

REVIEW ESSAY

Civil Society and the Democratic Experience in Kenya: A Review of *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, by Willy Mutunga. Sareat & Mwendu, Nairobi, 1999

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Introduction

The process of democratisation in Kenya has made several successful strides. But these strides have been followed by instant reversals. The impact of such reversals has been responsible for the growing common person's indifference to the process. 'Apathy' is the term commonly used to describe the process where a general lack of interest or indifference to the democratisation process obtains in a country. 'Voter apathy' denotes a similar situation where there is low voter turnout in competitive elections. The Kenyan democratic experience is such a mixture of success and failure, of onward rushes and backward reversals. To take stock of this process requires learned detachment from the very process in order to balance the analysis, take stock of the process and probe the future trends.

Learned detachment, for me, is a priority because of the complex and confusing political scenario in Kenya. The activist's approach positions itself on the side from which the activist hopes to make the greatest impact. The scholar's approach attempts to balance the two or more sides of the story in order to account for its complexity. Since the democratisation process in Kenya, especially its constitution-making dimension is still on, the issue of learned detachment is of the utmost importance. Suspicion among stakeholders has dominated Kenyan politics and remains a potent factor in defeating the democratisation movement. It behoves every analyst of this process to carefully check out details and the varying perspectives with their implications for the movement itself. The obligation that Willy Mutunga accepts in the book under review is by this very fact enormous. Few have tried to undertake such a task, and by the very fact of doing it Mutunga deserves encouragement.

The Review

The study under consideration contributes in a significant manner to understanding the constitution-making process as a specific component in Kenya's transition politics. It centres the middle class as the agency of constitu-

tion-making. As the study proceeds, the author, himself a long standing and able participant in the constitution-making process, isolates the numerous civil society groups that initiated the process, showing the ones that dropped off, at what point they did so, and which continued the struggle. The bottom line is to draw significant lessons accumulated over the six years as the movement has engaged the state. The study asserts the generally conflictual nature of state-civil society relations, existing mainly in opposition to an illegitimate, oppressive and corrupt state.

Chapters 1 and 2 set the context of democracy in Kenya and analyse the role of civil society in constitution-making. But the first chapter is somewhat lean on details while chapter 2 is theoretically thin. Chapter 1 draws its democratic inspiration from anti-colonial movements in Kenya, highlighting the central role of Mau Mau land and freedom fighters like Dedan Kimaathi. Instead of broadening his analysis to cover resistance movements across the country in order to draw significant people-centred lessons, Mutunga resorts to a shortcut: 'I have discussed the resistance to the British invasion and occupation elsewhere and I will content myself with a summary here' (p.1). The resistance movement as a point of departure for discussing the democratisation process study deserves more than Mutunga allows. It must of necessity include a countrywide analysis and must ground the concept of resistance in a variety of literature both historical and political. It ought to capture the diverse resistance tactics envisioned by the path breaking analysis contained in the *UNESCO General History of Africa Volume VII: Africa Under Colonial Domination 1880-1935*. In this latter study, the Ghanaian born historian Adu Boahen problematises the idea of resistance, demonstrating that it cannot be seen as the polar opposite of collaboration. As such, it is not enough to mention Me Katilili and Mau Mau as Mutunga does and stop there. The historiography of resistance as the basis of democratic struggles in Kenya, as elsewhere in Africa, connects both historical as well as political science notions. The historical conceptualisation is fundamental to understanding the ambivalence of resistance, the heterogeneity of civil society and its contradictory and complex response to the state.

Historically, the alliances built between Nabongo Mumia of the Wanga and the British, for instance, were, in their own way, modes of resistance, call them passive resistance if you wish. Indeed, those who resisted at other times collaborated and vice versa. The Maasai used a combination of tactics, many of which would fit in the often-eulogised modes of diplomacy associated with traditional Africa. The most sustained resistance movements in Kenya appear among the Somali community of North Eastern Kenya, especially the Oromo, and in the Rift Valley among the Nandi and Kipsigis Orkoiik. This latter group sustained resistance not only through the colonial period but also in independent Kenya. Indeed, the Kipsigis Orkoiik have been victims of both the Kenyatta and Moi regime to the extent of being reduced to squatters in Kericho and Kipkelion

towns. Among the Kamba, the tactics enshrined in the Kilumi dance can be mentioned, while in Kisii, resistance overlapped into World War I. The list is longer than this.

The de-colonisation movements that Mutunga makes a point of discussing – valuable as they may be – differ from the traditional grassroots movements because of the formers' fixation on raw power. These have used grass-roots support as stepping-stones to power and have derived very few lessons from the broad-based early anti-colonial resistance movements. Such de-colonisation groups, like the Kenya African Union, were alienating movements whose pretence of popular mass connections was a means to state power (Furedi, 1973). These movements, as Mutunga variously and indirectly implies, have reproduced themselves indiscriminately in the Kenyan political parties and civil society movements. This is the issue that a political science approach should address in discussing the ambivalence of resistance as it relates to state-civil society relations, in order to underscore the point that such relations are not necessarily oppositional and conflictual.

Chapter 2 sets out to conceptualise civil society and its role in constitution-making. The author argues for an Afro-centric approach based on the corporate project approach. He characterises civil society as diverse and lacking homogeneity. He grounds his understanding of civil society on the central role of the non-governmental organisations (NGOs) and proceeds to analyse the role of the Citizens Coalition for Constitutional Change (4Cs) project in Kenya. The thread of the argument that follows implies that 4Cs was the mirror of civil society in Kenya. This is extremely questionable. Again Mutunga excuses himself from theorising the notion of civil society.

Like most of the writings from Africa on the concept of civil society, this book does not engage in theoretical debates on the subject. This book provides empirical material from which the understanding of the African civil society can be developed (p.18).

Providing empirical material is a worthy project. But, perhaps, the words 'African civil society' need to be replaced with 'Kenyan civil' society to emphasise its peculiarities and to avoid over-generalisations. And in any case, it is not true that most of the writings from Africa on the concept of civil society have not engaged in theoretical debates on the subject. Mamdani (1989, 1990, and 1996) and Ekeh (1992) are perhaps the best known theoreticians from Africa on the concept of civil society. Others would include Ake (1996), Bangura (1992) and a host of scholars whose works on civil society are indispensable here. What differentiates these from other scholars outside the continent is their insistence that the notion of civil society needs to respond to the African social formation because in its western sense it is inadequately fitted to the realities on the continent. Conceptual clarification has been insisted on to avoid the spurious identification of western analytical categories with unique African experiences (see Aina, 1997). Mutunga has no problem with the fact that it is the middle class

who should have taken the lead in the constitution-making process and ipso facto, the democratisation of Kenya. It is their right to do so, he adds.

The Kenyan middle class is scared of any disorder and instability. Its emphasis on peace and unity reflects the protection of its material interests. The Kenyan middle class finds the rule of the comprador class politically dangerous and based on a very narrow popular base. It sees this comprador group as endangering this peace and unity. It sees the comprador group as dominated by a backward and fascist cabal that is unpatriotic, arrogant, insensitive and politically narrow-minded (p.22).

The 4Cs is a middle class coalition that grew from the Coalition for a National Convention (CNC). This is a component of the bourgeois sector of civil society. The ruling class threatened its interests and aspirations and the national interests had to be protected. By this fact alone, the 4Cs is not a disinterested party. Being a member of that class, Mutunga has a stake in constitution making just like the Moi-KANU axis has. By describing the CNC position as a 'politically correct position' (p.41), Mutunga states a politically valid position. But this point is untested because the author, indeed, the CNC, took it for granted that it enjoyed popular support and that its objectives were broadly shared across Kenya's middle class and the general civil society.

Mutunga argues in chapter 3 that the CNC had a broad NGO representation. Its constituents were diverse (pp. 28-31) and their objectives noble. The noblest of these was the need to create a democratic, neutral ground for electioneering and elections. The CNC insisted on a national convention that would chart a process for free and fair elections through a transitional government. A new constitution needed to be instituted for this process. But it is precisely at this point that the *realpolitik* component eluded the CNC. Mamdani's peer review (contained in Appendix B of the book) raises this question by enquiring about the relationship between political society and civil society. Ngunyi's review summarises the tension between political and civil society well when he asserts that to ask politicians, especially the incumbents, to cede their power to a transitional government was to ask for too much. Indeed, the author demonstrates that the allied opposition politicians were fixated on power due to the euphoric hope that opening up the space for multi party politics was by itself an adequate condition for assuming the presidency. They could not, even if they were in opposition, allow the civil society groups to take control of issues in a situation where power was at stake.

The question that the CNC addressed related to what would happen to the extra-judicial powers invested in the presidency. This was indeed a 'politically correct position' to concentrate on, but what guarantee did the opposition politicians, the Moi-KANU axis and the rest of Kenyans have that the CNC would act the honest broker and hand over power to the new fairly elected leaders? As it has been argued, the CNC was itself an interested party. Mutunga shows in the sequel that people 'used sectors of civil society as springboards to activate political careers' (p.115). Indeed, many opposition politicians rightly viewed

the civil society sectors as being constituted by potential competitors. Suspicion among civil society groups and between them and political society was rife and belied attempts at instituting good governance through a well designed, people-driven constitution.

These are fundamental questions that underlay the tensions within civil society and between it and political society (see p. 114). It ought to be added that the CNC was not only middle class, it looked more like a coalition of NGOs, many of whose leadership was self-appointed and not necessarily democratic in nature and orientation. Other groups in CNC had no clear democratic agenda. Here the Law Society of Kenya (LSK) can be singled out for mention.¹ The tragedy in Kenya is that Moi has been so oppressive over the years that anyone who suffered under him or who professed to be anti-Moi passed as a democrat. Some of these people, basing themselves on the sympathy they elicited from unsuspecting donors formed NGOs of which they remained the self-appointed leaders. From their position in their organisations some abuse Moi and KANU as undemocratic while practising authoritarianism, nepotism, and corruption. They remain accountable to no one in particular. In the short run, such people and organisations quickly passed as civil society under the CNC project. As Mutunga and his group realised, these groups and some individuals had a tenuous, indeed transient history with the CNC and democracy in Kenya. Mutunga does not adequately theorise these issues.

A work of this magnitude and nature needs a well thought out theoretical conceptualisation of the notion of civil society in Kenya. If that civil society is to be based on the radical agenda of Mau Mau (why not other anti-colonial movements in Kenya?), the understanding of civil society ought frankly to isolate the pretentious elements within it based on the history of its constituent parts. Mutunga seems aware of this issue when he writes that

What seemed uppermost in the minds of many political *and civil society* actors was the handing over of political power to the “patriots”, some of them thieves and pillagers of the yesteryear turned “liberators” under the political nirvana of multi-partism. “Moi Must Go” was a clarion call that enticed ethnic chauvinism (p. 41 emphasis added).

But the question remains as to what prevented the CNC from isolating these elements from its midst. Indeed, reading through Mutunga’s book one comes across names positively presented but whose consistency and democratic credentials can easily be questioned. For instance, Throup and Hornsby (1998: 31) write that Paul Muite on behalf of Charles Njonjo drafted the scandalous bill that turned Kenya into a *de jure* one party state in 1982. The then leader of government business, Mwai Kibaki rushed it through parliament in a record 45 minutes. One wonders where the democratic conscience of these newly-turned democrats was then. In his analysis, Mutunga admits his close friendship to Muite and praises him for having made contributions to the course of the constitution-making project both financially and in his tenure as LSK chairman (see p. 149). One of the first victims of the enforcement of the *de jure* rule in

Kenya was George Anyona. Together with Oginga Odinga, Anyona attempted to form a political party called the Kenyan Socialist Alliance in 1982. It will be recalled that Odinga was put under house arrest while Anyona was detained together with Raila Odinga, Oginga Odinga's son. On the same page where Muite is praised, Mutunga deplors that the Anyona of the 1970s and 1980s was different from the Anyona of 1990s. While this is true, maybe it needs to be seen in the light of the composition of the so-called opposition parties and civil society groups of the 1990 where the Anyona of 1980s was expected to work with the Muite and Kibaki of 1980 but wearing a new guise. Friends of the democratic movement in Kenya have learned not to trust leaders of the movement because consistency and honesty are alien phrases to most of them.

The moral high ground that Mutunga cedes to the CNC in chapter 3 is seriously contradicted in the analysis of the 4Cs in chapter 6. The so-called middle class constituency of the civil society has on occasions been compromised and on other occasions acted in complicity with the undemocratic, corrupt, and inconsistent individuals within their ranks and even in the government. At times, individuals in this sector assumed a calculated silence or became defensive when people within their ranks were found guilty of corrupt practices. Anyang' Nyong'o exposes this problem in the following words:

Even in the work of the 4Cs, illiberalism did emerge, and a tendency towards Stalinist dogmatism was there as the "mass action" project became more and more threatening to the status quo. Any form of dissent from the idea of the gurus of mass action was looked at with suspicion and personalised in a manner not very different from the KANU hawk; name calling, reading conspiracy in every utterance, etc (p. 287).

I have described the consequence of this as the 'politics of selective blame' in a manuscript article under consideration. It would appear that the development of pluralist politics in Kenya came so fast that we did not take time to understand our political culture and practices as the avenue of arriving at a consistent basis for the democratic renewal and practice. The myth needs to be systematically destroyed that any person or group in Kenya that is anti-Moi automatically qualifies as democratic and a civil member of society. Indeed, not all members of civil society are civil. Many of them can be identified with one or more of previous dictatorial regimes. Some can be identified strongly with undemocratic and corrupt practices even as they profess transparency and accountability. Those self-declared as 'priceless in matters of national concern' have been faulted as dubious democrats whose pretence is self-serving and diversionary. Consequently, 'there is reason to be sceptical about [such leaders] capacity to effectively challenge and dismantle a status quo that they constructed' (Ihonvbere 1996:352).

Mutunga isolates opposition political parties and dismisses them for failing 'the people'. The tension between the coalition and the opposition political parties emerges in chapter 3, as Mutunga shows: the CNC's need to constitutionally redress the enormous powers vested in the presidency, the same powers

that opposition political parties seemed interested in inheriting under the clarion call of 'Moi Must Go'. This behaviour is what Ihonvbere (1996: 356) has described as 'the excessive personalisation of politics and an abnormal fixation on the incumbent leader'. This clarion call, Mutunga writes, enticed ethnic chauvinists. But a broader story on ethnicity and democracy needs to be told here which the confining topic of 'Constitution-Making' does not allow. This is precisely because the constitution making process was a latter-day development arising from the popular fight for the opening up of the democratic space.

The agenda for democracy in Kenya sprouted largely as a response to the institution of the authoritarian presidency (Anyang Nyong'o, 1989). Indeed, it acquired fire not essentially from coalitions like CNC but from the informal political arena presided over by popular leaders who had been rigged out of parliament in the infamous 1988 general elections (Muigai, 1993). The fight was at this time not conducted at Ufungamano House but in funeral places, in prayer meetings, Jua Kali shades, in *matatus*, university rooms, in the shamba in rural areas etc. Part of the reason why the movement gathered speed was because of the popular support base not of the CNC officials but of these leaders who, for one reason or the other, were accepted as leaders in their respective political spaces. Mutunga is aware of this though he maintains an ambivalent, but mainly dismissive attitude towards politicians. At one point he admits it by acknowledging that the NCA/NCEC popular base came through the political parties and religious groups (p.211). But he does not sustain the logic of this argument to illustrate how complex the relationship between political and civil society could be.

Ethnicity is not the bastard that Mutunga dismissively paints. The connection between ethnicity and political society is as much part of the success of the democratisation process as it has also contributed to its failure. As Bratton (1989: 422) argues, vocal ethnic interests have sometimes been a force for pluralism. This complex connection needs a rigorous explanation; one that simultaneously embraces ethnicity and political society and rejects them as processes in the political history of the civil society movements in Kenya. Ethnicity is both an inclusive and exclusive category of civil society. It has its potent interests in democracy as it also releases formidable forces that undermine democracy. Civil society in Africa, as elsewhere, ought to tolerate ethnicity as a category and harness it as a potentially constructive and destructive force.

While Mutunga dismisses political parties, as he does ethnicity, he must contend with the reality that their interests were not always destructive. As he writes, 'the political parties proved great mobilisers of the people' (p.115). In this sense, I differ with Ngunyi's peer review that sarcastically dismisses the politicians in a Hobbesian sense and implicitly privileges the NCEC as though the NCEC had no interests in the democratisation process. If one wrote a post-script of the NCEC to date, one would have to seriously consider the role of the

'opposition-aligned urban lawyers dominating the constitutional debate' in Kenya today. This sentence, quoted from Barkan and Ng'ethe (1998:46) suggests that the lawyers are in fact aligned and interested groups. They are not apolitical (p.242). The problem is that these lawyers have arrogated to themselves the role of all-consuming gurus of constitutional knowledge to the extent that pertinent issues relating to the present constitution are not highlighted for the public. All this is in the interest of ensuring that the constitution-making process proceeds even at the expense of setting a dubious precedent by breaking certain clauses in the current constitution. This is done tactically in the name of certain residual powers reserved for 'the people'. On investigation, 'the people' turn out to be this battery of opposition-aligned and urban-based lawyers.

The work of the CNC was taken over during the post 1992 election lull by, inter alia, the Kenya Human Rights Commission (KHRC). Chapter 4 looks at its proposal for a Model Constitution and illustrates in detail how the KHRC together with the International Commission of Jurists-Kenya Chapter (ICJ-K) and the LSK drafted the model constitution and floated it out for discussion. But the tough tide of Kenyan politics required that the KHRC consolidate its work on constitutional reform in an acceptable civil society realm – thus the birth and consolidation of the 4Cs. Once formed, the 4Cs had to engage in consultation with relevant groupings in society that had a stake in constitution making and in Kenya as a country. In chapter 5, Mutunga details the groups consulted and the issues raised. The groups included foreign stakeholders otherwise referred to as 'the recolonisers', political parties, religious groups, the labour movement, the business community and the NGO sector. The chapter concludes with the efforts initiated at civic education and the immediate pre-1997 general election strategy demanding minimum constitutional reform before elections.

Chapter 5 abounds with a number of bold claims, paramount among which is Mutunga's persistent belief that the 4Cs and its partners had an undisputed popular base. 'Some of the partners of the 4Cs', he insists, 'had larger flocks and following than the politicians' (p.84). Never mind that this was never tested in any way. But the point is that this statement underlines the tensions between the 4Cs and political society since it invokes a competitive criterion to assert a claim; a criterion regarding which politicians were more adept than individuals in civil society. The chapter examines the notion of liberal democracy affirming in the process that communism is dead. While addressing the consultations held with 'the recolonisers', issues related to the New World Order are highlighted. One gets the impression that more needs to be said. It is possible to trace the history of the current civil society project to the work of the Carter Center at Emory University through their governance in Africa program to the re-emergence of the notion of civil society as a current refrain adopted by the Bretton Woods institution.² The works of Africanists gathered at Emory Uni-

versity have shown remarkable resemblance to the policy documents released by the World Bank and the International Monetary Fund (IMF). And this raises more questions concerning the political and neo-imperialist role of Africanist knowledge than Mutunga has addressed in the book under review.

For instance, what is the nature of the new foreign incursions into the Third World and its impact on democratisation in Kenya? Why has it all of a sudden become easy for civil society groups and opposition elements to fight and indeed effect transitions in governance in Kenya today, unlike, say, in 1970s and early 1980s? Why is there new faith in NGOs and not in the state in Africa? Theoretically and even practically, are NGOs, by themselves bastions of democracy? Are they necessarily the antidotes to the state, never meeting with the state at any point except when they are fighting it? Can civil society in Kenya effectively replace the state? What effects does the rolling back of the state have on the delivery, however meagre and in whatever convoluted nature, of services to the generality of the citizens? It would also be interesting to give a comprehensive account of the configuration of forces in the lead-up to the fight for democracy in Kenya and how these forces aligned with external interests. Holmquist et. al (1995) provide interesting leads into this issue.

The point being raised is that it appears an exaggeration for one to paint a picture of Kenya as a society whose citizens have completely disengaged from the state and its apparatus except when they are coerced. This false assumption appears to be the basis for the opposition search for a single presidential candidate to take on Moi. Thus with dedicated concern, Mutunga asks: 'could the politicians tell the public what they wanted in one voice?' But this question can also be raised to the civil society groups like the 4Cs. Could civil society tell the generality of Kenyans what they wanted with one voice? Perhaps a more helpful question is whether any category can or ought to talk politics 'with one voice'. While Mutunga's understanding of 'the people' is acceptable, are 'the people' fully represented through the 4Cs? Who are these nameless 4Cs partners operating in the grassroots? Is it beneficial for the 4Cs to pretend to be fully represented at the grassroots across the country just like KANU does when we know that a multitude of the Kenyans stay at the grassroots in ignorance of the political developments in their own country?³

And this leads us to another important aspect of the single opposition presidential candidate and the means adopted for selecting one, leave alone the more debatable issue of whether one was really necessary and sufficient to ensure democratic transition. What does the regulation that the select candidate ought to stand in a constituency in Nairobi or Mombasa imply? (see p.90). I am trying to find a Kenyan town that is not cosmopolitan and I just do not seem able to do so. As unreliable as the Kenya Population Census Report of 1988 may be, it forms a good guide in my definition of town and cosmopolitan. Specific ethnic groups dominate every town, just as in Nairobi and Mombasa. Nairobi, both as a city and by its several constituencies, is notorious for voting ethnically, at

least going by the last two general elections.⁴ It is even possible to show that the opposition parties rigged elections in some of the constituencies in Nairobi, at least in the 1997 elections. Its proximity to the Kikuyu community opens it to an ethnic bias that would fail to satisfy 'the people' across Kenya. I focus on Nairobi because I am not convinced that the 4Cs or its related groups would agree to a candidate in Mombasa for this would have been subject to endless bickering. Generally, this criterion is amenable to the critical comments raised by Stephen Ndegwa and Mamdani in the peer review section relating to ethnicity and the rural-urban dichotomy respectively. Truly, Mutunga inadequately addresses the latter issue in this study.

A significant lesson that the 4Cs learned was that the KANU regime responds only to mass pressure. The minimum constitutional review call set the stage for this mass pressure. Chapter 6 to 8 examines the process towards mass action that characterised the pre-1997 elections while chapter 9 looks at the manner in which the elections were stolen in favour of Moi. The stand of the 4Cs was encapsulated in their rejection of the colonial, oppressive and undemocratic laws barring Kenyans from reaching the grassroots. Implicitly, this is an admission that the grassroots had not yet been reached which raises questions about the alleged popularity of the 4Cs there. As Mutunga writes, 'there were other organisations in this country that had the capacity to mobilise certain groups of citizens but had no serious political contacts with communities in urban and rural areas. NGOs and professional groups fell under this category' (p. 132). Latter on, he admits that the 4Cs really had no independent popular base. 'The regime knew very well that the base of the civic sector leadership was mainly middle class and lacked a popular base. ... The NCA/NCEC popular base came through the political parties and religious groups. Without those groups intact and solidly behind the NCA/NCEC as a block, the NCA/NCEC could not quickly mobilise popular support for its programmes' (pp.211-212). Was the urban bias of the 4Cs set to be its undoing ultimately?

Indeed, the grassroots was a monopoly of KANU. But this may not be solely because opposition groups were barred from reaching there as Mutunga holds. In most Kikuyu dominated areas, the Kikuyu politicians of the opposition were favoured irrespective of government hindrances. In most Luo areas, the Oginga Odinga aligned groups and individuals were favoured despite heavy police and provincial administration hindrances. I will hazard a guess that the 4Cs stood to make little impact in cosmopolitan Kisumu even with the latest heavenly sanctioned constitution. The grassroots people in remote Rift Valley, I suspect, would not accept the language of defiance like that demanding that oppressive laws should not 'be respected or complied with' (p.112). The 4Cs stood to make a greater impact in Butere constituency if they went with the politician Martin Shikuku than with the constitutional lawyer Kivutha Kibwana or in Bungoma if they went with Kijana Wamalwa than with Mukhisa Kituyi. It just takes the nullifying words of the former for the latter to be inoperative even in

the constituency for which he is the Member of Parliament. The question is why? The cautionary words of one writer are instructive here: 'the right to hold rulers responsible resides not only in formal constitutional devices but is part of the social fabric of society' (quoted in Bratton, 1989: 416).

The rest of the chapters are a narrative experience of the ways the NCPC and later the NCEC moved on its 'No Reform, No Election' campaign, cornered the government about reforms before elections and forced the Moi government to undertake minimum or facilitative reforms before the elections. Mutunga shows how the Inter-Parties Parliamentary Group (IPPG) overtook the NCEC initiative. It was through engineering a split of the parliamentary representatives from the non-elected civil society group leaders that Moi undid the ransom the NCEC had held over the government on reform through mass pressure on the streets, mainly, of Nairobi. Moi argued that the civil sector consisted of people who had no elective mandate and the government could not negotiate on the constitutional issue with them. The elected parliamentary leaders bought this argument, disengaged from the NCEC and formed IPPG to come up with the review bills. This allowed for negotiation leading to the 1997 election that Moi comfortably won.

Mutunga singles out for blame some sectors of the religious community and the parliamentary leaders who joined the IPPG for causing the Moi government to take control of the reform process and emasculate it later. The religious leaders are blamed for being in touch with the government and for initiating dialogue with KANU. Mutunga assumes throughout this book that the civic sector approach to the issue was the correct one and those who deviated were wrong. He pours scorn on the election monitors capping up his discussion with a sarcastic comment: 'Apparently, Kenyans will have to define the content of "men and women of integrity"' (p.218). Also in for blame are the foreign interests in Kenya who, he avers, took the gradualist reform approach since they feared any development that would upset peace. Mutunga suggests that the foreign interests like embassies and the World Bank/IMF feared that their interests would suffer because the NCEC convention was set to discuss the foreign monopolies in Kenya. I think otherwise.

The history of transition in Kenya will illustrate that the civil society sectors have been very compromising to the foreign interests including their use of foreign embassies for refuge (Holmquist, et. al. 1994). They have also urged the World Bank/IMF axis to stop aid to Kenya as a means of forcing the government to reform. This embrace-rejection mode of operation evident in opposition and civil society politics in Kenya, which is replicated in Mutunga's analysis, is absurd to say the least. Had Mutunga adequately problematised the foreign interests in Kenya and especially their role in the re-introduction of pluralist politics, the point ought to have emerged that their role was temporary and anti-people in the long run.

Chapter 10 is a synthesis of the paradigms used in the book. Reading through the chapter, one sees rudiments of the theoretical threshing that ought to have been applied throughout in the text under review. The chapter discusses the notions of non-partisanship and the development of civil society not as a government in waiting but as a parallel government. Its vibrancy should be designed to put checks and balances to the excesses of a government. Mutunga argues that there should be no danger in civil society being partisan. It is known for sections of civil society to form governments or to join particular parties as their think tanks. Then why blame individuals in civil society who use it to activate political careers? As Mutunga rests his case, a set of issues are discussed in Appendices A to D. They include, in this order, two critical group reviews of the book written by A.M. Shatry and Mutahi Ngunyi respectively; several peer reviews of the book by Julius E. Nyang'oro, Mahmood Mamdani, Anyang' Nyong'o, Stephen Ndegwa, Irungu Houghton and Mutahi Ngunyi; Mutunga's personal archives and lastly the general archives. I will not systematically review these appendices because they have been extensively used in the text of my review. I wonder however why the author included the peer review section in the volume. The purpose of a peer review is to gauge the worthiness of a book for publication. It is difficult to establish here if the author really took in the comments of the reviewers. In any case, the editorial work on the manuscript needs to be improved because there are glaring mistakes dotted all over the text.

Critical Issues

An exhaustive reading of the book under review illustrates the large amount of empirical material gathered in the discussion. Mutunga manages to deliver on his promise in an appreciable way. He narrates the story with extreme familiarity and ease. He also writes from a committed angle acknowledging his personal inclinations and openly criticising his friends and foes alike. This makes the book very interesting reading because very few participants in the democratisation movement in Kenya acknowledge their own failures and those of their groups as Mutunga does. Many of them are not just obstinate, they are also extremely obdurate. This explains why the NCEC lost the initiative to IPPG with the likes of Kivutha Kibwana and Gibson Kamau Kuria abusing their hitherto allies in NCEC who had joined the IPPG as 'idiots and cowards' and 'political prostitutes' respectively (p.237). Such obdurate and obstinate behaviour was out of tune with the changing realities of the crowd in Nairobi that had been extremely supportive of the reform movement (Murunga, 1999). Thus it may not just be the 'idiots and cowards' who were deviating from the initial resolutions of the NCEC but the demoralised crowds in Nairobi.

To adequately understand this perspective of the reform movement in Kenya, one ought to historicise the transition movement while making constitution making agenda a specific point of reference for the analysis. Can constitution making be seen outside the general call for democratising the political

space in Kenya? The book under review poorly historicises the democratisation process in Kenya and as Anyang Nyong'o shows lacks a good appreciation of the political culture in Kenya. Mutunga descends on his topic of constitution making as if it emerged from heaven and side-steps important pre-constitution-making processes in the political making of Kenya. The book is also badly theorised. Historicising the study would have allowed Mutunga to carefully marshal the empirical data he has to critically explain the diversity of representations evident in the Kenyan civil society. The political sociology of Kenyan politics needs to be foregrounded in analysing the categories that protrude within Kenyan civil society and the effects they have on democratisation.

The cultural component needed attention as a basis on which the constitution of Kenya needs to be grafted. The tension between the African communal setting and the individualism of the West is not problematised as a basis of understanding the type of constitution necessary for Kenya. It is surprising that Mutunga does not have time for ethnicity in his book. He seems to confirm Shivji's (1991: 35) concern that 'hardly any constitution in Africa ... recognises collective rights of nationalities'. Ethnicity is a major factor in the tensions within political society, civil society and the State and between these categories. Yet ethnicity is a valid cultural category in Africa, one that cannot just be brushed aside. Is there any relation between ethnicity and civil society in Africa? We want to remark on these general comments to analyse the ambivalence of resistance in Kenya, the nature of civil society and especially the place of ethnicity in the constitution of the Kenyan civil society. In particular we want to underscore that the state-civil society relations in Kenya are not always conflictual as Mutunga implies but interactive on many occasions. Parts of his empirical evidence illustrate this fact but because the author refused to theorise from his evidence and acknowledge interaction as a means of transforming the state, he did not drive home this point.

Theorising Civil Society

Civil society is a broad concept. Its history is decidedly western. But we live in a world where the West comes up with concepts and indiscriminately employs them in the African context without due regard to the peculiarities of the African social formations. This does not mean that there is no civil society in Africa or Kenya for that matter (see Ekeh, 1992). It just means that civil society in Kenya has its peculiar history, which does not in any way have to conform to the western one. But the West has made numerous incursions in Africa and deployed their power to impose concepts locally. That is why many scholars on the continent begin by clarifying such western derived concepts to ground them in the local context (see Ekeh 1992, Aina 1997, Mamdani, 1989, 1995).

The history of the notion of civil society is broad and the constitutive elements very heterogeneous. That is what Mutunga means when he says that civil society is not homogeneous. A specific tradition of the concept of civil society

can be traced to de Tocqueville, through to Durkheimian social theory before re-merging in numerous versions of pluralist political science. This de Tocquevillian approach saw civil society as a buffer against the state. Civil society was conceptualised in terms of its 'organically conservative role' serving to protect the state from 'spontaneous popular impulses' and also at the same time 'shielding those with a stake in society from the state itself' (Gibbon, 1998:31). This is the predominant approach employed by Mutunga in characterising civil society in Kenya though with some musings here and there to show the heterogeneity of the Kenyan civil society. But there are more traditions of conceptualising the notion of civil society that trace to other writers like Gramsci, Hegel and Karl Marx. Over time this concept has been theorised and re-theorised to accommodate new dimensions. Mutunga uses it largely in a de Tocquevillian sense where civil society is seen mainly as the anti-thesis to the state; that it exists in opposition to the state. Mutunga then highlights the role of the middle class in Kenya from which vantage-point he narrates the story of its conflict with the state and political society.

This analysis resonates very well with studies done by western Africanists whose labour has been fundamental in establishing the policy initiatives of the World Bank/IMF. Bayart (1989: 111) portrayed civil society in that dimension. Other writers in this tradition differ slightly with Bayart in insisting that civil society is a norm-setting realm that is sovereign from the state but addresses the state. Azarya (1994) and Harbeson, (1994) view civil society in this manner. For Azarya, what differentiates civil society from society is the 'civility' of the former. Borrowing from this lead, Chazam (1994) saw a difference between norm setting civil society groups and those that are self-seeking in nature. Perhaps the most radical break between these and Bratton (1994) is the latter's insistence that civil society is by nature plural. It should not be seen as essentially opposed to the state rather civil society is a 'necessary social sphere for legitimating state power' (Quoted in Sjogren, 1998: 11). Important reconceptualisation of this concept has been done by scholars of the Marxist persuasion many of whom are Africans.

The Ambivalence of Resistance

In reconceptualising the notion of civil society, scholars of radical Marxist persuasion point to Hegel and Gramsci and the revisions inserted by Marx in this thinking. In Africa, the concern is with the conflict relations asserted to exist between state and civil society. The mistaken assumption in Africanist and donor understanding that the re-emergence of civil society is by itself a re-emergence of democracy in Africa has been succinctly combated. Donor thinking upheld that civil society, especially in the NGO variant, was a bastion of liberty, democracy and good governance. It was consequently argued that the intrusive state needed to be rolled back to play the function of creating an enabling environment for private enterprise. Private enterprise was being

forged within the neo-liberal thinking as the arena where the rational citizen would maximise his potential. As such, Africanists and the donor community romanticised civil society.

Critical issues emerging from this discussion illustrate that the donor thinking was wrong in its romanticisation of civil society because it has not turned out to be the bastion of democracy that it was assumed to be. Relations of domination exist also within civil society. Rejuvenating civil society consequently turns out to be no cure for authoritarianism as the donor thinking via structural adjustment neo-liberalism asserted and forcefully thrust on Africa and the Third World. Evidence of civil society authoritarianism does abound in Mutunga's analysis though some of the most damning evidence is not highlighted. Had Mutunga seriously conceptualised the role of the donor community and the intellectual debts they owe the western Africanist in designing this structural adjustment and governance thinking, it should have been apparent from his analysis that the whole facade of thinking behind the new trust in civil society groups in Africa is not because of the western love for the African people. Rather, the issue was that western capitalism was undergoing a crisis and new adjustments in its thinking took it in the direction of faith in civil society. Thus, groups like the 4Cs were flowing on a wave firmly controlled and directed by renewed neo-liberal thinking. As Ajulu (1992) has concluded, democratisation in Kenya in the 1990s was achieved through imperialist collaboration.

Which brings me to a second issue about civil society in Kenya. This is the fact that the heterogeneity of civil society in Kenya as in Africa leads to other consequences. One consequence is that the dichotomy between state and civil society is rendered useless because these categories 'systematically interpenetrate and overlap one another' (Bangura and Gibbon: 1992, Olukoshi, 1998:17). Indeed, the CODESRIA school that Mutunga mentions in passing has done well in highlighting the point that civil society in Africa is such a contradictory realm that the simplified western approach that privileges conflict with the state and romanticises it as a bastion of democracy cannot adequately cater for its expression. This means that resistance to the state is not uniform from civil society. It means that civil society in many ways replicates totalitarian tendencies that are seen essentially as the hallmark of the African state. Indeed, nepotism, ethnic chauvinism, corruption, and inter-civil society exploitation are as much within civil society as they are within the state. As a result, civil society just like political society in Kenya cannot tell Kenyans what they want in one voice. Individuals within civil society engage with the state in myriad networks accusing the state only when they are losing grip and joining it when they have the opportunity. They at the same time link up with the donor community when advantages abound to be reaped and disavow it when conditions change. Had Mutunga thoroughly consulted the so-called CODESRIA school,⁵ it ought to have been apparent to him that the relation between notions

of civil society, good governance, structural adjustment etc is intricate and complex. One fundamental conclusion drawn in this school is that neo-liberal thinking has wrongly emphasised the western initiative in the democratisation of Africa. That the struggle for democracy predates western initiatives is the message one derives from Zeleza (1997). In relation to SAPs, Beckman (1991: 69) shows that 'it is resistance to SAP, not SAP, that breeds democratic forces'. Indeed, many serious analyses from within the continent emphasise this point. As Olukoshi (1998: 20) summarises,

It is the process of organization of resistance to the authoritarianism and repression associated with structural adjustment implementation that begins to open up (new) democratic possibilities based on the self-organization of groups opposed to the programme and in spite of state repressiveness. If, therefore, the period of implementation of structural adjustment has witnessed the growth of democratic pressures in many African countries as evidenced by the public demonstrations for political change in all four corners of the continent, it is not because of structural adjustment *qua* structural adjustment but in spite of it.

Why then does Mutunga take for granted the rationale for the mass protests in Kenya? Are there possibilities that the mass support rallied only around the 4Cs and NCEC because it was the next available means of expressing dissent against forces beyond the comprehension of the masses? It is possible that there are numerous forces involved in the mass action to which the masses spontaneously but capriciously rallied against than the mere support for constitution-making project. It is possible that the state only appeared as the most visible target but the issues to be addressed had an extra-state spread. Why then does Mutunga relegate discussion of SAPs in his book as an important instance in the mass pressures he so ably narrates?

Ethnicity

Another consequence of the intricacy of the civil society expression in Kenya is the divisive element that emerged to defeat the movement for democracy. As highlighted earlier, ethnicity is a category of society that Mutunga pays no attention to except when dismissing it. One wonders how a constitution-making project would be people driven without a concise analysis of ethnicity both as a valid identity and cultural category (see Shatry's critical review in the book) and as a politicised element that can deter democratic movements. Ethnicity is not a problem in itself in Kenya or Africa (Ake, 1993). That we belong to ethnic groups is a natural heritage that we have little control over. Indeed, as an identity category ethnic groups are acceptable forms of civil society expression in Africa. Civil society in Africa is derived in a fundamental way from kinship relations and plays important social roles through these biological relationships. The tension in Africa lies not in the existence of many ethnic communities but in the process of state formation that is taking place. Generally this process involves 'integrating disparate autonomous communities into one central political unit' (Ake, 1996: 42). Generally, this is a process of

conquest, of pacification and it is a very threatening process to the primary solidarities of African kinship and ethnic ties. These communities rightly see their existence being desiccated and rendered irrelevant through the centralising ecumenism of state-building ideology and practice. African constitutions see national diversity as a burden and an evil to be obliterated in the interest of national unity (Shivji 1991: 35). On the contrary, if there are conflicts within Africa, I would agree with Ake that they are the downside expression of the 'democratic' role of civil society. When people harness their primordial relations to defend interests that they hold dear, this is a very positive component of ethnic solidarity in Africa.

But the other side of the story is the divisive agenda to which these solidarities are put when ethnicity is politicised and used to achieve ends that undermine, overtly or covertly, those of other groups. This is the point where ethnic solidarity turns into ethnic chauvinism (Tamarkin, 1973: 263). In this role, ethnicity is responsible for new forms of rivalries that look at other communities in disparaging and pejorative ways. Here, a group's heritage of culture and social systems is seen in terms of the binary categories of inferior/superior and consequently privileges one group in the power hierarchy as opposed to the other. In the process of state-building and concentration of power within the new political units, contestations emerge when one community is privileged in the power game compared to the others. In such a context, issues related to heterogeneity of composition in leadership positions come into play both in the state and civil society groups. The initiatives from the state and civil society groups will make sense mainly in relation to the ethnic composition of its leadership. Conflict will be managed in this regard on the basis of ethnic balancing, competence, merit and other qualifications. As Bratton (1989: 427) has argued, 'Ethnic heterogeneity in leadership and staffing is as relevant to maintaining legitimacy in civic organizations as in the African state itself'.

This perspective demands that Mutunga examine the ethnic composition of the civil society groups in question. The tendency in Kenya has been towards subjecting the state to such scrutiny and not the opposition groups or civil society organisations. This has been made easy by the serious levels of oppression perfected by the Moi regime in which people become democrats by virtue of professing to be anti-Moi. Who are the leaders in the NGOs in question and what is their democratic record? What is their ethnic origins and are they related to one another in kinship or even professional terms? Is there a danger of building civil society groups that are linked by ethnicity and family relations? Are they representative of the Kenyan people, as described by Mutunga, 'spreading from as far as the Maasai in the South to the Somali in the North, from the Sabaot in the western border of Kenya to the Pokomo at the Coast'?

While the dominance of the Kikuyu, Luo and Luyia may be understandable on the basis of demographic calculations, it is particularly disturbing for some organisations to have an almost monochrome ethnic homogeneity. In this

respect, it is true that the Kikuyu seem to dominate these organisations. While this may not mean that the issues they raise are Kikuyu, the fact of this dominance means that the issues they raise are likely to be seen as imbued with Kikuyu interests plus a sprinkling of Kamba, Luyia, Luo etc. interests. What then does this mean in terms of people's response to the initiatives launched by such civil society groups?

This point meets with another basic consideration, to which Mutunga pays no attention: the rural-urban dichotomy. The Kikuyu dominance of the civil society network is because of the urban (Nairobi) bias of the civil society political initiatives. The difference between political and development NGOs also comes to play here as the rural areas are dominated by development NGOs and the urban by political NGOs. The rationale here is that the organisation of power in the rural areas differs significantly from the urban areas. The analysis contained in Mamdani (1996) differentiating citizens from subjects and illustrating the differences between civil and customary domains in the organisation of colonial power is an important starting point in explaining the plight of civil society groups in Kenya. The dichotomies that Mamdani introduces however need to be transcended to show the inter-penetrations between the rural and the urban. For there is ample evidence in Kenya that the urban relied heavily on the rural as people struggled to beat cost of living in the urban by getting their food, house help, etc from their rural homes.

The difficulty of gauging the urban population in Nairobi, for instance, arose from the constant in and out migration from the city, what Parkin (1975) calls the circulatory movement of population. People leave the rural home to the urban area knowing that primordial ties and obligation allow for a kinsman to house the other at no cost, assist one in getting a job, foot the cost of travel in case there is no easy job available etc (see Parkin, 1975: 149 and Ekeh, 1972). But as I leave home to visit my kinsman in the city, I arm myself with bananas, groundnuts, roast meat, millet flour, chicken, foodstuffs that go into supplementing the cost of food in the city. In this way the rural supplements the urban. I also move along with certain cultural practices from my village with which I need to survive in solidarity with those of my village in the city. To this extent, I am careful to retain my knowledge of village rules as are organised through the chief and local authorities at home. It is important to note that the local authority in independent Kenya has been carefully retained in subservience to the central government authority.

The authority of the chief in the village remains largely unchallenged in Kenya despite the changes effected recently on the Chief's Act. The chief is the representative of the Divisional Officer, the District Officer and Provincial Officer. All of these have unyielding loyalty to the president of the country as they initially did not only to the governor but also to the Crown. Chiefs in most cases were elders in the community. In colonial times, their modes of operation differed depending on the points of contact with the colonial powers and tradi-

tional ways of organising power in respective communities. Some chiefs defended their communities against oppressive laws or found ways of circumventing these rules. In other places, chiefs became real agents of the Crown. This was the more pervasive picture in which chiefs turned out to be law enforcers as well as adjudicators. These modes of customary law defined relations within the native reserves and ensured compliance. Compliance was forced and resistance was criminalised. In initiating colonial rule among the people of North Eastern Kenya, for instance, Sir Arthur Handinge recalled the need to inspire fear in these words: 'these people must learn submission by bullets – it's the only school; after that you may begin more modern and humane methods of education' (Lonsdale, 1989: 11).

The lesson of fear has all along pervaded the rural areas. The word of his Excellency remains a command even in the context of political pluralism. In the person of the chief is infused authority if he enjoys some rudiments of gerontocratic authority but this necessarily mixes with commands from above. That is what Moi knows to be the case in the rural areas. He pays little attention to urban civil society groups. Civil society groups have more of their attention in the urban not the rural, all these can be explained by the fact that they have not grasped the manner in which power is organised in rural areas.

Specific ethnic groups dominate specific urban areas. The Kikuyu dominate in Nairobi. The appeal of the civil society organisations in Nairobi has an ethnic touch to it. Just like the civil society groups have the ethnic dominance of the Kikuyu, a good study of civil society groups should not gloss over the possible connection between the dominance of the Kikuyu in the leadership of the groups in Nairobi and their apparent mass appeal in Nairobi. A careful study of the spread of this mass appeal will show that when mass action is called for, it spreads mainly in Central Province and parts of Rift Valley (Murunga, 1999: 194). In this case, it even permeates into rural areas in these regions. Some cosmopolitan urban areas also respond but in a very uncommitted and tenuous manner. Which simply means that the hindrance to the civil society groups getting to the grassroots is not only constituted by the state but also by the ethnic composition of the group calling for mass action or wanting to get to the grassroots. Mutunga has seriously glossed over these issues. Instead, like the urban lawyers mentioned earlier, he takes for granted the popularity of the constitution-making process, puts it in a vacuum where it is not predicated on any political culture that supports or inhibits democracy, and proceeds to narrate a story that is also partisan in its approach. Ours in this paper has been a call to historicise and theorise the narrative that Mutunga so ably weaves together.

Notes

1. The LSK has been at the forefront of the democratic transition in Kenya but its leadership lacks heterogeneity of ethnic composition over time. The leadership has also been guilty of selective condemnation of errant lawyers. Cases abound of

LSK leaders who have misappropriated society funds but gone unpunished while other cases of less serious nature meet with harsher punishment. Thus the story as told by Ross (1992) is just part of the whole. More needs to be investigated in terms of the inventory of LSK leaders over time, the various reported cases of errant lawyers, the punishment meted out and the variation in the harshness of the punishments in relation to the seriousness of the mistake committed.

2. Mamdani provided a good critique of this debate in *CODESRIA Bulletin*, No. 2 1990. This was followed by rejoinders published in *CODESRIA Bulletin* Nos. 3, 4.
3. This point is made clear by information I obtained from a friend concerning a voter in North Eastern Kenya who when asked who he wanted to vote for in the 1997 elections insisted on voting 'Jomo'. This was apparently in reference to the founding father of the nation Mzee Jomo Kenyatta.
4. At the moment, most of the members of parliament (MPs) of the constituencies in Nairobi are from one ethnic community, the Kikuyu. Most of them belong to one political party, Democratic Party of Kenya and almost all the MPs in this party are from one ethnic group, the Kikuyu.
5. Note that there is a diversity of schools in CODESRIA because the institution has survived on allowing a diversity of views of different ideological orientation as will be seen in the Anyang Nyong'o versus Mkandawire debate.

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