategy paper having the common title ‘Small Enterprise Development in Kenya’. (Ibid. 15) As research back in 1986 had already concluded, “macro-economic policies aimed at the economy as a whole, such as the strategy to raise farm productivity and income, lower tariffs and encourage the substitution of labour for machinery” stimulated the informal sector and encouraged the growth of small enterprises. (Ibid. 1996:14) The reform, once implemented, following the strategy papers in 1989, had a “positive impact on the informal sector”. (Ibid. 17) The reform consisted of “import liberalization, relaxation of price controls, (and) the deregulation of interest rates.” (Ibid. 17-18) Despite the fact that the donors that had committed to the reform, such as the ILO, the World Bank, the GTZ, USAID and other international NGOs, argued that there had been a “positive impact,” others observed that “[w]hile reform of the macro-economic framework, like exchange rate and interest rate policy, were actually implemented, most of the reforms in the policy towards the urban informal sector failed to go beyond intention.” (Ibid. 18)

These contradictory observations are due to the fact that the willingness of international organizations and governments to do something about the informal sector failed to draw “a single recommendation in which the Jua Kali themselves have to take the initiative”. (Ibid. 20-21) Therefore, while the reform was carried out with some positive impact, the Jua Kali was considered to be a passive actor, a perception that persisted despite the fact that President Moi himself had encouraged the informal sector to build associations and form self-help groups as far back as 1985.

Indeed, government policies promoting the Jua Kali associations helped Jua Kali to be “the focus of a number of donor projects and of international and national NGOs attempts to do something about

enlarging the current technology frontier on the informal sector”. (Ibid. 30) However, the different attitudes of the central government and of the donors towards the Jua Kali associations increased the volatility and anxiety of the informal sector. The Kenyan government recognizes Jua Kali associations only as small-scale enterprises—squatters on governmental or vacant land without title—and “hence cannot put up a permanent building from which to operate”. (Ibid. 32) The government also claims that the “temporary structures do not meet the standards required both by local by-laws and under the Public Health Act.”⁹ (Ibid. 32) To sum up, the Kenyan government on the one hand encouraged the informal sector through macro-economic policies, but on the other hand it limited their business space. This ambiguous government attitude is entrenched in corruption and land issues and has led to the demolition of many slum blocks. (Ibid. 34)

The Education and Training Approach to Reform the Jua Kali Sector

Parallel to the macro-economic reform approach to the informal sector was the bottom-up (or the empowerment approach) focusing on education and vocational training within the informal sector. In 1985, the 8-4-4 reform was implemented, shifting the school curriculum to include eight years of basic, four years of secondary and four years of university education. The new curriculum “was concerned with skills, knowledge, expertise and personal qualities for a growing modern economy”. (King 1996:164) It emphasized the need of trained manpower in both self-employed and paid employment in the country. (Ibid. 164) The educational reform encouraged self-employment and entrepreneurship by requiring vocational training institutions where Kenya formerly depended on the foreign donors, NGOs or local entrepreneurs—this included the Jua Kali sector. (ibid. 177) In the area of education and training, Kenya “establish[ed] 10 *harambee* (self-help) institutes of technology and some 300 basic-craft level Village Polytechnics” in the 1970s. (Bennell 1984:51) However, these facilities were concentrated in urban areas where “less than 15 percent of central government recurrent and capital expenditure on training was specifically allocated to these rurally oriented training institutions”. (Ibid)

⁹ Kenya 1989a is the Small Enterprise Development in Kenya towards the Year 2000 Part One referred to in King 1996.

The empowerment approach to the informal sector turned out to be based on a wrong assumption. The Government and the NGOs sought to ensure that “the sector consists of people who are school dropouts with low academic qualifications, and who only resort to joining the sector after failing to qualify for the formal academic or vocational route.” (Barasa & Kaabwe 344:2001) The political elites, entangled in the colonial administrator legacy, and the development agencies viewed the Jua Kali as a sector “trapped in a culture of poverty that perpetuates illiteracy and apathy and fails to teach the skills required to ‘get ahead’ in a modern economy”. (Winder 1991: 35) This may also explain the policies addressed to the informal sector, looking down on them as if they were incapable of making a change by themselves. Contrarily, the adult literacy data in Nairobi (where male and female literacy rates are both 87.1%)¹⁰ confirms the assumptions that “undereducated” or people of “low academic qualification” are not eligible, at least in the informal sectors in Nairobi. Winder (Ibid.) even argues that many people in the informal sectors are conscious of their unstable status, and therefore keen on the political developments of the nation. In short, they listen to the radio and read newspapers and are generally more aware of both national and international politics than policy makers believe.

Therefore, the education reform and the concentration of vocational training, based as it was on a wrong assumption, did not lead to the diminishing of the informal sector or a decrease in the slum population. Ironically, it has been found that “the [Jua Kali] sector appears to be self-sustaining in terms of skills development.” (Barasa & Kaabwe 2001:340) Furthermore, some scholars argue that the informal sector, which the government tried to abolish through its empowerment policies, “should be marketed as an alternative mode of vocational training and not as a dumping ground for academic rejects” (ibid. 350). They argued that the informal sector may be “an increasingly viable alternative mode of vocational training to the formal sector, not only in Kenya but in most other African countries.” (ibid. 351)

¹⁰ Data from Ministry of Planning and National Development (2007)

The failure of policy to reduce the informal sector and slums further worsened conditions by continuous clearance of the sector, which increased distrust of political elites throughout the sector.

The Kenyan government explained the failure of reforms in the following ways:

“(1) that it is a result of racial discrimination under colonialism; (2) that it stems from African urban poverty; (3) that it is a product of Kenya’s heavy international debt burden; (4) that it is intensified by structural adjustment programmes imposed by the World Bank and International Monetary Fund (IMF); and (5) that it has been worsened by inadequate foreign aid.” (Werlin, 2006:40)

By drawing these seemingly persuasive points, the government attempted to reduce its responsibility for the failure of the projects targeting the Jua Kali, and distract attention from its own inability to control the informal sector. Werlin (Ibid), however, further argues that, while all these points are valid, “none gets to the crux of the problem, which has to do with the low quality of governance or the lack of social energy.”

CORRUPTION AND THE FAILURE OF POLITICS

Kenyan Social Capital in Terms of Networking and Civic Participation

As noted above, Werlin argues that low quality of governance and a lack of social energy are the core problems contributing to the failure of the reform policy of the informal sector in Kenya—to a greater degree than the external problems listed above. The low quality of governance means high corruption and a lack of social energy, in other words, a lack of “capacity for governance.” Hence, social capital in the meaning of ‘trust and network’ in Kenya seems appropriate to illustrate the problem. There are two main streams of social capital theory, which are dissimilar when applied to the political development in Kenya. The argument represented by Putnam is that social capital is defined as social networking and the level of civic participation. (DeFilippis 2002:791) A critic of Putnam summarizes that “[s]ocial capital promotes economic growth, health and well-being, educational attainment and just about anything else anybody would care about”. (Ibid. 791) From this point of view, Putnam’s work contains some political significance, but it justifies the “blame the victim” perspective, which is “if you are poor, or your neighbourhood is poor, it is because you have not networked enough and have not constructed enough social capital.” (Ibid. 794)

Interestingly, neither the theories of Putnam nor those of his critics could satisfactorily explain the failure of development in Kenya. In Kenya, networking at the political elite level does exist and it is driven by political interests. Theoretically, this fact should build the capacity of governance, whereas the social capital may also explain the growing middle class and the However, the social capital theory

fails to explain the actual incapability of the policies concerning the Jua Kali sector, even if the high social capital as defined by Putnam can also be observed in Kenya.

The strong network among elites consists of two main characteristics: ethnicity and a political system bearing the stamp of authoritarianism persisting since the British colonial period. Since independence in 1963, Kenya's political power has been concentrated among members of the Kikuyu tribe, despite the fact that they suffered most under colonialism. (Klugman and Neyapti 1999:15) The Kikuyu are the largest tribal group, comprising up to 21%¹¹ of the Kenyan population and, from whose ranks, the famous Mau Mau¹² was formed in the fight for independence, deriving morale from their erstwhile collective oppression. The networking and the bond within tribes were strengthened under British colonial power, which undermined traditional authority. They "laid the basis for divisions and government authoritarianism" and drew the administrative boundaries according to ethnic lines, which deepened the ethnic divisions. (Ibid. 16) Despite the cleavages created by the British administrators during colonialism, the "attainment of independence and the charisma of the first Kenyan president provided sufficient basis for overall national consensus, at least initially." (Klugman and Neyapti 1999:17) However, Kenyatta's "Forgive and Forget" policy maintained a "remarkable continuity" from the British era and eventually the already disrupted national unity fractured and ethnicity defined again the political power divisions. (Branch and Cheeseman, 2006:11) For example, the Kenyan bureaucracy, which was structured by the powerful combination of "the strength and legitimacy of the executive and the capacity of the provincial administration" (Ibid), was consolidated by the Kikuyu to fortify Kenyatta's own power— Kenyatta being a member of the Kikuyu tribe. (Leonard 1991:119)

Kenyatta's successor, Moi, who came from the Kalenjin minority ethnic group, was opposed to the ethnic division. Hence, the power concentration of the Kikuyu waned (at least in the political sphere)

¹¹ Africa Research Bulletin - Political Social and Cultural Series, Volume 44 Number 12 December 1st–31st 2007 Kenya Disputed Election

¹² Mau Mau is a radical sect of Kikuyu, which emerged during the independence movement. They fought for land and their focus was on Kikuyu independence rather than that of the entire nation, and it is said that they fought more against the Africans from different ethnicity than the British settlers

under his regime. (Klugman and Neyapti 1999:51) Instead, power was further concentrated on the president by amendments to the constitution. Under the Moi regime, the Kenyan constitution “was repeatedly amended to correspond to the political goals of governing elites and to enhance the power of the state vis-à-vis society.” (Grindle 1999:97) As already mentioned in the introduction, the third Kenyan President, Mwai Kibaki failed to effectively address corruption, which was virtually institutionalised during Moi’s 24-year dictatorship. Moreover, Kibaki has appointed fellow Kikuyu and members of related ethnic groups to positions within the cabinet and senior civil service, securing his and his tribe’s elites’ power with the so-called “Mount Kenya mafia”. (Nicholl 2008: 1) Furthermore, “[t]here have also been claims of a resolve among Kikuyus not to allow any other ethnic group to take power again. The fact that KANU leader Uhuru Kenyatta, who had been the official opposition leader during Kibaki’s first term, decided to support Kibaki gave the impression that Kikuyu were determined to stick together”. (Ibid) The apparent Kikuyu-centred structure of the central government and the policies allowing inequality to grow encouraged the violence against the Kikuyu following the election. In sum, the social capital in the form of networking is extremely high at the political level, especially among the Kikuyu, but it does not promote the well being of the non-elite Kenyans—including the Kikuyu.

Kenyan social capital, in terms of civic participation, is high at both the local level (represented by the self-help movement since independence) and at the national level (represented by the high voting rate despite a badly organized electoral system). Furthermore, the fact that the number of Jua Kali associations now exceeds 400 since its encouragement in the 1980s, demonstrates the capability of networking and the eagerness to participate in local, Kenyan socio-political activities. (King 1996:32) Seierup (1994:17) observes that active networking among the Jua Kali have shifted away from traditional kin and community networks. He analyses that the new networking is organized according to “their wish for upward mobility to the higher economic echelons of the small town economy, but the size of their capital constrains these ambitions”. Jua Kali associations “form the core of those who fain the most from the NGO-offered business courses”. (Ibid. 17) As one can see, social capital defined in terms of networking and civic participation is strong in both the political and local levels in Kenya. Hence, Kenyan society confirms the criticism directed at Putnam that his social capital approach does not take power relations, e.g. gender, racism, and class division, into consideration. (De Filippis 2002: 794)

Kenyan Social Capital in Terms of Trust

The second influential definition of social capital is given by Fukuyama (1995: 26), who defines it as

“a capability that arises from the prevalence of trust in a society or in certain parts of it. It can be embodied in the smallest and most basic social group, the family, as well as the largest of all groups, the nation, and in all the other groups in between. Social capital differs from other forms of human capital insofar as it is usually created and transmitted through cultural mechanisms like religion, traditions, or historical habit.”

The focus on education, which is connected to the empowerment of the informal sector, is intensely connected to social capital together with the human capital (education) concept. Although the theory itself was paramount in the 1990s, the initiatives and programmes that are focused on local and community-based organization have departed from the Basic Needs Programmes of the 1960s and 1970s. (Mayer and Rankin 2002:805) The two crucial characteristics of trust-building programmes are, first, “their claims of ‘solidarity,’ ‘empowerment,’ and ‘inclusion,’” and second, “each of these approaches to poverty alleviation advocates a specifically entrepreneurial role for the marginal and disadvantaged.” (Ibid. 806)

As already discussed, during the 1990s this particular approach to the alleviation of slum growth and of the informal sector failed in Kenya. However, the reasons for this failure lie not only with the irrelevant assumptions made by policy-makers and by the NGOs, but also with this particular type of social capital in the informal sector - the *lack* of trust. According to Fukuyama, “[t]rust is the expectation that arises within a community of regular, honest, and cooperative behaviour, based on commonly shared norms, on the part of other members of that community.” (Fukuyama 1995: 26) This definition is more or less the same as the notion of “trust” used in conventional conversation. Despite the fact that the networking and civic-participant type of social capital is strong in Kenya, it is not accompanied by trust. This is because “[t]rust is not necessary for cooperation” and “[g]roups can be formed at anytime based on self-interest and group formation is not culture-dependent”. (Ibid. 26) This case is true for the Kenyan Jua Kali associations, in which “members of such associations said they could not trust each other sufficiently to continue joint efforts.” (Winder 1991: 51) It is common that a leader of an association would keep donor support for him/her-self.

On the political-elite level, a rather higher trust within the same ethnicity tends to repel trust among different ethnicities. This is because trust is culturally and historically determined in Kenya. The case already mentioned above, in which Uhuru Kenyatta supported Kibaki, is a good example of

ethnocentric trust in Kenyan politics, where social capital helps the convergence of political power to a certain group instead of helping the development of society at large. The Kikuyu-centred central government has brought Kenya to the point where “[p]oliticians and officials no longer trusted one another, with the result that authority within the bureaucracy and between the central government and the city council no longer [was] delegated with any expectation of implementation.” (Werlin 2006: 39) To sum up, the high networking and trust among politicians, especially the Kikuyu elite, has enabled them to secure their power and individual interests, while the high networking but low trust among local Kenyans has been helpless in bettering their situations and in demanding effective policy implementation. Therefore, the argument pointing to a lack of social capital does not seem to explain the political inability in Kenya, but rather the disparity in social capital between the elites and the locals—which also corresponds to the inequality in economic capital—leads to a deadlock of policy implementation with respect to the slums and to the informal sectors.

CONCLUSION

The elections in 2007 were not the first instance when Kenyan citizens experienced fraudulent and illegal actions of their politicians. The elections in 1992, 1997, and 2002 were equally unfair and “characterized by serious and routine acts of repression, electoral fraud and other crimes, perpetrated by state-security agencies and politicians of the then ruling party and opposition counterparts and outlawed informal gangs and militias”. (KHRC 2008:5) What triggered the violence after the election in 2007 was the combination of growing inequality due to policy failures in connection with corruption and ethnic chauvinism. The victory of NARC in 2002 gave people the “hope that the new government can deliver the country from economic malaise, extreme corruption, and ethnic conflict; ...that it will install rights-enhancing governance which, ultimately, can create the conditions for alleviating poverty”. (Ndegwa 2003:154) The government’s failure in the wake of the recent Mungeki crisis¹³ increased the fear and hatred against the Kikuyu. The 2007 election was a chance for the people to

¹³Mungeki is a group of ethnic Kikuyu militants inspired by the Mau Mau. They are believed to be linked to high-profile politicians and are blamed for revenge murders in the central region. For more information see <http://news.bbc.co.uk/2/hi/africa/6685393.stm>

make their voice heard and thus “expectations of a fair contest had been high on all sides”. (Nicholl 2008: 2) Therefore, the failure of processing a fair and transparent election easily triggered the violence. The fact that the political elites were not targeted in the violence is the result of the isolation of political elites from those dependent on the informal sector, which has been analysed in this paper through the employment of social capital concepts.

Growing inequality and ethnic chauvinism connected with political corruption will continue to fuel popular unrest, erupting in violence if fair and transparent elections fail. However, violence does not change the political structure dominated by the elites, especially the Kikuyu elites, because of the isolation between the two groups. To conclude, the violence that occurred following the 2007 election may have been prevented if a fair election were carried out, as mentioned in the argument section. However, the corruption and political elitism that increases public anger, inequality and political impotence, will continue unless the Kenyan political elites acknowledge the marginalized population as an active economic and political factor, and work on decreasing the disparity between the elite, the poor and between the different ethnic groups.

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**DEMOCRACY WITHOUT OPPOSITION
-KENYAN CIVIL SOCIETY AT A JUNCTURE**

Carsten Brinkmeyer*

Abstract

One result of the Kenyan national election in 2007 was the construction of a “Grand Coalition”. That circumstance left Kenyan democracy without a formal opposition, a gap that has been suggested to be filled by civil society. This article explores the role of Kenya’s civil society in the struggle for democracy, its role in a transitional democracy and its capacity for being a “check and balance institution” in a democracy without a parliamentary opposition. It argues that civil society cannot fill the role of opposition within a democracy that has not been consolidated, since the foremost role of civil society is to promote public participation and the fulfilment of a social contract between state and society that is aligned with the societal values of redistribution, equality and inclusiveness.

INTRODUCTION

A NECROLOGY OF HOPE

The confidence in Kenyan democracy has been exaggerated, and this has happened in conjunction with the international description of Kenya as the “beacon of stability” in East Africa. The country’s economic stasis, which began in the 1990s, has been to some extent improved under the National Rainbow Coalition (NARC) government while re-distribution issues remained pending. The popular impression of stability ignores the pressing socio-economic constraints of average Kenyans, the so-called “mwananchi”¹. To comprehend the full magnitude of the post-election crisis, it should first be acknowledged that the history of Kenya, for most of its citizens, has been stained by violence, inequality and rampant poverty. Additionally, the divide and rule policy of the British has continued in post-independent Kenya, as a tool used by the political elite to keep itself in

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¹ According to the Kenyan Integrated Household Budget Survey of 2006, 46 percent of Kenyans do not meet daily food needs (Department for International Development, retrieved at: <http://www.dfid.gov.uk/countries/africa/Kenya-facts.asp>).

power. A nation building process that transformed fractal Kenya into one nation has never taken place, and contemporary political identity still correlates with ethnic identity².

Kenya comprises of 42 ethnic groups whereas the largest groups are the Kikuyu, Kalenjin, Luo and Luhya. The Kikuyu constitute the largest group with approximately 20% of population, followed by the Kalenjin with 15%, Luhya 14% and Luo with 12%. Kenya's first president Jomo Kenyatta (Kikuyu) was followed by Daniel Arap Moi (Kalenjin) in 1978. Daniel Arab Moi ruled 24 years, before Mwai Kibaki in 2002 (Kikuyu) got the presidency of the wining Rainbow Coalition. Mwai Kibaki was a long serving vice president and minister under Moi until he in 1988 was excluded from Moi's inner circle. Politics and economy in postcolonial Kenya was closely related to ethnic affiliation as presidents and leading politicians often favoured their regions. GEMA (Gikuyu³, Embu, Ameru Association) for example unities related Bantu groups at Mount Kenya into an influential association with cabinet members in its rows. The Nilotic Luo of western Kenya often felt excluded from political influence especially after the assassination of Tom Moya⁴ (1969) and Robert Ouko ⁵(1990).

However, to perceive the recent crisis as a pure ethnic conflict, in the way that the international media did, does not consider the roots of the conflict between the 'haves' and 'have-nots'. Ethnicity has merely been an instrument for the realisation of political ambitions on both side of the divide. Kenyan politicians, some more vocal than others, succeeded in pulling a veil of ignorance over the most pressing issues by mobilizing their supporters along ethnic lines and thus successfully suppressing a conflict between the ones who have and those who have not. Political protagonists succeeded at making the impression that if in power, their respective community would gain and make progress. In that light, it is not surprising that Kenyan communities turned on each other during the post-election crisis. It could easily have been predicted, and some commentators in fact did exactly that⁶.

² Kenya comprises of 42 ethnic groups. The largest groups are the Kikuyu, Kalenjin, Luo and Luhya.

³ Gikuyu means Kikuyu

⁴ Minister of Justice and Constitutional Affairs, and later Minister for Economic Planning and Development in the Kenyatta cabinet.

⁵ Minister of Foreign Affairs in the Moi cabinet

⁶ One of them was Mutahi Ngunyi who wrote in December 2003: "Consider a hypothetical situation here. What would happen if President Kibaki decided to run for re-election in 2007 and lost? Would he and his men have the grace to hand over power peacefully? From the way they have behaved in the last one year, I doubt it. And where would that leave the country? At the risk of sounding crazy, I want to suggest the following: If we thought that Mr. Moi would plunge the country into civil strife, he proved us wrong. Narc is the party to plunge the county into civil strife. You just have to listen to the FM stations and the call-in television programmes to see a pattern. From the name of the

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The NARC governments that succeed the Moi regime in December 2002 gave a lot of hope to the common *mwananchi*. Ultimately, many Kenyans were deeply disappointed when NARC was not capable to introduce a new constitution, fight corruption, and significantly reduce poverty in the country. The constitutional crisis that had been ongoing for many years broke the NARC collation into the banana and orange fractions, as they were known in popular terms. A constitution that would abolish the “winner takes it all” democracy and introduce the devolution of power was never realised and left people in vain with the Bomas process⁷ collapsed at its peak. The bill was presented to the political elite in December 2007 at the same time as many well established politicians - some of them ministers and one of them the vice-president - were not re-elected. People turned out in great numbers at the polling stations only to receive another disappointment three days later. The delayed tallying process, taken together with the report of international observers, suggested a flawed election result. The sovereign had spoken, but the political establishment was not ready to receive the verdict. The so-called East African “beacon of stability” turned into instability as the state lacked popular legitimacy by all Kenyans. The last candle of hope for change, which had been lit in 2002, was blown out in December 2007 and turned Kenya into a land of skirmishes of violence and unrest.

Today, after the coalition government has been put together, Kenya as a part of its transition towards democracy lacks a formal opposition in parliament. Many eyes turned towards civil society as a possible solution to fill the gap⁸. The following will explore whether Kenyan civil society would be able to fill this role and what that might mean for the consolidation of Kenyan democracy in the future.

GRAND COALITION AND THE LOST OPPOSITION

Kofi Annan should be honoured for succeeding in his efforts to get the protagonists of the post-election crisis to sit down together at one table. However, the solution of this grand coalition leaves some questions as to how the checks and balances between government and opposition will work

caller, you can almost predict what they will say and what side of the divide they will take. In a disputed election, *such polarity would certainly take ugly proportions*” (Ngunyi, M. (2003), Why our second liberation is yet to be completed, Sunday Nation, italics added).

⁷ The Bomas -process one, two and three were to amend the current Kenyan constitution under the NARC government. It has been already started under President Moi while it collapsed while NARC government was in power. It was a citizen driven process with more than 600 delegates participating in the amendment of the Kenyan constitution.

⁸ Some members of parliament (MP), principally those belonging to the Orange Democratic Movement (ODM), felt left behind when minister and other posts were distributed within the new cabinet, and then challenged the party leadership to constitute an official opposition in parliament. The ODM leadership convinced them to refrain from this step, using the argument that every MP has an important role to play in the Grand Coalition.

during the upcoming legislative period. The overdue implementation of the peace accord brought with it as one result a bloated cabinet of 40 ministers and the introduction of a Prime Minister post as a way to assure real power-sharing. This eradicates the existence of a real opposition in the parliament, because all parties find themselves represented within the legislative. Robert Dahl emphasises that liberal democracy without a formal opposition in parliament questions the very existence of democracy (Dahl, 1966):

“ (...) one is inclined to regard the existence of an opposition party as very nearly the most distinctive characteristics of democracy itself, and we may take the absence of an opposition party as evidence, if not always conclusive proof, for the absence of democracy”

Kenyan democracy is transitional, since it lacks consolidation within its own institutions, electoral processes and in relation to popular participation. Within contemporary literature, Carothers' illustration of the three phases of transitional democracy assists to understand the current state of democracy in Kenya, as explained below (Nasongo'o, Murunga, 2007:7).

The first transitional phase comprises the *opening*, the movement from dictatorship towards a regime of democratic governance. In Kenya, this took place between 1992 and 2002 when multi-partyism returned. The second phase, the *breakthrough*, can be marked by the 2002 election when the NARC government came to power. The NARC government was in conception a grand coalition, with the paramount goal of extracting power from the Kenya African National Union (KANU)⁹, which was then left as the only opposition party in the 9th parliament. One major goal of the NARC coalition was the promulgation of a new constitution – the most crucial feature of the *breakthrough* phase. That particular goal was never reached and the coalition split into the already mentioned 'bananas and oranges', where the later comprises the informal but effectual opposition in the 9th parliament from 2003 onwards. Therefore the *breakthrough* phase became prolonged. The present governance construction that has followed the power sharing accord has extended the breakthrough phase, by resuming the tasks of the NARC government. It is apparent that the *consolidation* phase - the last of three - has not been accomplished, because Kenyan democracy lacks important consolidating features such as:

“The reform of state institutions, regularisation of elections, strengthening of civil society and overall habituation of society to the new democratic rule of political engagement” (ibid.)

⁹ KANU has been in power since independence 1963.

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The reform of state institution and the strengthening of civil society are pivotal for an accomplished *consolidation* process. It goes hand in hand with the transformation of Kenyan society towards one nation - essential for the consolidation of democracy as recent history has taught. Without an opposition in parliament, the ball has “officially” been played into the court of civil society. Protagonists of this view are the builders of the peace/power sharing accord. In other words, civil society in Kenya should serve as a *check and balance institution* within the transitional democracy of Kenya - a feature that calls for further exploration.

CIVIL SOCIETY AND THE “THREE THEATRES”

To comprehend civil society is a difficult task, since there are many different organizations (Civil Society Organisations) and movements under this particular umbrella. It is therefore essential to introduce a definition for civil society that further on will serve for the understanding of civil society:

“Civil society is a sphere of social interaction between the household and the state which is manifest in norms of community cooperation, structures of voluntary association, and networks of public communication”¹⁰. (Bratton, 1994: 2)

In relation to the above, two contradictory views should be elaborated. The first view emphasises Bratton’s definition by a way of characterizing civil society as the “providential spirit dispatched to redeem a political world gone awry” (Nasong’o, 2007: 23). Using the conceptualization of Bratton for Kenya, civil society influences the political process by being the voice of the *mwananchi*. It is a force that propels inclusion in the political process beyond elections. It assumes real impact on social and political change, while not being part of the formal parliamentary system. It builds on the dichotomy of state and civil society and promotes inclusion and participation of citizens in the legislative processes, while additionally serving as a societal watchdog. The second view introduced here contradicting Bratton criticises civil society as being a “metaphor masquerading as a political player” (ibid.). It suggests that civil society is only a construction, a hidden political player that has its own agenda while being detached and incoherent to the general society.

Historically, both concepts are relevant in Kenya and for that matter to a conception of global civil society. Civil society organisations (CSO), like social movements, Community Based Organisations (CBO) and Non-Governmental Organisations (NGO) have often been stepping stones for

¹⁰ Civil society is a theoretical concept that builds on a universal idea of civic participation in democracy. Its roots can be found in liberal as Marxist traditions of political thought. De Tocqueville on the liberal side as Gramsci on the Marxists side can be named as being important theorists. While De Tocqueville points to the importance of voluntary associations for democratic citizenship Gramsci emphasises the role of social institutions for challenging or enrich state power (Bratton, 1994:1).

individuals and groups to enter the formal political “theatre”. Mutahi Ngunyi¹¹ offers a description of the three theatres - *the elite theatre, the external theatre and the theatre from below* – that profoundly distinguishes between actors on diverse political stages¹². Ngunyi developed this distinction to illustrate actors and stages of the post-election crisis in Kenya. At this point, it is a distinction that can be used to analyse the contemporary governance regime of the Grand Coalition in Kenya and the subsequent consequences for civil society within the *consolidating* process of democracy.¹³

‘THEATRE FROM BELOW’ TURNS ELITE

After a failed coup attempt in 1982, Kenyan civil society as well as its opposition parties experienced a crackdown on their associational freedom and freedom of speech, which nearly eradicated civil society from the political and societal map. After the *opening* in the 1990’s, civil society flourished within a supportive movement towards multi-party-ism and democracy. Kenyan civil society along with its CSOs played a crucial role for the re-establishment of democracy. At that point in time, it was possible to establish a united civil society by pressing for a democratic *opening*. However, the *opening* and the *breakthrough* later in the 1990’s and 2000’s changed part of civil society as these transformed into political parties. The hidden political player became visible and detached itself from its own civil society agenda.

Civil society as a *hidden political player* suggests that actors within civil society change the scenes and theatres in its continuing search for political influence. The “theatre from below” (civil society as a motor) would consist of the interface between civil society organisations and *mwananchi* (households) by promoting popular participation in the political process. However, the scenario of the hidden political player characterises the *mwananchi* as the voiceless, listening audience, whereas the actors on the scene are the voices for their own good and thereby use civil society as a personal stepping stone for political ambitions. Kenyan civil society in the Moi era of the 1990s profoundly illustrates this metamorphosis of CSOs into this kind of role.

¹¹ Presented at the MS Kenya Annual Meeting on the 27.03.08

¹² This article distinguishes civil society and CSO’s from political parties. The latter is formally part of the political system while CSO’s search to influence it through formal and informal institution. Political parties furthermore outline a clear goal to access formal political power. To distinguish political parties from civil society evolves the possibility to analyse the relationship between the two.

¹³ This article will not elaborate on the role of the “external theatre” which points to the international community (including international NGOs) and its role in Kenyan post-colonial politics and its particular role in the establishment of the peace accord. Its important role is not neglected, but would go beyond the scope of this article.

Carsten Brinkmeyer – Democracy without Opposition

From Civil Society to Political Party

A prominent case of the above-mentioned metamorphosis is the formation of the Forum for the Restoration of Democracy (FORD) and its transition from a democratic (social) movement - envisaging the democratisation of Kenya under Moi - to its fragmentation into two political parties. The abolishment of single party rule, which came about through pressure from parts of Kenyan civil society such as FORD together with encouragement from the UK, US and some Scandinavian countries, provided the necessary space for maturation of the political scene. However, the *opening* towards democracy in 1992 resulted at the same time in a disintegration of the movement into two parties: FORD Kenya, under the leadership of Odinga Odinga (later Raila Odinga¹⁴, his son) and FORD Asili under Kenneth Matiba. Both parties ran for the first multiparty election, but neither was able to defeat Moi's KANU.

Although CSOs mushroomed after 1992, organizations like FORD failed to construct a common agenda for democratisation and social change in Kenya, for the most part due to personal ambitions. The major problem FORD faced was that it turned itself into a vehicle for accessing direct political power. This led to disintegration and the construction of new political factions in Kenya based on ethnicity (Nasongo, 2007:39). This meant failure for the initial goal of Kenyan civil society, which was to propel an inclusive democracy. Civil society was not able “to articulate an ideology to unify its varied elements and catalyse the commitment of its followers to action for social change” (ibid.). The *opening* phase within Kenya's transition towards democracy was therefore characterised by the introduction of “person related politics” instead of politics geared towards an ideology that would bring social change for the common *mwananchi*. The following disintegrative dynamics that came to the surface in Kenya prevented the formation of a cross-ethnic civil society that could jointly advocate for a more inclusive democracy model.

Civil Society and the Divide

Within the *opening* towards democracy, the NGO act of 1992 played a pivotal role as it provided the legal space for civil society to engage in political and social matters. The establishment of the NGO Council included all registered NGOs that elected their own board and chairperson and is the important civil society umbrella in Kenya which should preferably unite civil society. Bratton emphasises that, “in deeply divided societies, the emergence (of) civil society is likely to be

¹⁴ The present Prime Minister of the Grand Coalition government, a post newly created to ensure power sharing between the rival parties of Party of National Unity and Orange Democratic Movement

accompanied by an intensification of ethnic identity” (Bratton, 1994:4). Although it is preferable to refer to a politicised identity along ethnicity, instead of pure ethnic identity, Bratton’s analysis applies to Kenya. Unfortunately, the ethnic political divide has affected the work of the NGO Council in recent years, as predicted by Bratton. Members picked sides as to political protagonists on either side of the divide, which split the council into fractions and crippled the important work of uniting civil society. The vital point to make is that civil society does not operate in a politics-free vacuum. It is part of the political landscape, since it comprises one of the important institutions of liberal democracy. The lack of cohesion within the NGO Council emphasises the aforementioned disconnection and disintegration that took place between CSOs and civil society and *mwananchi* as such: the three disintegrative theatres.

Some of the council members occupy seats on the NGO Board, which is the government arm that regulates civil society in Kenya. The NGO Board registers and de-registers¹⁵ NGOs in Kenya and is consequently a powerful tool, one that influences the work of civil society and their methods of association, activities and advocacy. Broadly speaking, civil society in Kenya suffers on one side from the politicised ethnic divide existent between organisations, and on the other from the regulative control of the state. Both alienate civil society from the social constraints of the *mwananchi*, as this situation prevents the communicative and interactive role of civil society between state and citizenry.

The “elite theatre” sets the agenda for civil society’s way of operation. The referendum on a new constitution in Kenya split civil society not only within the NGO Council, but also at the grass roots level. The banana and orange identity conflict forced CSO’s either to support one or the other side. This meant civil society was following a political agenda set by the main political figures without establishing its own. In relation to state power, civil society should play a legitimising role for ideally providing popular acceptance to established institutions. To silence civil society in this respect, two strategies are apparent. The first one is to take away their freedoms, as happened in Kenya during the 1980’s. The second strategy is to integrate them within the “elite theatre”. The latter is not a conscious strategy, since the dynamics of the *breakthrough* phase enable civil society to engage in the “elite theatre” as active actors. This is a natural dynamic when the open democratic space needs to be filled. This very process in Kenya, however, left civil society in the lurch as many of its leaders lost their initial identities and the original objectives of many CSOs vanished. What

¹⁵ Any NGO must be registered at the NGO Board; without registration the NGO is not allowed to operate.

was left in 2007 was a civil society which consciously or unconsciously supported one or another side in the political struggle by emphasising their own respective political–ethnic identity.

Within the *post-breakthrough process* civil society did not play the role as a civic institution that could be neutral in relation to party (ethnic) politics in Kenya. Instead of voicing the pressing problems of the *mwananchi*, party politics threw a veil over the pressing social problems. The *breakthrough* phase in Kenya created disorientation for civil society once it achieved its prime goal, which was to remove Moi from power. Civil society leaders left for the “elite theatre” in order to get their share of the now accessible cake, while the “theatre from below” had to orchestrate its play alone. Kenyan civil society was thereby silenced as it became incorporated into the struggle for power along well-known Kenyan ethnic lines. However, with the election of the NARC government in 2002, it seemed that Kenya might overcome the long history of this ethnic-politic divide, through amendment of the Kenyan constitution and formation of a government representing the majority of ethnic groups.

This early assumption turned out to be flawed, as the split of the NARC coalition and the 2007 election skirmishes emphasised¹⁶. Civil society had been a strong force in terms of civic education (for example the considerable improvement in turnout at polling stations) but was weak in terms of unifying Kenyans in the struggle for democracy as one nation (thus the skirmishes of the 2007 election). In other words, civil society has been squeezed between its struggle for democracy and the demand to access power.

Civil society in its current state will not be able to unify all Kenyans in the struggle for a *consolidated* democracy that will change the socio–economic conditions of the citizenry. Its ability to be an opposition to the Grand Coalition are meagre, because functioning institutions for the engagement of the civil society in the legislative process are crippled, not readily available or not properly established. The split of the NGO Council and the controlling NGO Board also limits the role of civil society as a check and balance institution, since it is divided along ethnic lines. The often close affiliation to political parties and their main protagonists further undermines the civil society capacity for the task. A Kenyan civil society that is engaged in all *three theatres* misses its function

¹⁶ One reason the coalition broke up was acrimonies as to how to amend the constitution. The orange faction disagreed on the proposed amendments of the presidential faction and lobbied for a “no” at the referendum. The amendment was outlined single-handedly by the presidential faction after the Boma process collapsed. The major critique was that the proposals were not for devolving power but rather adding power to the position of president.

as a catalyst for a social contract – one between the state and the *mwananchi* for the *common good*, which builds on a consolidated democracy as a system of social justice.

KENYAN CIVIL SOCIETY: CATALYST INSTEAD OF OPPOSITION

The following section will look at which role civil society is actually capable of fulfilling in order to establish a contract that envisages “an overlapping consensus between people who otherwise have a very different comprehensive concept of the good” (Nussbaum, 2006: 70). It will elaborate on the possibilities for overcoming the division between the *three theatres*, within civil society and between Kenyans, and to thereby promote inclusion, redistribution and the eradication of poverty.

Kenyan civil society’s main objective, namely to re-establish democratic processes in Kenya, was paired with the assumption that democracy working together with a liberal market economy would automatically lead to prosperity and the eradication of poverty. The relation built between the people of Kenya and the state focused merely on the process (democracy) rather than the actual achievement of social justice. The *common good* emphasised by ethical values and virtues related to re-distribution; inclusiveness and equality were lost in the process itself, which in turn inherited the concepts of mutual advantage and equal opportunity for participation: a common philosophy related to the market dogma of demand and supply. Recent history in Kenya has taught that democracy is rather an empty shell of democratic procedures more than an effective tool for positive change for the *mwananchi*. The obvious problem was the lack of basic ethical values to drive home the democratisation process, and no clear formulation of where the journey should lead to. Civil society was too busy trying to be part of the “elite theatre” to take the *mwananchi* along on this vital journey. In this respect, a look at social contract theory helps to identify the gaps in the relationship between state and society and the pivotal role of civil society as a catalyst.

Social Contract

A social contract theorist such as John Rawls and others before him build their concepts on the state of nature (e.g. Hobbes) as the initial state of society. Rawls refers to it as the “origin society” that provides the guiding idea for a basic structure¹⁷ (Rawls, 1972: 11). Justice for Rawls (in contrast to Hobbes) is contextual and substantive and takes societal values into account. In relation

¹⁷ Basic structure is defined as “the way in which the major social institution distribute fundamental rights and duties and determine the division of advantages from social cooperation” (cited at Nussbaum, 2006: 232)

to Kenya, justice urges people to fill the empty “democracy shell” with values that are derived from society:

*“Whenever institutions satisfy these principals [of social justice] those engaged in them can say to one another that they cooperating on terms to which they could agree if they were free an equal persons whose relations with respect to one another were fair”
(ibid.13)*

Institutions need in this respect to reflect the values and virtues of its society. Rawls assumes that this can be accomplished by involving people in the process to create a common basic structure. To accomplish this societal task, the *basic structure* of society is the point of departure. It defines what justice is and how people can participate in the definition process of social justice. Rawls contract theory aspires to implement “justice as fairness”, where the contract is made between equal partners that engage each other to mutual advantage (Nussbaum, 2006: 227). Rawls follows the Kantian tradition while assuming a “moral state” that represents the parties of the original position (initial state of society). In this respect Kenya seem to fall short of fulfilling the Rawlsian idea, since the post-independence state did not inherit the “moral” of all Kenyans in terms of equality, inclusiveness and redistribution. Leaders all too often do not represent the people in this respect, and Kenya seems to be no exception.

Communication between the citizenry and the state, with civil society as a catalyst, did not create a “Kenyan basic structure” at the institutional and a state level. The role of civil society as a catalyst for the legalization of a social contract between Kenyans and the state met serious obstacles in term of freedoms and its own attitude (the masquerading political player). The concept of nation - another pre-condition for Rawls - does not apply either as the Kenyan society is not only divided by ethnic (politicized) identities but also by strained social and economic conditions. To agree on a common *basic structure* as the crucial point for justice, a nation should consolidate itself not only in terms of procedures but also in terms of objectives which define social justice. Since in Kenya the negotiation process on equal grounds for a common *basic structure* was seriously flawed, due to historical unequal distribution of bargaining power, social contract theory calls for some augmentations.

Capabilities: The Missing Link

It is vital to acknowledge that Rawls is oriented towards process (procedure) and is not normative in his approach. He assumes that popular participation on equal grounds, with mutual advantage as a driving force, would lead to a just society. The problem lies with the concept of equal grounds, as this concept often presume a non-existent equal society in terms of access to political, social and

economic resources. Nussbaum (2006) argues for a normative concept that builds on entitlements instead of procedures. These entitlements are “pre-political, not merely artifacts of laws and institutions” and they are based on human dignity as a mean and an end (ibid: 285). The existence of rights does not mean everybody can exercise them, alongside people who lack the capacity to do so. Nussbaum’s capability approach enriches Rawls contract theory by pointing towards the need for an ability to exercise the right of participation – whether such exercise is political, economic or social. To enjoy ones right of speech, for example, one would need sufficient access to education (ibid.: 289). Although Kenya formally ensures free primary education and since the 10th parliament also secondary education is at least in theory free, many children and particularly girls miss out on adequate education opportunities. In this context, there is need for a substantive approach towards rights and procedures that is concerned with the outcome and not concerned only with the process itself.

CONCLUSION: “NO PEACE WITHOUT JUSTICE”

Civil society in Kenya has in the recent past been vibrant and certainly played a vital role in the restoration of democracy in Kenya at the end of the Moi era. The political vacuum after years of political oppression was filled by civil society protagonists who turned movements like FORD into political parties. However, Kenyan democracy still lacks the reform of state institutions, the proper implementation of elections and the “overall habituation of society to the new democratic rule of political engagement” (Nasong’o Muranga, 2007: 7). A consolidated democracy needs a strong civil society which freely engages in political, social and economic deliberations. Furthermore, Kenyan civil society needs to sustain interaction between the state and the citizenry in order to consolidate Kenyan democracy.

Civil society in Kenya is not able to fulfill the role of an opposition to the current Grand Coalition, simply because formal institutions for engagement are not established and that situations prevent an active role for any kind of opposition. Kenyan civil society and its CSOs cannot take the place of an active parliamentary opposition, which is pivotal for a consolidated democracy. The transitional process towards democracy that started in 1991 has therefore not been concluded. There is a need for a vibrant civil society which engages the citizenry in the political process, and also gives them voices to articulate their political, social and economic preferences, all the while acting as a visible and audible watchdog. Civil society will not be able to play on the stages of both theaters - the one from below and the elite, as history has shown.

A first step to be taken is the civil society in Kenya to be called upon to advocate for all citizens' rights of participation, while simultaneously building capacities for political, economic and social participation. This would turn the "immoral state" into a state that lives up to intrinsic societal values that exist in every society. It would lead to a *basic structure* that enhances re-distribution, equality and inclusiveness and that furthermore is built on a *consolidated* democracy which envisages the Aristotelian Eudemonia (the common good) as its foremost objective, and would include human dignity as the vital indicator for the fulfillment of this objective.

Secondly, the constitution itself must be a pivotal part of the *basic structure* discourse. This document defines the distribution of power between Kenyans, the participation of Kenyans in political processes beyond elections, and the composition of institution that enhance public participation.¹⁸ Instead of just civic information, a civic education that articulates and demands active participation and ways of advocacy for change should be at the centre of these activities. Kenyans are aware of the governance system they live under, but lack ways to actually have an influence on it. As a catalyst, civil society has the obligation to advocate for the participation of Kenyans in the political process and should work for institutions that enhance public participation. It should transport the values and virtues of Kenyans towards the "elite theater" and at the same time unite Kenyans under these articulated values.

Third, civil society is urged to work towards one nation while at the same time it is necessary to overcome its own internal division. Hence it is essential for a *basic structure* to be built on an *overlapping consensus*, and this in turn will enable the political process to overcome the historically rooted social and ethnic divide between Kenyans. The formulations of a pro-poor agenda independent of ethnicity will for the first time unite Kenyans in a struggle for a just society and will also *consolidate* democracy into a substantive form. It will furthermore enhance the focus on political programs (ideologies) instead of person-related politics and build a political consciousness that is unrelated to ethnic heritage.

Civil society at this juncture should be a genuine part of the "theater from below", influencing the "elite and external theater" for the common good of all *mwananchi*. It should refrain from being a

¹⁸ The amendment of the constitution is part of the peace accord and should be concluded within the next year. Unfortunately, the process does not include public participation as it is negotiated between the PNU and ODM fractions within the parliament (government). It is not clear if the amendment of the constitution will be concluded by a referendum. However, a referendum would only seek public agreement but not participation.

hidden political player that does not bring change but still prefers to be part of the very political system in question. Acting independently, civil society will be able to set a popular agenda that looks towards the fulfillment of a social contract based on a consolidated democracy. However, democracy alone will not be able to overcome the socio-economic divide that is the undercurrent of ethnicized political conflict. Democracy is only a vehicle to distribute power while bargaining power within Kenya is unjustly distributed. Civil society could have the essential role to impel redistribution of political, social and economic power between those who have and those who do not have.

“No Peace without Justice” was the chant of people demonstrating in the streets of Nairobi and elsewhere in Kenya after the election in 2007, and this pinpoints the vital task of civil society and the Grand Coalition. If the question of justice in relation to democracy and participation is not addressed as part of this process, it will take Kenya back to skirmishes and unrest and leave the country without a consolidated and substantive democracy in its immediate or more distant future.

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ABBREVIATIONS

CBO	Community Based Organizations
CSO	Civil Society Organizations
FORD	The Forum for the Restoration of Democracy
GEMA	Gikuyu, Embu, (A) Meru Association
NARC	National Rainbow Coalition
NGO	None Governmental Organisation
ODM	Orange Democratic Movement