



Non-Reconciliation as A Threat to Peace And Security: The Case Of Kenya

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Abstract

This paper investigates the concept of non-reconciliation and interrogates how it can be a threat to peace and security. Its main argument is that failure to genuinely pursue or achieve reconciliation after an experience of violent conflict is a recipe for reoccurrence of the conflict. It focusses on Kenya, questioning whether the structures put in place to address past injustices, notably the commissions, succeeded in the promotion of reconciliation. The paper is qualitative in nature and employs critical review of data relating to reconciliation in Kenya to come up with implementable recommendations. Its main finding is that lack of goodwill, courage and commitment from the political class is largely responsible for the failure to implement recommendations that would have put the country on the path of reconciliation. This implies that Kenya has not substantially dealt with its past; it is yet to address and resolve the underlying causes of perpetual violence in the country. The threat of reoccurrence of violence fuelled by grievances of the past is therefore still alive. The paper recommends that fresh and genuine initiatives at reconciliation should be aroused.

Key words: *Non-reconciliation, Threat, Security, Peace, Kenya*

Introduction and Background

Violent conflict has been responsible for the death of millions of civilians, displaced many more and resulted in the destruction of infrastructure hence contributing remarkably to human insecurity (Bowd Richard, 2008). In the aftermath of such experiences, it is imperative to sufficiently address the issue regarding the damaging relationships between the warring parties since they would eventually have to accommodate each other and live in close proximity. (Kristina Lundqvist (e.d), 2019). Violent conflict adversely damages the psychological well-being of its victims and their healing is as crucial as the reconstruction of the battle-scarred

infrastructure and towns. These “invisible effects” of war are often harder to treat than the physical ones.

Reconciliation has therefore, over time, been appreciated as an essential component of post-conflict reconstruction. It effectively averts the employment of past disputes and tensions as the reasons for future conflicts. Reconciliation further fortifies the peace achieved and injects vitality to reformed or newly-created institutions in post-conflict societies (Bloomfield, Barnes and Huyse, 2003). Essentially, this means that the misunderstandings and differences that were experienced in the past must be attended to secure a future that will enjoy positive and durable peace.

Unlike many other African countries, Kenya has survived nearly five decades as a functioning nation-state with its borders intact, without fighting a single war and without a complete breakdown of law and order or the imposition of military rule. However, it has never really achieved its vision of a peaceful, united, and harmonious nation. Lines of division from the past have endured. Presently, Kenyans are fighting over many of the same issues that had divided them five decades before: over land, ethnicity, and power. Divisions of the past, and real and imagined injustices have merged to create conflicts and entitlements that fuel contemporary politics. (Hornsby, 2012)

The paper is therefore concerned with the efforts that have, time and again, been put by the country’s leadership for the purpose of fostering reconciliation. It does this with the view that failure to genuinely pursue reconciliation is a constant threat for peace and security, not only for Kenya but for any other state too. The paper is anchored upon two major premises: One is that reconciliation gives rise and arises from security; and secondly, that there can be no positive and durable peace without reconciliation.

Reconciliation is a multifaceted term hence has more than one acceptable definition. This is majorly because it is a goal (an achievement or an end) and a process at the same time. The paper conceives reconciliation as the process of forging a harmonious relationship between parties that were previously hostile to each other. As an end or achievement, it is an already-created agreeable or harmonious relationship after a dispute (Kriesberg, 2007). As a process, it comprises the pursuit for truth, justice, forgiveness, and healing. Simply put, it is an avenue of finding a way to harmoniously co-exist with former adversaries with the intended purpose of having better lives together instead of worse lives separately (Bloomfield, Barnes and Huyse, 2003).

Desmond Tutu, who chaired the South African Truth and Reconciliation Commission posited that reconciliation is ordinarily a very lengthy and mortifying journey, though very necessary for the achievement of lasting peace. He reiterated that there are no short-cuts or quick-fix solutions for undoing the ‘invisible harm’ caused particularly by intentional infliction of distress. This is specifically because the building of comprehension, tolerance and trust between former enemies is an unmistakably uphill task. (Bloomfield, Barnes and Huyse, 2003)

This brings us to the main question that the paper has set out to investigate: Has the political leadership of Kenya had the courage and commitment to embark on this ‘mortifying journey’ in the search for peace? Have Kenyans embarked on the path of examining their painful past,

acknowledging it and understanding it, and above all transcending it together? In other words, has Kenya embarked on reconciliation, thereby effectively tackling non-reconciliation as a threat to peace and security?

This paper delves into finding out whether Kenya has addressed the evils of the past by examining the various commissions established precisely for this purpose. These commissions were notably created with the aim of unearthing whatever it is that has been ailing the country hence possibly leading the nation towards the process of reconciliation. In this manner, the paper shall examine the findings and recommendations of the Commission on Irregular and Illegal Allocation of Public Land, the National Cohesion and Integration Commission and the Truth, Justice and Reconciliation Commission.

By investigating whether these commissions managed to exhume the truth about past injustices and have the same addressed, the paper will essentially be answering the critical question regarding reconciliation in Kenya: Have Kenyans reconciled? If the response to this query is not in the affirmative, then that would mean that non-reconciliation is a potential threat to peace and security in Kenya.

Statement of the Problem

Various political leaders have, at various points, issued statements asserting that Kenyans have successfully gone through the process of reconciliation. Such remarks have often been made in reference to the coming and working together of leaders from two adversarial ethnic communities in the land: The Kikuyu and the Kalenjin. Their decision to work together has therefore been extrapolated to mean that the two adversarial communities and even the whole of Kenya at large has reconciled.

However, the process of reconciliation may not take place as fast as is desired. It is a long (takes time), deep (involving questioning and changing of attitudes, belief, and sentiments) and broad (inclusive process involving those who have suffered directly and indirectly) process. It is therefore remarkable that certain Commissions were instituted so as address Kenya's historical problems and set it on the right path of reconciliation. On this basis, questions have been raised as to whether these Commissions functioned optimally and whether their recommendations were implemented? As such, are Kenyans really reconciled or are they at least on the path of reconciliation?

Justification of the Study

The paper is instrumental to policy makers as it provides an important framework in determining whether a society is reconciled or not. It highlights the important issue or areas to focus on and address to achieve reconciliation or at least be on the path of reconciliation. In the academia, the paper makes substantive contributions to the body of knowledge on matters pertaining to reconciliation as a threat to peace and security. It particularly sheds light on the debate regarding whether Kenya as a country is truly reconciled or not. The paper also provides a platform to critique the utility of the framework applied and gauge whether the same can be used in questioning reconciliation in other countries.

Discussions

In this section, the paper interrogates the functioning, findings and recommendations of three Commissions that had been set up to address the underlying causes of the persistent cycle of violence in the country, especially during, before and after general elections.

Commission of Inquiry into Illegal/ Irregular Allocation of Public Land.

This Commission was established in 2003 and was Chaired by Paul Ndung'u to provide insight into the challenge of unlawful and improper apportionment of public land in Kenya. In addition, it was expected to make recommendations on the most suitable solutions to this problem and was most notably supposed to facilitate the restitution of those lands to their original purpose. The Commission's Report commences by indicating that land remains a centre of interest in Kenya's history. It was the focal point for the struggle for independence and has continually dictated the pulse of the nation (Ndung'u Commission, 2003). Indeed, the significance of the land question in understanding Kenya's woes cannot be over-emphasized. Land has been a critical determinant of the political, social and economic lives of Kenyans (Oucho, 2008).

The report also acknowledges that the issue of landlessness, coupled with repeated altercations between individuals and even communities on matters concerning land have been ever-present. The implementation of the recommendations of this Commission was therefore expected to help resolve land issues and thus steer the country on the path of reconciliation.

The land problem began immediately after colonization when fertile arable land was taken away by the colonialists. Since the struggle for independence was predominantly rallied around the issue of land, the Africans hoped to get back their land as soon as they had gained independence. On the contrary, communities (such as the Mijikenda, the Maasai, the Kikuyu and the Kalenjin) that had been hugely affected by repressive land policies of the colonialists are yet to gain access to their land. (Oucho, 2008).

The Commission revealed that public officials attached to the Land's Ministry abused public trust to the extent that they could not see anything ethically wrong with illegal allocation of public land. Illegal and Irregular allocation of land became normalized. Similarly, it concluded that the powers bestowed upon the Office of the President (on matters regarding land) had been blatantly abused over the years. In summary, there had been unrestrained misappropriation of public land under the watch of land administrators charged with protection of the same land. (Ndung'u Commission, 2003).

The second major issue regarding land was the politicization of land issues. Grievances on land have almost always been wrought during elections to form potent fodder for violence. This effectively resulted in unleashing of violence against voters of certain ethnic groupings, forcing them to flee from where they were registered as voters. The affected voters were thereby prevented from participating in the elections since they had been forcibly transferred from where they had registered as voters. This was made manifest by the Commission's findings that most of the improper apportionments of public land was done before or immediately after

the 1992, 1997 and 2002 multiparty general elections thereby proving that public land was allocated 'as political reward or patronage.' (Africog, 2009)

Politicization of land issues has been rife in the Rift Valley and Coastal regions of Kenya especially because unaddressed land grievances have almost always been employed as a reason for political mobilization against those perceived as outsiders. For instance, since Kenya's 1992 general elections, there has been a trend of galvanizing the Kalenjin of Rift Valley against the Kikuyu, the Kisii and to some extent, the Maasai while the Coastal tribes have been made to coalesce against the non-coastal people (Oucho, 2008).

The Commission made several recommendations, key of which included: the automation and digitalization of the management of land records so as to eliminate unsystematic record keeping as well as falsification and hiding of land records; Insurance of Land Titles so as to do away with the challenge and danger of transacting with forged title deeds; and enhancement of the capacity of institutions (personnel in the Ministry of Lands, the Judiciary and the Attorney General's Chambers) so as to effectively and competently execute matters related to Land. The Commission equally recommended the formulation of an inventory of all public lands by Ministries, Local Authorities and State Corporations together with an annual update of the same; and the legal retrieval of all funds that were fraudulently acquired through the unlawful apportionment and sale of public land.

Other key recommendations included the creation of modest yet reasonably-priced housing for the urban dwellers who lack decent housing; investigation, prosecution and/or retirement of all public officials, private individuals, companies, and professionals who connived to fraudulently allocate and sale public land.

The Commission recognized that putting these proposals into effect was a very intricate affair and thereby resolved to recommend the establishment of three new institutions to facilitate the same: A Land Titles Tribunal, a Task Force on Land; and a National Land Commission. The Tribunal was to be charged with provision of speedy and low-cost resolution of past wrongs while the Taskforce was supposed to advice the Ministry of Lands on matters concerning revocation of illegal titles, repossession of land, and court action in relation to land. The National Land Commission was mainly charged with the administration of public land on behalf of the national and county governments; recommendation of a National Land Policy to the national government; and issuance of advice to the national government on a comprehensive program for the registration of title in land throughout Kenya (Africog, 2009).

While the Land Titles Tribunal and the Taskforce on Land were never formed, the National Land Commission has been struggling to be relevant because the national government has been hesitant in giving up its control over vital land functions such as land registration. The state has demonstrated determination to maintain control over management of and access to land, as well as the regional and central land registries (Ouma S. and Manji, 2019).

The functioning of the Commission has been ruined allegedly by infighting, corruption and uncertainty. It has variously been said that unscrupulous officials therein have insidiously set up cartels that demand payoffs for almost every service rendered. In addition, some well-connected junior officers colluding with a section of their seniors are alleged to have 'grown

rich overnight.’ What is more troubling are the insinuations that former commissioners and senior officials, some of whom have already been charged in court for engaging in graft, are said to be still pulling strings within the commission where corruption goes on unabated. In April, 2019, the Ethics and Anti-Corruption Commission charged 24 National Land Commission staff with charges of graft (Gisesa, 2019).

In addition, those who desired to debilitate the newly formed National Land Commission conspired to make it an appendage of the executive. The move was fruitful in making it play a subsidiary role to the Lands Ministry. The Commission became housed in the Ministry of Lands and was made to absorb administrative officers from the Ministry. It therefore compromised its independence and distinction from the Lands Ministry (Ouma and Manji 2019).

National Cohesion and Integration Commission

The National Cohesion and Integration Commission (NCIC) is a statutory institution set up under the National Cohesion and Integration Act and borne out of the National Dialogue and Reconciliation Agreement of February 2008. It was established so as to address the genesis of ethnic conflicts in Kenya as well as provide a remedy to the challenge of marginalization and ethno-political exclusion in the country. It was instituted out of the appreciation that deliberate efforts at establishing and fostering nationhood and national cohesion are requisites for attainment of durable peace and harmonious coexistence among Kenyans (Akech, 2015).

Furthermore, it was borne out of the realization that it was crucial to have an officially mandated national institution spearhead the promotion of national ideals, mitigation of ethno-political disputes and ethnically-driven violence as well as the promotion of national reconciliation. Likewise, NCIC was created with the understanding that systemic issues such as uneven distribution of national resources, historical injustices, poverty and deliberate exclusion of particular regions of the Kenyan society were responsible for the perpetual social tensions and recurrent unrests (Githinji, 2020).

One malady that has hard-pressed the NCIC is the issue of politicization of ethnic identity, which may be defined as the use of ethnic identity by individuals for the sole purpose of pursuing or attaining narrow or selfish personal interests. The politicization of ethnic identity has variously been described as the foremost persistent problem that has tormented the country ever since the colonial era. Political parties in the country are largely formed along ethnic lines while elections are nothing more than a measure of the numerical strength of ethnic groups. Ethnic identity has indeed been regarded as the single most important element in the Kenyan political scene (KHRC, 2018).

As indicated earlier on, the inception of this predicament can be traced to the colonial government which through their ‘divide and rule’ policy sowed the elements of negative ethnicity. Notably, the failure of subsequent governments to put an end to this system of injustice is largely to blame for the interminable inequalities relating to access to public resources in the country. Reinstating indigenous communities back to what was originally their lands soon after independence would have nipped the problem in the bud (Kituo Cha Sheria, 2014). This is most probably where the rain began beating us.

Subsequent post-independence regimes took up the divisive ‘divide and rule’ policy and perfected it for the purpose of ensuring that they remained in power. Furthermore, cultivation of a strong national identity among Kenyans has proved to be elusive probably because of the substantial weight accorded to ethnic favouritism in matters concerning delivery of public services and social amenities. Ethnic patronage determines who gets what and when hence exacerbating tensions between ethnicities (KHRC, 2018). For instance, there is a political culture of guaranteeing ‘rewards’ to ethnic groupings and communities that are seen to offer political support to the regime in power as opposed to those that are perceived to be political opponents.

By the same token, the Report also highlights that gross corruption in the 1980s and 1990s mainly comprised inappropriate and unlawful disbursement of public land as political patronage. In this manner, access to public resources was made to be dependent on ethno-political affiliations (Klaus, 2009). As initially highlighted, this is a deeply embedded issue that began during the colonial times and was taken up by successive African regimes.

While the NCIC has put in effort to sensitize the masses on the importance of building a cohesive and integrated society, it is still in pursuit of having this vision materialized for it is evident that the ethnic variable still plays out strongly in the social, political, and economic lives of Kenyans. In fact, even to-date, political parties and political coalitions have been dictated, by and large, by ethnic projections and hence founded on assurances of ethnic rewards.

Secondly, in as much as the Commission is said to be independent it enjoys independence only to the extent that it regulates its activities the moment the legislature has apportioned it funds. In this respect, the parliament and by extension the government determines, to a significant extent, the capacity of NCIC to function. The irony of this is that it is the same parliamentarians and government officials that have been known to be leading offenders in crimes related to the functioning of the Commission (Akech, 2015). Can the NCIC bite the hands that feeds it? He who pays the piper calls the tune hence it is difficult to see how the Commission can effectively fulfil its mandate under such circumstances.

Thirdly, despite the National Cohesion and Integration Act’s Article 7 (1) provision that, ‘All public entities shall seek to represent the diversity of the people of Kenya in the employment of staff,’ and Article 7 (2) stipulation that ‘No public establishment shall have more than one third of its staff from the same ethnic community,’ (GoK, 2012), a substantial number of private and public entities have hired even up to more than two thirds employees from one or two ethnic communities.

The county government sector, for instance, has only 15 counties (31.9%) compliant with the above provisions, despite it being one of the country’s major employers and also major provider of public service functions. (National Cohesion and Integration Commission, 2016). In fact, 68.1% of the counties have hired more than 70 percent of their staff from one ethnic group (National Cohesion and Integration Commission, 2016). Even with this, there is also the worry that NCIC’s mandate only stretches to public establishments, leaving out Kenya’s private sector yet issues are not different there (KHRC, 2018).

The Truth, Justice and Reconciliation Commission.

Truth Commissions have been regarded as crucial mechanisms of transition for societies that have suffered gross injustice because they aim at, among others: establishing a coherent record of abuses; restoring the dignity of victims of injustice and addressing their plight; making recommendations for reform, reparations, prosecutions and hence preventing a reoccurrence of such abuses; promoting respect for the rule of law and human rights; and contributing to healing and reconciliation of individuals and communities (Walker, 2015). Proponents of this mechanism testify that truth commissions provide avenues for reparation of historical injustices thus enabling societies avoid vengeance and move towards reconciliation (Langer, 2017).

It is therefore undeniable that the establishment of truth commissions is a very vital phase in unearthing the truth about historical injustices and facilitating the transition from a disturbed past to a harmonious future. However, the process of rooting out the truth has often proven to be a highly sensitive and even contentious process. In addition, the failure of most governments to implement the recommendations of these commissions is a trend that is disconcerting. It is therefore not surprising that Johannes Langer evaluates the impact of truth commissions and questions whether they are just 'hot air balloons,' without any significant outcomes (Langer, 2017).

The Kenyan Truth, Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament as part of the National Dialogue and Reconciliation process. This was deemed to be a critical step in the search for national unity, healing, and reconciliation. It commenced its assignment in 2009 and presented its final report in 2013. What informed the creation of this commission is the certitude of the existence of deeply rooted acrimony that significantly contributed to the 2007/8 post-election violence. The Commission was therefore charged with investigating historical injustices (such as deliberate marginalization of certain communities and regions, state repression, land injustices, cases of torture, enforced disappearances and assassinations of political dissidents), committed from December 1963 when Kenya gained independence to February 2008 when the 2007/8 post-elections violence subsided (Lynch, 2013).

One key finding that the Commission's Report highlights is that successive regimes that have been in power - since the colonial era (1895-1963), through (1963-1978), (1978-2002) and (2002-2008) - had, either by acts of commission or omission, presided over infliction of injustice upon the people of Kenya. By the same token, it zeroes in on the Kenyan security agencies as the main perpetrators of human rights abuses, including massacres, torture, enforced disappearances and sexual exploitation. Many Kenyans have suffered a great deal thereof and many others continue to suffer (Tjrc, 2013).

In relation to this, the Commission made several important recommendations, which if implemented would have been a good starting point for the process of reconciliation. It recommended that the President (within six months of the issuance of the Report), the Security Agencies (particularly the Kenya Police, Kenya Defence Forces, and the National Intelligence Service), the Judiciary and the British government offer public and unconditional apologies to the people of Kenya for all injustices and gross violations of human rights that they may have

committed or failed to address adequately. The act of confessing and apologizing would have indicated admittance of the wrong done and remorse over the same (Tjrc, 2013).

Another key recommendation that was vital in championing the reconciliation process was compensation for the victims and their families for gross abuses to repair the injuries suffered. This would have fast-tracked the process of healing for the survivors and relatives of the victims of the past injustice. An initial 500 million Kenya shillings was to be set aside for this purpose. Further to this, the setting up of public memorials and/or community facilities (such as hospitals and schools), and other channels of acknowledging and addressing the suffering of victims of injustice was also recommended (Tjrc, 2013). The Commission similarly recommended the prosecution of the adversely mentioned perpetrators.

However, just as was the case with previous regimes, the Commission felt that the government was not too keen on following through and implementing the recommendations it had made.

The hesitance of the State to pin the Commission's Report on any government online platform intimated absence of goodwill to publicize the findings and implement the recommendations of the Report. It was only made available on the TJRC's website, but the website was discontinued when the Commission's mandate ended. For quite a while, the Report was only available on Seattle University Law School's website where Ronald Slye, one of the three international commissioners of the Commission has been teaching. The Report has now at least been made available online by the National Commission on Human Rights (Maliti, 2020).

Conclusion and Recommendations

To find out whether non-reconciliation is a threat to Kenya's peace and security the paper investigated the major findings and recommendations of commissions that were formed for the very purpose of fostering reconciliation among Kenyans. It sought to find out whether the commissions served their purpose or were, as has been suggested, conduits for cover-up and entrenchment of the culture of impunity. The commissions included the Commission of Inquiry into Irregular and/or Illegal Allocation of Public Land, the National Cohesion and Integration Commission and the Truth, Justice and Reconciliation Commission.

Truth is ordinarily at the heart of reconciliation. Unravelling the truth about the issues of the past and the reason(s) why they happened is imperative to understanding the source of the conflict and therefore the best way of avoiding a reoccurrence of the same. The efforts by the executive to incapacitate the functioning of the commissions either by interfering with their independence or by denying them access to important documents related to their mandates may be described as efforts to hide the truth.

Similarly, the passing of the Truth, Justice and Reconciliation (Amendment) Act of 2013 to enable alteration of the Report's recommendations by the National Assembly and allegations of sanitization of the Land Chapter of the TJRC Report manifest the lengths that the executive has gone to incapacitate the commission from achieving its mandate.

The key recommendations of the three commissions have not been implemented. Lack of goodwill, courage and commitment from the political class is largely responsible for this failure. This implies that Kenya has not faced its past; it is yet to address and resolve the

underlying causes of perpetual violence in the country. Since genuine reconciliation is the most guaranteed assurance that the disputes of the past will not be used as a seed for future violence, Kenya, by failing to go through the process, has not broken the cycle of violence that bedevils it, particularly during general elections. Non-reconciliation therefore poses a threat to the peace and security of the country. As such, there is need for renewed efforts at seeking genuine reconciliation among Kenyans.

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