

Transitional justice and democratisation nexus: Challenges of confronting legacies of past injustices and promoting reconciliation within weak institutions in Kenya

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Abstract

Following the post-election violence (PEV) of 2007–8, which almost jettisoned the country into civil war, Kenya put in place a number of transitional justice mechanisms, such as truth telling, as a peacebuilding strategy. One of the major recommendations of Kenya's Truth, Justice, and Reconciliation Commission (TJRC) is the creation of institutions and mechanisms for peacebuilding, reconciliation, and early warning with a view towards harmonising their activities and adopting a coordinated approach. This article explicates the centrality of democratic institutional reforms in the process of reconciliation, peacebuilding, and long-term stability. In tackling the notion of national reconciliation as a central pillar in post-conflict recovery and peacebuilding, this paper proposes that reconciliation happens within strong and properly functioning institutions

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of governance that are supportive of transitional justice mechanisms. Based on the transitional justice process in Kenya and building upon a view of reconciliation as a process, rather than an end, this paper argues that strengthening institutions that function within governance structures will go a long way towards placing Kenya on the path to reconciliation, national cohesion, and long term stability.

Keywords: Kenya, transitional justice, democratisation, reconciliation, institutional reforms, TJRC

1. Introduction and background

In response to legacies of accumulated injustices coupled with the desire to create strong democratic nations (Buckley-Zistel and Zolkos 2012:3; Kisiangani 2008:56), many countries in Africa continue to adopt transitional justice mechanisms of truth telling, institutional reforms, reparations and prosecutions. Nonetheless, these mechanisms have not significantly helped African countries transition to sustainable and peaceful nations. For example, the growing criticism on the use of truth and reconciliation commissions (TRCs) in Africa has generated questions about ‘the value and utility of such commissions to meet the presumed expectations of their beneficiaries’ (NPI-Africa 2014:5). For instance, Rigby (2001:126) opines that South Africa’s TRC ‘traded justice for peace since some perpetrators were persuaded to say the truth after being assured of amnesty’. Similarly, Schabas (2004:363) argues that the Sierra Leonean TRC ‘in the absence of strong ritual inducement ... lacked deep roots in the local cultures of Sierra Leone, thus many people did not see the need to testify before the TRC’. The International Centre for Transitional Justice (ICTJ) in its analysis of Kenya’s TJRC report maintains that ‘the difficulties surrounding the TJRC process and its final report reflect the reluctance of the political leadership to account for the country’s dark past’ (ICTJ 2014:10). State fragility has since been identified as an important obstacle to transitional justice processes anywhere (Gready and Robins 2014).

Over the years, Kenya has witnessed a number of internal armed conflicts leading to deaths, transfer of population, rape, torture, and destruction of property. Elite fragmentation and ethnic polarisation have been important factors informing conflict in Kenya (Kanyinga et al. 2010:4). Gross abuse of state power has led to numerous cases of injustices and accumulated human rights violations since independence (TJRC 2013:iv) culminating in the PEV. Following the PEV, many actors agreed that Kenya needed to put a break to past injustices (Buckley-Zistel and Zolkos 2012:3; Kisiangani 2008:56) and foster healing and reconciliation to pave the way for sustainable peace. This marked the commencement of transitional justice as a response to the need for peace and demands for justice. Some of the transitional justice measures established include: commissions of inquiry – most importantly the TJCR; institutional reforms – especially constitutional, judicial, security sector and electoral reforms; and prosecutions – remarkably the International Criminal Court (ICC) process. Unfortunately, as some pundits argue, ‘most of these mechanisms have since come to a complete halt’ (Kamungi 2015).

This paper postulates that institutional challenges have been a major hindrance to the success of transitional justice mechanisms in Kenya, hence derailing the reconciliation and peacebuilding process. This is, in part, a result of ‘little attention given to local politics and dynamics’ (Bosire and Lynch 2014:257) and failure by Kenya’s civil society to closely work with state-led initiatives such as the TJRC to bolster them (Bosire and Lynch 2014; Hansen 2012). On its own, the state may not create strong institutions of governance that support transitional justice process, after all, the state is at the centre of numerous cases of human rights violations (TJRC 2013). Institutional reforms should entail a ‘process of reviewing and restructuring public or state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents’ (ICTJ n.d.).

2. Brief contextual analysis of the Kenyan situation

After decades of repression, ‘many authoritarian oligarchic regimes in Africa obliged by the impulse of mass discontent and popular protests already begun in the last two decades to accept their own illegitimacy’ (Nyong’o 1992:98). Within this time, Kenya witnessed a spirited demand for democratic space leading to multiparty democracy and regular elections (Makau 2008:247; Nyong’o 1992:99). However, fundamental democratic transition through institutional reforms has been slow (Kanyinga et al. 2010:4).

Kenya has historically witnessed numerous cases of atrocities, systematic violence, historical injustices and widespread human rights violations, with some, such as the Turbi and Wagalla massacres of 1984 and 2005 respectively, being perpetrated by the state (TJRC 2013:187, 235). Against this background, a strong desire for change emerged, especially following the PEV (Makau 2008:249). Triggered by the disputed presidential election results, the swiftness with which the PEV manifested in ethnic violence startled the world.

Kenya was to embark on what appeared to be a strong-willed attempt to transform the country by addressing the past and creating structures that can assure future stability. The aim was to foster reconciliation, to ensure national cohesion and peaceful coexistence of Kenya’s different ethnic groups and assure non-recurrence of past painful experiences (Mue 2013). ‘The National Accord of 2008 committed the coalition government to carrying out a number of activities, with the two most prominent being the constitutional reform and the review of the 2007 presidential elections that led to the establishment of transitional justice process’ (Brown 2011:6).

Kenya witnessed a swift constitutional reform leading to the promulgation of a progressive constitution in 2010. However, five years on, the constitution, arguably, remains the only concrete achievement of the institutional reform agenda in Kenya to date. Nonetheless, ‘the longer-term impact of the new constitution heavily depends on the government’s respect for constitutionalism and the rule of law, which in turn is subject

to its political will' (Brown 2011:130). Unfortunately, this political will and accountability remain almost non-existent (Hansen 2012; Kanyinga and Long 2012; Migai 2011:14–16).

It is argued that Kenya's transitional justice process has been of little significance (NPI-Africa 2014; Hansen 2012:3) due to vacillating institutional reforms and other unintended side effects of democratisation (Branch and Cheeseman 2009). This has prompted some scholars and practitioners to question the country's preparedness for the transitional justice measures that it has since put in place. Some practitioners like Njonjo Mue (2013) opine that 'transitional justice mechanisms were put in place in Kenya without a genuine regime change'. Lynch (2011:183) had earlier held that 'none of the past political transitions led to a genuine democratic regime change in Kenya'. In his evaluation, Brown (2011:2) too thought that 'the transition to a new political order was only partial, lacking the solid break with the past that has occurred in places such as Bosnia and Herzegovina or Sierra Leone'.

An emerging strand of thought in the literature on Kenya's transitional justice process alludes to the notion that Kenya lost the transitional window in 2002 upon the exit of President Moi's repressive KANU regime (Ndegwa 1997:601). However, others hold that the PEV provided Kenya with yet another opportunity to address past injustices, militarisation, violence, and abuses and recreate a new nation based on equity and the rule of law (Mue 2013; Kanyinga et al. 2010:7). Kenya's civil society has equally been blamed for failure to work closely with state-led initiatives to ensure strong institutional design supportive of the transitional justice process in the country (Bosire and Lynch 2014).

The increased uptake of transitional justice mechanisms by many fragile states has led to the convergence of state fragility, institutional reforms, justice, security, and development agendas. In such a situation, institutional strengthening is an imperative undertaking in a holistic approach to transitional justice (Minow 1999). Yet, as Gready and Robins (2014) argue, institutional strengthening can become both imperative and

hugely challenging. Such reforms can be supported by recommendations of truth commissions, such as the TJRC, especially on how to tackle issues of corruption and political impunity. Recommendations should include fundamental reforms of judicial processes that seek to build the capacity of the justice system since accountability contributes to transforming institutions (Gready and Robins 2014). However, the Kenya-ICC process has demonstrated that prosecutions within weak institutions can be counter-productive since in fragile states there is a dangerous tension between a strong focus on human rights that targets reform of the security and judicial sectors and the need to ensure service delivery (NPI-Africa 2014:15). Another tautness occurs between legitimacy and capacity, for instance: ‘Is it better to have tainted institutions that still basically work or purer institutions that essentially do not?’ (Gready and Robins 2014:345). This has been one of the challenges around institutional reforms in Kenya. The country witnessed a swift constitutional reform but due to lack of political will, none of the institutional reforms contemplated in the constitution have been fundamentally implemented (Brown 2011: 5–6). Instead, the political elite are keen in deciding on the route with least threats to their political interests (Branch 2011; Musila 2009:459).

Kenya appears to have hurriedly established transitional justice mechanisms, largely as a strategy to end the violence of 2007–8, and to assure the citizenry and the international community of the state’s commitment to change the course of its chequered socio-political history (ICTJ 2014:2; NPI-Africa 2014:2). This was done without a clear grasp that establishment of such mechanisms primarily involves fundamental changes to infrastructures of impunity responsible for the human rights abuses (Brown and Sriram 2012:258). The country continues to grapple with embedded political impunity. For instance, the same persons, accused of committing atrocities, continue to control state power, making it extremely difficult to unaffectedly tackle issues of the past and ensure that justice with perpetrator accountability is taken seriously. Through the collapsed ICC cases, Kenya has once again demonstrated to the world what risks are involved in prosecutions and how poor strategies of prosecution,

whether domestic or international, can lead to undesired outcomes (NPI-Africa 2014:15–16). The danger is colossal where individuals, as opposed to institutions, are in control of state power (Murunga and Nasong'o 2007:12; Di Palma 1990:496).

Some theorists have elaborated on accountability as a pre-requisite to reconciliation since justice for past atrocities in Kenya is partly to be attained through holding perpetrators accountable (Brown and Sriram 2012; Musila (2009:452). Brown and Sriram (2012:244) emphasise that the 'big fish cannot fry themselves'. It is an assertion affirming that only strong institutions that operate outside the clasp of individuals (Murunga and Nasong'o 2007:12; Di Palma 1990:496) can successfully bring perpetrators of past atrocities to account, hence, assure justice to the victims and open or speed up the process of healing and reconciliation (AfriCOG 2015; NPI-Africa 2014).

3. Reconciliation and politics

Recently, Sarah Maddson (2015:40–57) expounded on the complexity of reconciliation and multiple political challenges facing societies attempting to transition either from violence and authoritarianism to peace and democracy, or from colonialism to post-colonial stability. Maddson (2015:40–43) conceives of reconciliation as a process that is deeply political, and one that prioritises the capacity to retain and develop democratic political contest in societies that have, in other ways, been able to resolve their conflicts.

The conviction that 'whereas the past is painful, it is possible to transform the relations and structures that continue to divide societies' (Maddson 2015:51) is one that can nurture reconciliation. The Kenyan debate on transitional justice and reconciliation should therefore operate within the prevailing political realities. Lack of political will remains a key challenge to democratisation and transitional justice anywhere. But as suggested by Murunga and Nasong'o (2007:12), this challenge can be overcome through a political discourse that moves politics from the hands of people and

places it within institutions – since reconciliation occurs within structures over which individuals have no control. Such structures contribute to the fight against impunity and assure political inclusion, which may defuse the prevalent conflicts of greed and grievance. In Kenya, as is the case in many other African countries, control of state power is linked to development (Herbst 2014). This causes developmental imbalances that are bedrocks of conflict. Transformation of such conflicts calls for a situation where the persons who control the state are not, at least, the sole determinants of the government's development agenda (Kanyinga et al. 2010).

Reconciliation opens up space for politics between former enemies rather than covering over the conflicts that threaten their political association. This entails accepting the risk of politics and the opportunity it presents rather than eliding it (Schaap 2005:4). That is the substance of democracy: the ability to accommodate diversity of views (Schaap 2005:22). With such accommodation there is a possibility for co-existence of democratic political expressions (Little 2014:138). This leads to the creation of space for more robust engagement towards attaining co-existence in Kenya. It is for this purpose that Maddson (2015:51) echoes that meaningful reconciliation can occur when 'divided societies expand their political capacities, embrace conflict without violence and find new ways of respecting old adversaries'. Daly and Sarkin (2011:124) had earlier held that 'reconciliation recognizes that in many deeply divided societies, the capacity to disagree respectfully may be the most that can be expected from conflict transformation efforts'. This article reiterates that if strong institutions are widespread throughout the structures of governance, it will assist Kenya to respond positively to past injustices and place the country on the right path to healing and reconciliation.

The aim is to create Kenya as a society where reconciliation and conflict transformation can thrive. Underlying this avowal is an understanding of disagreement as normal 'but one that requires institutional interventions if it is to harness its democratic potential rather than devolve into violence' (Maddson 2015:52). The challenge is 'to develop ways of engagement that

allow for nonconformity, dissent, open debate, and orderly political change when necessary' (Maddson 2015:52).

4. Concept and praxis of transitional justice

The UN (2010:2) defines transitional justice as the 'full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation'. The notion of transition connotes a fundamental shift in governance: from autocracy to democracy, military rule to civilian rule or from accumulated injustices to democratic stability (UN 2010:3). In any of these alterations, the centrality of democracy is accentuated, meaning that transition profoundly entails a democratisation process. Transitional justice consists of both judicial and non-judicial mechanisms, including prosecutions, the search for the truth, reparations, institutional reform, and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations (UN 2010:2; UNSC 2004). Duly rooted in the disciplines of international law, transitional justice entails accountability during transition. Transitional justice includes a much broader range of mechanisms, goals, and inquiries across a multiplicity of disciplines (Hansen 2010:2–4).

The interconnectedness of the transitional justice discourse and the complexity of human rights violations require global action but also sensitivity to local needs. Transitional justice discourse and particularly the complexity of the process within a slow democratising process in Kenya should therefore be viewed within a global theorising process. Many countries continue to reckon with contextual issues given the sensitivity of transitional justice to cases in both theory and praxis. Imitation of what has happened elsewhere, without proper institutional design, has led to cases of failure of transitional justice processes in Kenya and other parts of Africa.

5. Institutional reforms – a key component of transitional justice

Weak or lack of institutions is not only the cause of state failure to prevent human rights violations but also the reason that state power is used to perpetrate injustices (TJRC 2013:57–58). Strong democratic institutions are remedial (Gibson 2009:137) and can facilitate the movement from instability to stability; from human rights violations to a situation where such rights are universally upheld, respected and protected (Olsen et al. 2010:997).

Latin America has gained its place as a global leader in transitional justice (Grombir 2012:12; Forsythe 2011:557–8) partly due to its ‘position at the forefront of the third wave of democratisation and its relatively long experience and practice in developing mechanisms to deal with past authoritarian state violence’ (Forsythe 2011:558). Latin America’s experiences demonstrate that when establishing transitional justice mechanisms, it is important to restructure systems of governance that have in the past caused human rights abuses (Brown and Sriram 2012:258). Key areas of consideration are: the type of conflict termination; the path to democracy; the scale of human rights abuses; the time span and character of the former regime; the commitments of the new government; the democratic status; and the length of the post-conflict period (Kisiangani 2008:52; Nwogu 2010:286).

Countries with strong and functioning democratic institutions generally excel in terms of upholding values of justice, human rights, equality and the rule of law (Donnelly 2007), leading to peace, stability and development (Bertucci and Alberti 2005). This is partly due to the promise of political inclusivity and institutionalisation of governance that accompanies democracy (Risse-Kappen 2005:21). Robust institutional reforms can help overcome Kenya’s prevailing political realities (Murunga and Nasong’o 2007:17) where the political elite continue to manipulate the system through entrenched structures of impunity, exposing the country to high risks of recurrence of violence (Sihanya 2011).

The significance of democratisation in transitional justice is clearer when examining how a fledgling democracy reckons with severe human rights abuses, especially those committed by earlier authoritarian regimes, their opponents, or combatants in internal armed conflict (Grombir 2012:4). Transitional justice and democracy should therefore be explored concomitantly. As Musila (2009:449) postulates, ‘transitional justice debate is inseparable from the wider political context’.

Olsen et al. (2010:982) argue that ‘transitional justice has a positive effect on democracy and human rights’. The positive effect is more likely to occur in situations where transitional justice mechanisms are pursued in combination as opposed to isolated processes (Olsen et al. 2010:982). Olsen et al. (2010:982) suggest that ‘two combinations of mechanisms – trials and amnesties; and trials, amnesties and truth – achieve these goals’. Minow (1999) had earlier hypothesised that a combination of various mechanisms might satisfy the requirements for successful transitional justice process. Minow (1999) assessed four main theoretical frameworks. The first two are: *maximalist* (which emphasises the highest level of accountability) and *moderate* (which emphasises victim-oriented restorative justice). The others are: *minimalist* (which warns against accountability and proposes that amnesty provides necessary stability to nurture democracy and human rights regimes) and *holistic approach* (that involves multiple mechanisms). Minow (1999) maintained that single mechanisms were insufficient to cope with the magnitude of problems faced by new democracies and concluded that a combination of mechanisms was best suited in responding to the demands of transitional justice, and hence suggested the holistic approach as being more effective. Both Minow (1999) and Olsen et al. (2010) postulate the centrality of institutional reforms for the successful transition justice processes.

Kenya’s institutional degeneration is mired with a wide range of human rights violations and accumulated injustices (Kagwe 2010:417; Makau 2008). The country has always struggled against the dominance of state power (Murunga and Nasong’o 2007:9; Amutabi 2007:203) leading to historical injustices and human rights violations such as massacres,

assassinations and displacements among others (TJRC 2013:57). Spirited attempts to reform the infrastructure of the state in line with Agenda Four of the National Dialogue and Reconciliation Act of 2008 indicated the need for institutional reforms (South Consulting 2009). Reforms still remain vital for Kenya's slow democratic transition. According to Grombir (2012:3) 'transitional justice and democratisation are so related such that one cannot conceive either in the absence of the other'. Many other previous commentators such as Teitel (2003), Elster (2004) and Nadeu (2010:7) have all underscored the mutual reinforcement between transitional justice and democratisation. Quinn (2009:37) states that 'justice and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives'. This led to the inference by Grombir (2012:15) that 'transitional justice measures are likely to succeed in situations where there is a robust democratic shift'.

Post-conflict settings require strategic planning, careful integration, and sensible sequencing of activities (Branch and Cheeseman 2009:4–6), through strong democratic institutions anchored in the rule of law (Quinn 2009:37). Kenya's challenge so far, is to separate the two; the current administration has consistently worked against structures of accountability and adopted the 'accept, forgive and move on' (Crocker 2000:99) stance, arguing that revisiting old injustices can only open up old wounds and complicate healing and reconciliation. Quite to the contrary, the majority of the victims feel that there is need to hold perpetrators of serious past violations accountable (TJRC 2013).

Speaking out about what happened to them and their loved ones helps to restore the dignity of the victims (Borello 2004:13). This is the essence of truth telling mainstreamed in truth commissions (Hayner 1998:598). However, truth seeking and truth telling need to be conducted within parameters that can assure careful and effective utilisation of the revealed truths for purposes of justice, healing and reconciliation. Otherwise, revealed truths can either go to waste or in worst scenarios, become destructive (Hazan and De Stadelhofen 2010). While the revealed truth by the TJRC has not been destructive, many actors agree that the country has

failed to effectively utilise the truths gathered by the commission (NPI-Africa 2014:4). The question is why Kenya has failed to make good use of the revealed truths for purposes of national healing and reconciliation. As a response to this question, there is need for critical considerations on the nature and design of Kenya's institutions such as the Office of the Director of Public Prosecutions (DPP), the Judiciary, and Parliament. This should provide the legal framework and necessary resources for implementation of the recommendations of the TJRC.

In the practice of transitional justice, deepening of democracy through institutional reform is necessary at all levels (UN 2010:2). First, institutional reforms are prerequisite for transitional justice since reformed and strong institutions are amenable to transitional justice mechanisms. Secondly, institutional reform provides one of the four pillars of transitional justice (ICTJ 2012:5) since correction of past wrongs involves altering factors that were responsible for injustices. Weak or non-existent democratic institutions are important reasons for injustices and human rights violations (Gibson 2009:137; TJRC 2013:57). The centrality of the state makes it impossible for it to be exonerated from human rights violations and injustices. Either way, the state remains culpable since it either perpetrates or is unable to prevent human rights violations. A case study of Mount Elgon (TJRC 2013) revealed that victims succinctly placed the blame on the state security apparatus for numerous human rights violations committed against innocent civilians in 2008 (TJRC 2013). Thirdly, reformed institutions are basic guarantors for assurance of non-recurrence. Other transitional justice mechanisms, such as prosecutions and reparations, are sustained within a framework of democratic structures and principles that are a consequence of strong democratic institutional design (Maddson 2015:57).

Kenya's perennial challenges of negative ethnicity and political impunity cannot be checked by individuals but can be rectified through mechanisms that operate within the parameters of strong and functional democratic institutions anchored in the rule of law (Bosire and Lynch 2014; Murunga and Nasong'o 2007:4-6). But institutional reforms are unlikely to reverse the situations where politicians, some of whom accused of committing

atrocities, determine the route to take. Proper and full implementation of the Constitution of Kenya is one of the practical strategies towards reforms. Yet the process has faced numerous challenges (Sihanya 2011) with a shift in political narrative from implementation to amendment (Mugambi 2015). The role of the civil society to provide corrective action is indispensable, since government and the political class have demonstrated unwillingness to lead the way (Bosire and Lynch 2014).

6. Institutional reforms for peace consolidation

Inspiring public confidence in the redress of grievances, human rights violations and various forms of injustices obtainable through legitimate means within known structures and predictable processes is important in the consolidation of peace (Onyango and Maina 2015:1). Legitimate structures for peaceful settlement of disputes and fair administration of justice within strong democratic institutions of governance are amenable to peace consolidation (Arbetman and Kugler 1997). States with high institutional quality are less likely to experience civil war or conflict due to their responsiveness to the needs of their citizens; whereas those with low quality institutions can lose the loyalty and support of their citizens, and consequently fall prey to violent conflicts (Taydas et al. 2010). As already said, peace, stability, and development are more likely in countries with strong democratic institutions (Bertucci and Alberti 2005), not only because they are inclined towards upholding justice, human rights, equality and the rule of law (Donnelly 2007), but also due to the high level of political inclusivity they exude (Risse-Kappen 2005:21).

Kenya embarked on a vigorous reform agenda following the PEV with the major achievement so far being a new constitution. However, in implementing the constitution, the political elite are keen to decide on a route with the least threats to their political interests (Brown and Sriram 2012). It is important, therefore, to put in place structures of constitutional implementation devoid of overreliance on the political elite (Bosire and Lynch 2014:257). Onyango and Maina's (2015) assessment of institutional reform concludes that Kenya's reforms, in the short term, contributed to

preventing a repeat of electoral violence in 2013, but nothing much has been done to ensure sustainable peace in the long term.

Full implementation of the 2010 constitution remains central to the reform agenda. The constitution establishes rules, principles, and mechanisms that, if implemented, would strengthen the ability of the country to redress past wrongs and end impunity by ensuring accountability in the exercise of state power. Laws and regulations that give the statutory order an authoritarian character can be transformed to ensure conformity with the values and principles of the constitution (Kwasi 2007:70). Much of the power of government is exercised by the president through bureaucrats who regulate the daily lives of citizens and therefore exercise broad delegated powers. Creating mechanisms to regulate exercise of government power through reformed statutory orders will ensure ‘certain norms in accordance with which state officials, as well as, private individuals are to treat one another, even and precisely, under conditions of extreme hostility’ (Benhabib 2004:8). In this regard the ‘traditional refrain of the soldier and the bureaucrat that “I was only doing my duty” is no longer an acceptable ground for abrogating the rights of humanity in the person of the other’ (Benhabib 2004:8).

6.1 Judicial Reforms

Kenya embarked on extensive judicial reforms with a rigorous process of appointment of the Chief Justice where applicants were publicly interviewed by a revamped Judicial Service Commission (JSC). Subsequently, parliament passed the vetting of Judges and Magistrates Act in 2011 to facilitate the vetting of serving judges and magistrates and terminate their employment where necessary (Goin 2015). However, as the current Chief Justice Mutunga (2011) agrees, the effectiveness of judicial reforms depends on wider reforms in the entire justice sector. This would include critical stakeholders, such as, the prosecuting authorities, penal institutions and the police – and even the executive and parliament which put forward and approve budgetary allocations (Gainer 2015). Therefore, there is need to ensure that complementary reforms are taking place within all those

other institutions in order to ensure effective and timely delivery of justice (Bosire 2012).

Since 2010, institutional culture and structural impediments have stood in the way of judicial reforms (Gainer 2015:3), but this should not be allowed to retard efforts to implement an ‘ambitious plan to make the courts more efficient and open, increase professionalism, and expand the court system’ (Gainer 2015:4). The process of judicial reforms has to revamp an opaque system, many of whose members have historically had strong senses of entitlement (Mutunga 2011). These reforms, Mutunga (2011) suggests, should aim at overcoming internal resistance, strengthening weak accountability mechanisms, and finding the necessary resources.

Another key component of judicial reforms is structuring judicial accountability. Accountability is a particularly tough challenge because many Kenyans do not understand how the court system works, and lawyers are often involved in corruption (Final Report of the Task Force on Judicial Reforms 2015). ‘For reforms to take root, users of the justice system – whether lawyers or everyday citizens – have to understand how the courts should function and demand that judicial officers deliver quality services’ (Gainer 2015:5). This requires high and consistent levels of sensitisation.

The Final Report of the Task Force on Judicial Reforms (2015) contains key fundamental recommendations in justice sector reforms. Access to justice has been pointed out as the first pillar and key result area. This should ‘encompass such actions as the establishment of customer care desks to answer questions, the simplification of court procedures, and the creation of a case management system’ (Gainer 2015:6). It stretches to public and stakeholder engagement, including ‘the strengthening of complaint mechanisms and the creation of more-formal structures for court users’ committees’ (Gainer 2015:6). In addition, change of institutional culture, increased training, clarified responsibilities, an expanded court system and its budget, and increased use of information and communications technology are vital (Gainer 2015:6). This entails, in part, simplifying and communicating procedures, creating strong monitoring mechanisms,

and building structures that are responsive to complains (Gainer 2015: 9–12). To expedite judicial reforms, the creation of known frameworks of sustained engagement of the civil society and the public is equally crucial (Gainer 2015:13; Bosire and Lynch 2014).

6.2 Parliamentary reforms

Increased awareness of the links of parliament to the conflict-poverty nexus has in recent times led to a growing acknowledgment of the role of parliaments in peacebuilding. Parliament is one of the best tools for managing issues of conflict and poverty that affect the nation (O'Brien et al. 2008). Factors that underlie conflicts in Kenya are often found in constitutional and electoral systems or in how those systems are operationalised and in the way public resources are utilised (Barkan 2004). Representatives of the people are better placed to address potential causes of conflict before violence erupts. 'Parliaments are perceived therefore as perfectly positioned to contribute to peacebuilding through conflict prevention initiatives, oversight and accountability over the executive, public service and public resource, as well as, through programmes that tackle poverty and conflict' (O'Brien et al. 2008:21).

Parliaments are more representative of diversity; their members are equal by design, and more accessible to the public than executive and judicial arms of government (Olson 1994). This makes parliament a unique forum to address contentious issues (Onyango and Maina 2015:6), such as Kenya's current crisis on electoral reforms. Parliament can also be a forum that helps build relationships among conflict-affected societies (O'Brien et al. 2008) – a forum for ethnic communities in Kenya where rivalries are commonplace. Parliament is recognised as fundamental not only to democracy but also to the relationship among different groups of people represented, as well as, the executive and the judiciary (Brazier 2007). Furthermore, parliament as a transformative dialogue forum within a divided society, if it satisfies all parties (Ramsbotham et al. 2011), is better positioned to address matters of national concern. The committee system enables the legislature to organise

its affairs and to shadow the operations of government agencies (Barkan 2009:48–49.)

A robust and independent parliament can help inspire public confidence. Various groups represented in parliament will trust that their representatives will handle competently, diligently, and independently issues of concern, including grievances, without resorting to violence (O’Brien et al. 2008.). In order for it to deliver effectively on this mandate, parliament should be properly constituted and its constitutional independence safeguarded (Onyango and Maina 2015:5). There should be mechanisms to ensure that interest groups seeking favourable legislative outcomes do not subvert the public interest (Onyango and Maina 2015; Bosire and Lynch 2014; O’Brien et al. 2008). Accountability mechanisms for parliamentary reforms, therefore, should include those that regulate lobbying, conflicts of interest, misconduct, and abuse of power (Onyango and Maina 2015:5–6).

6.3 Security sector reforms

Kenya’s existing security architecture is still deficient in a number of respects. For instance, policing still largely remains executive-dependent, undemocratic, and inequitable (Saferworld 2015; Migai 2011). The ruling class still want to ‘have the security agencies deployed to serve the interests of the regime to the detriment of crime control and protecting citizens’ (Migai 2005:228). Secrecy surrounding security operations has made the security sector the most corrupt centre in government. The police are usually heavy-handed, insensitive, and use excessive force, leading to a compromised public confidence (Saferworld 2015). Security governance is largely not participatory, because citizens are not consulted in decision-making (Migai 2010:32). Discretionary presidential power over security agencies that the constitution sought to correct still exists. In the pretext of fighting terrorism, the current regime has sought to regain such powers as witnessed in the recent controversial Security Laws Amendments Act 2015 (Mugambi 2015).

In addition, no mechanism ensures accountability of joint police/military operations, which historically have operated in a regulatory vacuum (Migai 2010:31–33). Such operations are often characterised by gross human rights violations (Migai 2010:32), and investigating the military is problematic (TJRC 2013:72–76). For instance, the TJRC (2013:75) reports that ‘the commission’s interactions with the military were difficult and requests for information went largely unanswered’. During such operations, there is a great need to create clear and operational mechanisms and legal frameworks for ensuring military accountability through legislation, anchored in Article 241 of the Constitution.

The police reform agenda must be driven to provide its desired impact, maintaining its goal of sustainable peace, stability and justice for all through the rule of law and respect for human rights (Migai 2010:33). It is equally important to create synergies between reforms in different institutions touching on the security sector since a malpractice of one institution inevitably impacts on the others (Onyango and Maina 2015:1). Reforms should be implemented within the broader philosophy of change management that requires a conducive and supportive political environment, including the commitment of the executive arm of government (Onyango and Maina 2015:3).

Commissions of inquiry and task forces dealing with police reforms have suggested that careful evaluation of police officers is a prerequisite to transforming the police. In particular, implementing the recommendations of the National Task Force on Police Reforms should form part of the process (Migai 2010), thus addressing challenges of police evaluation. Among others, the Task Force recommended that all officers be subjected to a review against criteria such as professionalism, integrity, track record, and psychological fitness. It is imperative to implement these recommendations to the extent that they promote the values of the constitution and ensure a police force that is effective and one that enjoys public confidence (South Consulting 2013:31).

7. Conclusion

This essay maintains that strengthening of institutions, as a strategy of peacebuilding, is most likely through implementation of various transitional justice mechanisms. Such mechanisms should aim at confronting the past, ending injustices, fostering reconciliation, redressing the victims, ending the culture of impunity and building structures that can prevent recurrence of past injustices. Through strong institutions afforded by the principles of democracy, the norms of transparency, equity, accountability and non-interference with judicial and non-judicial transitional justice processes are fortified (Nadeu 2010:8). Transitional justice measures are more likely to succeed if Kenya puts in place strong democratic institutions. These include fundamental reforms of critical sectors of governance such as the judiciary, parliament, the security sector, electoral process and the public service.

Kenya will do well not to retreat from the trajectory of transitional justice. However, actors in this field must be alive to the fact that any country which attempts to utilise transitional justice mechanisms to tackle past human rights abuses during the process of democratisation faces political, judicial, and ethical challenges (Arenhövel 2008:576). To surmount such challenges, the inevitability of institutional reforms comes to bear since the process largely depends on the nature of government and democratic institutions in place (Forsythe 2011:557–8). Kenya should relentlessly continue in the path of reforming structures of governance through designing institutions responsive to current demands of peacebuilding, reconciliation, and national cohesion. This paper accentuates the need to have robust institutional reforms as the basis for transitional justice mechanisms to avoid replication of failure of transitional justice measures, not only in Kenya, but also across Africa where many countries are emerging from violent conflicts and others such as South Sudan and Burundi are still trapped in violence and political uncertainty.

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