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WILL THE TRUTH JUSTICE AND RECONCILIATION COMMISSION SAVE KENYA?



Will the formation of the TJRC be a panacea to our past problem? Will it enable Kenyas to reveal the truth and obtain justice about what happened? Will it provide true ventilation, redress, healing and reconciliation without jeopardizing our stabilitiy and social cohesion?

By Phitalis Were

The first attempt to establish a Truth, Justice and Reconciliation Commission (TJRC) in Kenya was in 2003, but the idea died aborting. In our humble view, Kenya should carefully weigh the mandate of its TJRC and "articulate clear and realistic goals" that must be communicated to the public. The inclusion of "justice" in Kenya's proposal suggests that the reconciliation commission has positive connotations, but heavy implications for the country. It indicates that unlike the other Truth and Reconciliation Commissions (TRCs), Kenya's model is intending to give attention to justice for victims of violations.

It is therefore necessary for the design of the TJRC to define its specific goals with regard to each of the three pillars that form its existence – truth, justice, and reconciliation. There is need to define justice being sought and in so doing to be sensitive to the unique situation in Kenya. It should also not just concentrate on the violence witnessed after the elections because to do so would be to address the symptoms and not the disease. It should hence interrogate; what is the underlying injustice? Accountability for victims and suspected perpetrators should also be in accordance to the international law that is a fundamental

component of victims' right to redress and justice, and perpetrators right to fair trial.

But do we have the political will, determination, sufficient governance infrastructure and courage to deal

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Truth Justice and Reconciliation Commission

with historical baggage? Indeed Kenya has been mentioned along the lines of countries such as South Africa which has a less similar past, albeit in different form. Other Africa countries that have established Truth and Reconciliation Commissions are Liberia, Ghana, Sierra Leone, Morocco and Rwanda.

Will the formation of the TJRC be a panacea to our past problems? Will it enable Kenyans to reveal the truth and obtain justice about what happened? Will it provide true ventilation, redress, healing and reconciliation without jeopardizing our stability and social cohesion? How will this particular commission be different from past commissions that consumed public money, but ended with no action? In other words does Kenya need a TJRC? In doing so, it is imperative that Kenya looks at the 2003 Prof. Makau Mutua Truth and Reconciliation Commission Task Force.

The task force was formed to establish whether or not Kenya required a Truth Commission and did not extend to investigation of wrongs and atrocities committed. It came up with the recommendation that Kenyans wanted the Truth Commission set up to look into past human rights abuses and economic crimes committed since independence. The government, then, promised to implement the recommendations of the task force but this was not to be. Proponents of TJRC should therefore not let the effort of the Mutua Task Force to be overlooked but push for a careful reference of the report of this taskforce.

Can Kenya address the socio political and economic issues without a TJRC?

Kenya cannot thus address its problems without a TJRC given the present circumstances that has mutated over time. Kenya has so many laws to curb almost all conceivable offences, but this has not deterred people from committing these offences. The perpetrators scavenge for any loopholes in the law, and even then, witnesses are threatened thus very few come out to testify in courts of law. We require a TJRC because it allows people to open up and ventilate. The TJRC must therefore entrench witness protection and the right to access information mechanism in its mandate.

Kenya needs an equal opportunity commission to deal with inequity and equality to opportunities. It

should look at and address disparities, inequities, injustices, imbalances and unequal access to opportunities and resources on the basis of tribe or race, gender, geographical origin, size of your group, disability amongst others. This makes the proposed National Ethnic and Race Relations Commission a step in the right direction. The question of impunity particularly with regards to economic crimes must be addressed once and for all.

Impunity with regards to Economic Crimes

There are various laws that have been passed in this country supposed to address Economic crimes. They include: The Anti-corruption and Economic Crimes Act, The Public Officer Ethics Act, Public Procurement and Disposals Act and the Penal Code. All these and many more others address economic crimes in one way or the other. However, this does not seem to curb these crimes as every day, more economic crimes are committed despite the exist-

ence of these laws. The Kenyan TJRC should for that reason be established along the lines of the South African TRC with slight improvements especially on reparation of victims and punishment for some serious offences. The improvements should be aimed at preventing future impunity and bolstering the confidence of victims to feel that some right and justice has been done.

There is need to define justice being sought and in so doing to be sensitive to the unique situation in Kenya for it may be viewed as witch hunting and thus rekindle the tension and hatred that existed.

What determines the parameters of such commissions?

The parameters of this commission are largely determined by the specific situations in various countries. What wrongs is the TJRC envisioned to remedy and what historical injustices have led to the need to create the TJRC. In Kenya for example, the need for a TJRC has been necessitated by the following:

- § Land grabbing by a few individuals and unjustified displacement of many from their lands-
- § Massive corruption-misappropriation of state resources by few individuals leading to a few millionaires and millions of people languishing in poverty.
- § Inequitable distribution of resources- some regions in the country are allegedly favored more than others when it comes to distribution of resources. Some groups of people also feel marginalized by the state.
- § Poverty is rampant as a result of corruption and unemployment-many Kenyans especially the youth feel disenfranchised.

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Truth Justice and Reconciliation Commission

§ Tribalism is rife-Kenyans perception is that people are given preferential treatment because of their tribes-the ethnic hatred that manifested itself after the December elections

§ Collapsed institutions-various institutions. e.g. Judiciary, ECK, Parliament, religious bodies have failed Kenyans lending to consequent lost of faith in them.

SHORTCOMINGS OF TJRC

In many cases, truth and justice are pre-conditions to dialogue and reconciliation. Firstly Truth Commissions therefore end up having an impossible mission since the needs of victims may be incompatible with the needs of society Secondly TRCs do not go far enough to deal with the past or generate reconciliation. They don't have the power to punish nor authority to implement reforms. The proposed period 1963-2008 is not sufficient for the TJRC to effectively discharge its mandate. This is because the wrangles following the disputed elections dates back to pre-independence era. The problems involving land misappropriation especially resulted from the coming of the colonialists who displaced natives from their ancestral land. If this Commission is to fully investigate the past injustices, it has to go beyond the year 1963.

Amnesty Clause: Amnesty clause is often included in the for-

mation of Truth Commissions to encourage perpetrators to unveil the truth in exchange for being pardon. However, care must be taken not to pardon the architects of international crimes against humanity as proscribed in international law. Nevertheless, past Commissions have granted amnesty to the low ranking individuals who inflict actual pain to others in the belief of having a common cause as that of their perpetrators. The pardon is granted on condition of naïve participation to a 'common cause' as a result of influence by political elite.

Selection of members of the TJRC: It should be through an open process, involving consultations and public input. The persons should be well qualified, understand the interests of the competing groups and be independent minded.

Independence- The statute must guarantee operational independence-free from Executive, Opposition or any influence. It should have a separate and independent financial vote to avoid executive control and blackmail by donors.

Two year Timeframe- the two years being proposed for

its life may not be enough for the TJRC to achieve its heavy mandate; not when it took the South Africa TRC eighteen months in preparations alone.

Lack of universal definition of justice, truth and reconciliation. The remote perpetrators, leaders, and planners of the type of violations that have taken place in Kenya in recent weeks must never be exempted under any circumstance. To do so would be a travesty of justice, but justice according to whom and to what? Given the stereotype of 'Our Community' verses them.

RECOMMENDATIONS FOR THIS COMMISSION

This justice must be based on truth and should apply to all tribes equally This is because, the problems in Kenya have largely been inter-ethnic and failure to "obey" the ethnic balance would lead to further hatred and animosity between tribes. The displacement and dispossession of people

from their lands has been used as a political strategy for many years. The youths of this country are feeling disenfranchised due to unemployment even after getting education and others due to lack of proper education hence poverty. They are thus a time bomb waiting to explode and this commission should try to address their plight.

§ The commission should enjoy operational independence; protecting it from partisan political and

ethnic agendas that could dilute its undertaking.

§ Governments commitment towards implementation of the recommendations must be secured upfront.

§ Kenyans must have rational expectations from the TJRC, and not presume that it will be the panacea for all solutions of the various forms of violations that have bedeviled the country

§ The commission should also outline follow-up mechanisms to ensure implementation of recommendations beyond the commission's two-year lifespan.

CONCLUSION

In a nutshell, Kenya requires comprehensive historical, policy and constitutional review that will broadly address past and present social, economic and political maladies afflicting this country. In all these endeavours, Kenya should not reinvent the wheel. Lets learn and borrow a leaf from countries such as Guatemala, Spain and South Africa that have at different times dealt with these issues. Lets study their models and see which one best suits our social-cultural, economic and political circumstances. As to whether TJRC will be the best vehicle to deliver us out of our present morass and secure a lasting, just, healed, reconciled, peaceful and sustainable country is for you Kenyans to decide.

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The writer is a governance and development specialist

INTERNATIONAL MODELS OF TRANSITIONAL JUSTICE

South Africa; Truth Telling with a Bite-the mixed memory and punishment model

South Africa is perhaps the best example of a paradigm that we can term “the mixed memory and punishment model.” In this instance, there is a combination of truth telling as well as (potential) prosecution of selected individual involved in past abuses. Blanket or eschewed. The standard for pursuing such prosecution as are undertaken often revolve around the abusers’ willingness to admit their crime and in the process plead for an individual grant of amnesty. Failure to do so lays the person open to criminal procedures. The central ethical dilemma in this scenario is of course, whether even those who are guilty of particularly brutal crime should be allowed to go free simply because they offer a potential hypocritical and false contrition for past wrongs.

In April 1994 the promotion of National Unity and Reconciliation Act was passed established the Truth and Reconciliation Commission (TRC). Headed by Nobel laureate Bishop Desmond Tutu, the commission was eventually given leave to examine all putative cases of human rights violation committed during the period from March 1, 1960 through May 10 1994 (the date of Nelson Mandela’s Inauguration as South African President). The TRC was composed of three separate committees, one dealing with hu-

man rights violation, another with amnesty and a final one concerned with reparations and rehabilitation. The committee was authorized to consider amnesty for those who committed abuse associated with political objectives. Essentially this meant that the individual involved had to be a member of an acknowledged public institution (such as the security forces) or a recognized liberation group (such as the African National Congress). The acts in question had to have been committed in furtherance of the person’s “official” duties and not for essentially private or arbitrary reasons.

The amnesty provisions in the TRC’s charter represented, essentially a compromise between the demand of the old regime for a blanket amnesty for all those charged with human rights abuse and the equally strong insistence of many in the anti-apartheid movement that just punishment had to be meted out. The decision to proceed on a course that represented a middle ground between “Nuremberg and Amnesia” was dictated by the fact that the transition to the new South Africa was the result of a negotiated settlement between the old regime and the liberation forces. Without the possibility of at least selected amnesties for past crimes, it is virtually certain

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South Africa; Truth Telling with Bite-the mixed memory and punishment model

that the government of President. F W de Klerk would simply have refused to proceed with the dismantling of apartheid and to allow the African National Congress to come into power. In the event, fear that the TRC would be unduly generous in forging the crime of the past proved to be exaggerated.

Aside from the issue of amnesty, the other main purpose of the TRCs deliberation was to establish an agreed-on historical records of the nature of the human rights abuses committed during the apartheid period in South Africa, and in so doing promote a process of healing between whites and blacks. The assumption here was that given an acceptance of responsibility and an admission of guilt on the part of those involved in various crimes, the process of forgiveness and ultimately reconciliation would be significantly advanced. One striking aspect of the TRCs final report in this regards was the way in which it addressed not just the iniquities of the Pro-Apartheid forces but of the liberation movement as well.

The report detailed action of the African National Congress as well as the Zulu-based Inkatha organization that involved attacks on civilian target, killing of suspected informers, often by the dreaded "necklace" method (a car tire placed around the victims neck filled with gasoline and set alight), and other abuses. This attempt at evenhandedness outraged many in the ANC, including current South African President Thabo Mbeki, who denounced the TRCs findings as "inaccurate" and contrary to international law. It was further suggested that whatever abuses the liberation forces had committed were "unauthorised" or the results of poor communication with forces in the field. Interestingly enough, however, Nelson Mandela supported the TRCs position: "The ANC was fighting a just war, but in the course of the fighting the just war, to committed gross violations of human rights." Nevertheless, as it were, President de Klerk himself was able to persuade a court to black out a part of the final TRC report that implicated him in human rights abuses.

Guatemala: Remembering is enough; The Historical Clarification Model

There are two major paradigms of transitional justice that can be identified, and each of these occupies distinct intermediate points along the line of the retribution-reconciliation spectrum. The first of these to be considered is what might be called the historical clarification model! In this instance, there is some attempts to confront and document the abuse of the past (unlike Spain), but at the same time the identification of specific individuals responsible for such abuses is eschewed and, it follows logically, no formal legal proceeding are instituted against those responsible for human rights violation (unlike Ethiopia). Perhaps the best contemporary example of this model is that of Guatemala.

The government response was brutal and in the course of a 25 year civil war, up to 200,000 civilian were killed. Under the auspices of the United Nation, negotiation between the Guatemala government and Guatemala National Revolutionary Unity guerrillas eventually resulted in a 1996 peace accord...

After the overthrow of the leftist government of Jacobo Arbrnz in 1954, Guatemala evolved into a society in which social stratification was extremely pronounced. As of the early 1990s according to a report from the Organisation of American State, 77% of Guatemala families lived below the poverty level; health programmes covered only 14% of the population and a third of the Guatemalan people suffered from malnutrition. It also became a country where a culture of violence become pervasive as the political and economic elite sought to maintain the privileged of its

position. From 1960, leftist rebel waged a war to topple the rightist military-controlled government and to at least some measures of social justice to the country. The governments response was brutal and in the course of a 25 year civil war up to 200,000 civilian were killed. Under the auspices of the United Nation, negotiations between the Guatemala government and the Guatemala National Revolutionary Unity (URNG) guerrillas eventually resulted in a 1996 peace accord, and as part of this agreement, both sides agreed to the formation of the so called "Historical Clarification Commission," which was agreed charged with examining the abuses that had taken place during the civil war without "individualising responsibilities.

This seemed to be an ornate or at least roundabout way of saying that on names of the guilty would be offered in the final report. The Clarification Commission, initially established in June 1994 issued its final report on February 25, 1999, styled as the "Guatemala: Memory of silence." The document ran some 3400 page, with about 2,000 pages, devoted to individual cases, and the remaining text offering a general analysis of the conflict.

The report was unsparing in its overall assessment. Christian Tomuschat, its co-coordinator and a German jurist, said that while the guerrilla group had been guilty of their own atrocities, government forces had been responsible for the vast majority of the killed or

Guatemala: Remembering is enough

missing (including 626 out right massacres). "Believing that the ends justified everything, the military and the state security forces blindly pursued the anti-communist struggle, without respect for any legal principle or the most elemental ethical and religious values, and in this way completely lost any semblance of human morals." The main objective of successive Guatemala government, according to the report was to crush dissent from the deprived elements of Guatemalan society and in particular the term "genocide" was used to describe these measures and the commission called for the institution of legal proceedings against those responsible for such outrages.

To date, the government had ignored this recommen-

dation and there seems little reason to assume that it will change its position anytime soon, particularly given the continuing heavy influence of the military and the security forces in Guatemala. The government has followed what might be called a policy of "tacit impunity" but it is interesting in promoting human rights and reforms outlined in the peace accords. At the sometime, the governments failure to move forward on any of the recommendations of the Historical Clarification Commission is far more indicative of its real stance. Past President Alvaro Arzu let the cat out of the bag in this regard when he simply asked the Guatemalan people to grant forgiveness for the states "actions or omissions, for what we did and what we didnt do."

Adopted from TI-K publication: Dealing with the Past Economic Crimes and the Transition

International News Roundup

Corruption still rife in Romania despite EU accession

Prosecutors have gathered substantial evidence on corruption cases against Prime Minister Adrian Nastase, former transport minister Miron Mitrea, current Labour Minister Paul Pacurar and five other senior officials, the media reported.

Although this could be an important test case for the country, the Romanian constitutional court ruled that the Parliament must give its approval to investigate high-ranking politicians. This prompted Romanian President Traian Basescu to call the constitutional court "a shield for corruption".

A telling image of what corruption can represent in Romania was provided by the discovery of \$17 million in cash in the boot of a car belonging to oligarch, foot-

ball club owner and populist politician Gigi Becali. He said the money was intended "to buy chocolate and candy". Strange as it may seem, the courts often consider such explanations to be valid.

The high-profile cases may remain taboo, but at least statistics from the anti-corruption prosecutors' office (DNA) show that hundreds of people have been indicted in recent months and dozens convicted. What remains to be seen is whether the Commission will find these developments satisfying.

Justice is not the only problem area. According to reports in the Romanian press, the country could lose a large part of its EU agricultural funds due to poor management of the programmes.

Bulgaria also under EU scrutiny

Romania is not the sole focus of the Commission though. Bulgaria could also lose most of its EU funding because of loopholes in the management of programmes and a perceived high degree of corruption, according to sources cited by EurActiv Bulgaria in an article last week.

Earlier this month, legal proceedings were launched against a former chief of the roads agency, who is accused of misusing over 50 million in EU funding. This public money was allocated to a company owned by his brother.

In an attempt to manage the crisis, Sofia earlier this month appointed a new deputy Prime Minister who was given special responsibility for the management

of EU funds (*EurActiv 13/05/08*).

In another move on 13 May, Prime Minister Sergei Stanishev gave his new deputy, Meglena Plugchieva, the green light to sack any civil servant whom she would consider incompetent. Stanishev also stated that the administration and the government will work around the clock, even on week-ends, to meet Brussels' requirements.

The Bulgarian daily Dnevnik published an interview with EU Commissioner for Regional Policy Danuta Hübner who said on Thursday (15 May) that the tackling of the road fund issues will be a test for Bulgaria to prove that it can abide by the rules when dealing with EU money.

VIEWS ON FUNCTIONS AND UTILITY OF TRUTH COMMISSIONS

Bryan Hehir

I think that truth commissions function at three levels: The first entails catharsis. The second level involves the process of moral reconstruction. Society must pass judgment on what has been heard. It must establish moral accounts of the historical records. The third level verges on the political- what is done with the process of truth telling? A number of options are available. A society may even choose to forget or ignore the truth.

Tina Rosenberg

I am struck by how many comments outline the parallels between truth commission and the therapeutic process of dealing with victims of post-traumatic stress disorder. The similarities are striking. People need to tell their story, but this is not all. Two other levels are important. People need to tell their story to someone who is listening to them seriously and validating them. This is official acknowledgement. More importantly, victims must be able to reintegrate that narrative into their whole life story.

Lawrence Weschler (Staff Writer, New Yorker)

Furthermore, as the victims put their own lives together, they also pull the whole country together.

I detect three overlapping metaphors in our discussion- the realms of law, art and therapy. The most effective truth commissions carry on elements of the art, by being broadcast to the public on television for example. Artfulness of presentation make the commission more effective. The public responds like an audience of a Greek Tragedy. People must organize their lives in an artful way that lends them a cathartic life experience at the end.

Yael Tamir

Should Israel and Palestine establish a truth commission? I can think of three kinds of justification, which I have ordered from the most to the least convincing. The first presuppose that we have a moral obligation to know and remember the wrongs that have occurred. If we ignore the injustice that has been done or forget it, we become in some sense accomplices to it. This implies that we have an obligation to know what has happened regardless of the social effects that this knowledge might produce. A truth commission contributes to our ability to reach this goal and is therefore welcome. It signals that no harm will go unnoticed and that those who bear responsibility will not go unpunished.

The second justification is instrumental. It is grounded in the psychological needs of the victims and their relatives:

Adopted from Oxford publication, International Human Rights in Context by Henry Steiner, Philip Alston and Ryan Goodman, 2008.

the need to talk about their harsh experience and to have their suffering publicly acknowledged. I am skeptical about the ability of truth commission to serve this goal. I also have deeper doubt about the psychological assumption for example, whether victims are better off if they are allowed to recount their experiences.

Truth commissions are also seen as instrumental in promoting reconciliation. I find this claim doubtful. In my experience in Israel-Palestinian workshop, I have found that an attempt to expose the facts is not particularly useful. It is often better to assume that injustices have been committed by both sides and then focus on how to solve the conflict.

The most convincing justifications are then of the first kind, for the argument for commission that rest on instrumental justifications are very contingent on detailed contexts. I believe that a truth commission is unlikely to be helpful in the Israel-Palestinian case. To summarize, if the peace process is to move forward it cannot proceed on the basis of

an investigation of the past. Rather we must disassociate ourselves from the past and build a future based on an abstract acknowledgment of the injustice done by both sides, an injustice grounded in the fact that we share the same small piece of land for which both sides make claims of right. We must therefore reach an agreement regardless of past injustices. Peace cannot be grounded in competition over past suffering.

It is often better to assume that injustices have been committed by both sides and then focus on how to solve the conflict

Fateh Azzam

Basically I agree with Yael Tamir's assessment of the situation and the potential for a truth commission. At the same time, I cannot help but note the urgency of dealing with issues of past injustices.

What should emerge from this strange animal called the peace process? I have some disagreement with Yael. Unless we acknowledge what happened in the past, it will continue to come up. Israel and Palestinians must redefine their relationship but not necessarily deny it. We must acknowledge one another in a way that lays a proper foundation for our future. This will take a very long time. The Palestinians need to hear some acknowledgment in order for them to admit that co-existence is possible.

For these reasons, I had thought a truth commission might be a useful exercise. But further reflection has made me realize how much the outcome of the peace process depends on politics and political desire. Our societies need to accept one another and this has not yet happened. Perhaps it is a question of timing.

Ten Lessons for the Truth and Justice Commission

How should Kenya confront her past? American philosopher and poet George Santayana warned: "Those who cannot remember the past are condemned to repeat it" As a means of confronting the past, the forthcoming Truth, Justice and Reconciliation Commission (TJRC) is a judicious middle way between two flawed alternative: Nuremberg-style "victor's justice" and simply sweeping history under the carpet. What lessons do their experiences hold for those conducting Kenya's investigations?

1. **There are two kinds of truth:** The first micro-level truth is the victims' truth which provides questions as to why something happened and by whom. The second, macro-level truth is the perpetrators' truth which provides the answer.
2. **Truth is found in Voluntary statements.** By offering amnesty to the perpetrators of politically motivated crimes in return for full confession.
3. **The goal is resolution, not retribution.** It is not possible to punish adequately all those who have indicated suffering upon members of another ethnic group.
4. **The issue of guilt and innocence is rarely clear cut.** Uncovering the truth and determining individual culpability is both difficult and potentially divisive.
5. **Amnesty is not a substitute for criminal justice.** The controversial issue of political amnesty is probably the most difficult.
6. **Making amends may require financial compensation.** Without "restorative justice" (appropriate financial compensation) the aggrieved continue to consider themselves victims and reconciliation is harder to achieve.
7. **Avoid ethnic and partisan bias.** Even-handedness is a prerequisite for widespread public acceptance of the TJRC's findings.
8. **Do not allow the perfect to become the enemy of the good.** There is no perfect way (ethically, legally or politically) of seeking truth, justice and reconciliation.
9. **The political establishment must stay the course.** The TJRC can work, however, if politicians do not exploit it as a prop to embarrass their rivals.
10. **There can be no turning back.** The TJRC's challenge is to minimize its pain while maximizing its healing powers.

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Event: Of Convention and Countries without change in power; Can change in law affects global corruption
Date: 4th June 2008
Venue: TIS
Organiser: The American Academy in Berlin

Event: 8th CIVICUS World Assembly
Date: 18th-21st June 2008
Venue: Glasgow, Scotland
Organiser: CIVICUS

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