

## **TRANSITIONAL JUSTICE**

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### **1. PRELIMINARY**

Right at the onset let me admit that I was very scared to accept Mr. Kepta Ombati's invitation to address the issue of Transitional Justice, because to most Kenyans, justice is an adversarial confrontation where victims not only come to court to seek justice as making things even with their victors (eye for an eye), but most often come in order to seek the court's declaration that they are the new victors and the old victors are the new victims (two eyes for one eye); they are the new masters and the old masters are their slaves. It scared me because Kepta asked me to talk about Truth, Justice and Reconciliation, while the victims know that the Truth hurts and may want to use it for hurting those who hurt them. Reconciliation is not problematic except that it is a baby whose father is Truth and mother is Justice.

Nevertheless, as an ordained minister, my duty is to join Truth and Justice in holy matrimony, if at all the two are virgins whose purpose of marriage is to give birth to reconciliation and willing to swear before me that, "We shall unconditionally remain one body called Kenya, and land, jobs and powers will *not* set us apart".

Despite my fear I considered this a grand opportunity because a Truth commission is a step in the right direction even though one step does not make the whole journey. I believe that the purpose and focus of transitional justice is not what should be done to the perpetrators of gross repression, violence, atrocities against individuals and communities and for the victims, the survivors, but is a process by which a broken body, the whole society consisting of perpetrators, victims and bystanders, comes together to own up to the brokenness so that they can mend their past and start life anew and all over again.

### **2. THE HISTORICAL TRASITIONS**

Transition justice needs truth to undo the falsehoods, distortions, amnesia, prejudices, biases, hatred and stereotypes by which the victors justify their gains and the use of violence, atrocities, brutalities and callousness to maintain the status quo. At the same time, it must undo the innocence by which the losers justify their counter violence, atrocities, brutalities and callousness as holy war. It took humankind too long to wake up to the fact that many civil wars, genocides and crimes against humanity were the result of this kind of reciprocity of evil that could be resolved without undue defeat or victory for any party. Just recently, Italy, a relatively powerful nation, set a precedent that Truth, Justice and Reconciliation are better ways of settling historical conflicts by paying reparation for its past injustices to Tunisia, a relatively weaker nation. This comes by humankind, both the offenders and offended, sharing a common psyche and therefore common guilt. Truth is not about facts and data but about using facts and data for self-examination, to know that the fact that had the slaves been the ones who had acquired the

technology of domination the masters would have been their slaves. What has happened as negative history is due to a collective psyche that needs to be changed in order to nullify the adage that “History repeats itself”. In fact, my term bystanders does not make any sense in the context of history where even outsiders started and continue to arm such conflicts as the Israelis versus Palestinians, the Iraqis versus Iraqis, the Sudan Government versus Dafur and Democratic Republic Congo (DRC) versus Eastern DRC. Only when it comes to African conflicts do other nations stand as onlookers, while after World War II when the western Allies inflicted comprehensive defeat on the Nazis, they applied their so-called transitional justice at the Nuremberg Trials, and Germany entered into an agreement to pay reparations to the Jews. But the same allies did not compel each other, as the perpetrators of slave trade and colonialism to own up to their atrocities and compensate Africa.

The problem with Kenyan historical transitions is that they occurred as whimsical motions, where slavery changed into colonialism without the market stopping to see people as human rather than property, the very foundation of capitalism. The Sultan of Zanzibar, the greatest importer of slaves from Kenya to cultivate his clove shambas, did not pay any reparation to freed slaves. This issue was raised by Akamba people at Machakos during the hearing by the Task Force. Equally true, the transition from colonialism to independence occurred without changing people from property into human or changing the structures of the state, which is the main organ of the market, from being an instrument of domination. In fact, most of the unresolved political conflicts in Kenya are not that there are not enough jobs but that tribes do not have equal numbers of slave masters and colonizers.

Now, the Sultan of Zanzibar and Britain are nowhere available inside Kenya for the nations (tribes) whose people they enslaved and colonized to vent their revenge or reclaim their territories. The transition from African states to colonial states was where most injustices of people, land and power alienation occurred; following which Sir Charles Elliot arbitrarily displaced hundreds of thousands of indigenous people in order to settle immigrant settlers.

The question of Britain leaving the issue of human dislocation unsettled for Africans to settle amongst themselves cannot be answered unless the Truth commission has powers to reverse the effects of slave trade and colonialism and to compel Britain to follow the Italian example. The other option is to give the Truth commission powers to dissolve Kenya so that by ceasing to be Kenyans people can revert back to their pre-colonial states. If Kenya is going to continue to remain one nation and not revert back to its original form as autonomous nations, the TJRC must help resolve the issue. Do Kenyans want to keep their ethnic identities and use them as the basis of reverting to their pre-colonial nation-state statuses, do they want to continue with the so-called ethnic land clashes based on those identities, or to they wish have a common national identity? If the Truth commission is not intended to answer such questions, it is not worth national trust, especially by the victims of the post-2007 election disorder. The issues of gross human rights violations, economic crimes, land clashes, lack of integrity and culpability of such state institutions as the Judiciary and Police, Extra-Judicial murders, tortures and

disappearance, citizen marginalization, Insecurity and violation of the election process are like a storm in tea cup if the issue of nationhood, or Kenyan national identity versus ethnic identities, is not resolved.

Hence, the conflicts that we have in Kenya for which we blame the 2007 elections are as old as British imperialism versus African nations. That is what happened in Rwanda where the Europeans (France) instigated the colonial conflict of the Tutsi-versus-European and Hutu-versus-European dominance, which then became the Tutsi-Hutu conflict. If the Tutsi survivors and Hutu survivors of mutual genocide could return to settle scores with their perpetrators this might fuel attacks and counter attacks that might lead to one or the other being wiped out.

In Africa, transitional justice may lack focus if it fails to be cognizant of the many transitions from African independence to European colonialism, from colonialism to independence, and the various post-independence changes of one regime to another. After the first day of Kenya's bloodletting in the post-election crisis, one of my children asked me why Kenya needs transitional justice while, on the face of it, it is perpetrators who pit the poor against the poor, and victims against victims, hiding their injustices behind their tribal identities. If by use of political influence a Kenyan can mobilize and galvanize Kenyans to kill others without any scruples, and have them eliminated simply because they are blocking his access to the higher echelons of the market, is he justified to do so because he does it on behalf of his tribe? Better a goat, because if a goat breaks the law (rope or fence) and goes to feed on the neighbor's pasture, the neighbor can penalize the owner. It is impossible to penalize the tribe because it is an amorphous abstract intangibility, a non-legal entity without any postal address that unlike nations or states that other nations and states can sue for damage, nobody can sue.

#### DEMYTHOLOGIZATION.

One of the old and most outstanding African religious philosophers, Prof. John Mbiti, alleged in his *African Philosophy and Religion* that, "Africans are notoriously religious," instead of saying that Kenyans are so religiously and notoriously **dupable, deceivable, susceptible** and **inflammable** that the politics of jobs, land, power and poverty makes them think that malice, ill-will and selfishness of politicians against each other for personal gain will magically get them out of joblessness, landlessness, powerlessness and poverty.

The way the Truth Commission conducts its inquiries must be to set rational and ethical standards of tackling joblessness, landlessness, poverty and powerlessness (marginalization); standards other than breaking God's commandments against murder, stealing and rape to get things even, purportedly on behalf of ones tribe. It is derogatory, and even obscene, to ascribe to ones tribe lack of conscience, rule of law, and morality. God did not create Africans in his own image expecting that they will become unequal and use the inequality as an excuse to behave lawlessly, without conscience, and baptize their sin as **tribalism**.

Indeed, in law, there is no such thing as tribe or negative ethnicity that elites use to keep on faulting each other's evil. What exists is **tribalism** as the **mythology** rather than the **ideology** of elitism by which elites mobilize votes for themselves and galvanize the youth as weapons (bombs) of mass destruction to clear rivals who deny them the right to enjoy capitalism out of their way of access to power. Africans tend to confuse wealth, heroism, popularity, charisma and oratory with leadership, failing to distinguish personal ambition from national vision and elitism from moral fiber.

Capitalism, not ethnicity, is the monopoly of access to the market that takes private property as more important than life. A Truth Commission should be able to demythologize the ethnic clashes by catching the concocters of the mythology and its beneficiaries and making them pay for the loss of human lives and destruction of property. Tribes do not murder or benefit from murder. According to English law a husband put poison in an apple and gave it to a man who did not know that the apple had poison, and the intermediary then passed the poisoned apple to the man's wife. She ate it and died. Another husband did the same, but the apple was eaten by a woman other than his wife and she died. In both cases the husbands and not the agents were found guilty and given death penalties. Due to the fact that none of the youths in the mobs who commit murders in the name of their tribes can be easily identified and arrested, the Truth Commission should identify their inciters and beneficiaries of murders and charge them in the international court as in the case of President Doe, or as might happen to President Barshir of Sudan. Why should Kenya offer immunity to some sacred cows?

While the Kenyan courts, police and prisons are instruments of social conscience that hold people guilty, accountable and punishable if they follow their instincts beyond the boundaries of acceptable moral and legal standards, goats that out of no deliberate choice break the fences and tethers to access hay in obedience to their instincts of hunger are better than many of our politicians. I know that politicians are not real goats that need ropes, fences and herdsman and herdswomen, but they sink below animals by citing their racial identities (as the white South Africans did during apartheid) and ethnic identities (as Kenyans do during ethnic clashes) as immunities from prosecution. While conscience is enough to constrain human beings from breaking legal and moral boundaries, does it mean that the TJRCs have become substitutes for conscience or for the need to arrest, try, fine and imprison those who by their arrogance power, racism, ethnicity and sexism have no due regard for conscience, human rights and morality?

As we went round collecting the views of Kenyans, the Task Force on the establishment of a Truth, Justice and Reconciliation Commission met a few politicians who feared that such a commission might whitewash the atrocities of politically correct perpetrators and witch-hunt the atrocities of the politically incorrect. Others feared that TJRCs might look for scapegoats to persecute out of the fear of prosecuting powerful culprits. While only in one place people questioned looking for "Truth" saying that truth is already self-evident, some questioned the need for Reconciliation and said that justice is enough retribution even if it means raping the rapist and shooting at firing squad those who tortured to death suspects at Nyayo House and elsewhere. TJRC is not God that it can make people

remorseful. If the constitution is not amended to give the TJRC powers to recommend jail and fines for unrepentant perpetrators, its labor is in vain and the results mere statistics.

### **SOCIAL CONSTRUCTS VERSUS BIOLOGY.**

The issue at stake is, if the TJ&R does not do enough to restore conscience to people, transform people from being the tools and commodities of evil into human beings, if the process of scrutiny does not make offenders remorseful and repentant, what will stop them from committing the same crimes over and over again? Having the TJRC in Liberia and Kosovo was not a substitute to presidents Doe and Milosevic being made to answer for their misdeeds. The idea of TJRC is that the constitution should be amended to ensure that such people shall never hold any public office and should be imprisoned if convicted of any crime that they failed to confess to.

Another idea is that TJRCs do not accept any excuse that people behaved like goats, without conscience, because they were obeying “orders from above”. When hungry, goats break weak fences and ropes to access hay but not to torture, massacre and “disappear” fellow goats. Bishops are not such goats as would be excused for breaking their Christianity to join their tribesmen in the fight for access to power during the post-election conflagration. In other words, the lack of conscience that Kenyan perpetrators of heinous crimes, torture, rape and political atrocities justify using ethnicity in order to get away with impunity, depicts tribes as worse than the innocent animals that resolve their differences by the rule of the jungle: “survival of the fittest”.

The recovery of public land, money and property from political thieves, irrespective of how high the positions the perpetrators occupied during their tenure of service, is essential for the restoration of national conscience. If this does not happen Kenyans shall continue to have religions preaching irrelevant things outside the boundaries of right and wrong. The Ten Commandments cannot work in the Kenyan context where ethnicity is an ideology of perpetrators’ self-justification, rationalization, and denial as substitutes for conscience.

What is the difference between a case in which a goat, to which we attribute no psyche, ate your vegetables and the psyche of a Kenyan who, when challenged to account for his ill-gotten wealth pleads amnesia or innocence on the basis that stealing part of the forest land or looting the treasury is his tribe’s turn to eat because other tribes had their opportunity to eat? I shall become angry at that time when I shall discover that those who killed or defrocked me do have memory and conscience capable of noticing I was hurt by their actions; otherwise feeling angry at them now is like feeling angry at a goat for breaking the fence. Anger, like crying, is God’s to someone who is hurting to stop hurting you, to pay for the damage and reconcile. Why should we be angry at the people who broke by hands with axe handles while they have no conscience to know the meaning of my anger and say sorry? Just as you would do if a goat hurt you, I forgave them “For they know not what they do”. If the result of having the Truth, Justice and Reconciliation Commission (TJRC) exercise shall be to humanize the perpetrators by helping them prefer conscience to ethnicity, materialism and power, it will not be an exercise in

futility. Instead of being the Truth, Justice and Reconciliation Commission, it should be called the Truth and Conscience Restoration Commission (TCRC).

In Kenya, the likelihood that the TJRC will become a political gimmick for the “Masters and mistresses at rationalization, at self-justification and at entering the denial mode,”<sup>1</sup> is such that my friend Professor Kivutha Kibwana warned me to stop vying for its chairmanship, in case it turns out to be another fiasco like Goldenberg, Akiwumi, Ndung’u and Kregler commission.

I took his warning to mean that my character of forgiving them “for they know not what they do” may be interpreted to mean that I am their accomplice. This tells me that prior to transitional justice, law must be amended to give immunity and protect the victims and witnesses from prosecution so that they can name perpetrators without any fear of reprisals and libel intimidations. Once perpetrators are named the law should be amended so as to freeze their bank accounts, be apprehended and charged in local or international courts without having to plead guilt or innocence, pending the findings of the TJRC. Those who want to should be examined by psychiatrists, theologians and neuro-scientists to determine whether their rationalization, self-justification and denial mode is due to lack of conscience or a deliberate attempt to incite their tribes into violence. In the case of Kosovo (Milosevic) and Liberia (Doe) arraignments were done on the evidence adduced by other ways than the TJRC.

In fact, this informed me that the transitional justice that I have been fighting for in Kenya ought to settle the issue of whether perpetrators are human or beasts for according to the standards of ethnicity, Kenyan perpetrators define themselves and their victims by biology; a biology which says that tribe A (including victims) is the perpetrator and tribe B (including perpetrators) is the victim. Kenyan transitional justice is paralyzed by failure to pursue cases of economic sabotage and corruption because the accused consider their corruption and sabotage as part of transitional justice, and convince their tribes to defend them because it is “just” for perpetrators from tribe B to eat as much as the perpetrators from tribe A had eaten. Perpetrators do not mind if their victims were to be paid reparations by the government because this does not hold them personally culpable and gets them off the hook to eat their ill-gotten wealth at the expense of tax-payers, some of whom are the victims: a clear case of **double jeopardy**.

Unless transitional justice is clearly defined, the victims might be tempted to go for it because of reparations (money) rather than with the goal of re-humanizing the perpetrators by giving them a forum to own up and pay for their crimes against the economy and humanity. The fact that the perpetrators of colonialism had clear victory over the losers, as in the case of the British conquest of the African nations, does not make them exempt from transitional justice. The fact that the losers feared the preponderance of British might, armies, law and police, and settled with defeat for as long as it took the Mau Mau uprising, gave time for the uprising to lose focus by equating independence with justice. Independence merely inherited and perfected the British injustices, and Africans settled for this up until the ethnic clashes. The state may think

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<sup>1</sup> Peace, Justice and Freedom: Human Rights changes in the new Millennium. Editors, S. Bhatia, J.S. O’Neill, Gerald L. Gall & Patrick D. Bendin.

that it has strong armies, police and draconian laws to get rid of any attempts for revenge, but people need a forum to come together not in search of justice and material gains but for cathartic therapy.

## TIME LIMITATIONS

The current constitution is not adequate basis for a TJRC unless it is amended to become retroactive, and be give retrospective powers to summon the Queen of England to appear and testify about the British occupation, imposition of foreign power, and to account for the various abuses of that power between 1895 and 1963. Kenya may not be a superpower to compel the Queen to comply, but Korea, which is not a superpower recently obtained an apology from Japan for rape and war crimes. Any Reconciliation within Kenya that does not involve Britain to account for how it obtained the power and land which it bequeathed to the Kenya government and for which Kenyans are exchanging blows, begs many questions. If you look at our Report by the Task Force on The Establishment of a TJRC, 90% of whatever atrocities and privation of freedom Kenya have suffered from 1895 to 2002 emanated from the unjust and hierarchical structures set up by the British authority, and which independence perfected, for the exploitation of one man/woman by another.

## LEGITIMACY.

The fact that certain countries experiencing traumatic change from one type of regime to another do have Truth commissions is theoretically correct, but is not adequate justification for every other country undergoing a similar experience to have one.

It is for this reason that the Kenyan government set up a Task Force that conducted inquiries around the whole country to get the views of Kenya citizens about the need to establish a TJRC. The purpose of the Task Force was to obtain or not obtain the peoples mandate; Kenyans returned overwhelming consent that we should have one.

The legitimacy of a Kenyan TJRC should not be based on the liberal ideology whose only need for TJRCs is to provide the market with a climate of continuity, stability and profit. If the status of inequality and injustice would prevail without having negative effect on the market, as during the Cold War and now in Saudi Arabia, the Western World would never call for Truth, Justice or Reconciliation. The ideology of the market consists of competition, passing examinations, negotiation and profits, and does not care about losers as long as they do not join their forces to disrupt law and order. It does not care about everybody's rights to equal access to power and resources, and democracy as the guarantee for everybody to have ownership, controls and access to power and resources. When Malcolm X broke ranks with Martin Luther King Jr. and consequently with the position that has now been taken by Obama, he must have agreed with Frantz Fanon that independence was a whites mans' device to keep the stability and continuity of capitalism in the market. Fanon argued that independence signified aspirations by black elites to become white, where whiteness meant being in charge of the market. As instruments of the liberal market, African truth commissions should read Fanon's Black

Skins White Masks and The Wretched of the Earth to establish whether their legitimacy is providing security, stability and continuity for capitalism, as in the case of South Africa, Liberia and Rwanda, or for restoring humanity, self-respect and dignity to the victims of slave trade, colonialism and independence (Tribalism).

The TJRC saved South Africa, not for South Africans, the majority of whom are still languishing in poverty, but pacified the angry masses for the continuity and stability of the capitalist market. South Africa, the birthplace of Steve Biko and black consciousness, is now the place where black people are killing fellow black people because they block each other's access to the white market. We need a different TJRC to restore black consciousness as the conscience of Africa in South Africa. While South African blacks have a tall order on how to restore black consciousness, the Kenyan elites have yet to have a national consciousness by which to gauge the success or failure of a TJRC.

The issue is if TJRCs are for de-wiring the perpetrators of repression, fascism, ethnicity, sexism and exploitation and rewiring with a positive psyche with positive principles, have we decided on a suitable psyche for Kenya, black consciousness, African socialism or some fundamentalism other than capitalism? In Rwanda the TJRC tried to de-wire the Rwandese from 100 years of brainwashing that Tutsis are superior and Hutus are inferior and rewiring them with new values of being human, one nation and equal. If TJRCs are about transition, no Kenyan that I know has come out with any technique that a TJRC could use to de-wire the elites of arrogant competition for entry into the capitalist market, or to de-wire them from using their tribes as weapons of mass destruction. Nor has anyone come up with a constructive ideology by which Kenya can do away with elites. With what benchmarks shall Kenyans audit the success or failure of their TJRC? I contend that the purpose of the TJRC for Kenya should be first to deliver a democratic rule of the law and secondly unite Kenyans to change Kenya from a market into a nation where all people are human, sovereign and equal.

Truth commissions are not established in situations of complete defeat of former powers but as a compromise between predecessor regimes and incumbent ones. But there must be a substantive departure of the incumbent from the draconian way in which the predecessor ruled. The fact that in Kenya the departure was euphoric rather than substantive led the NARC regime to renege on implementing the recommendations of the Task Force. The more the change Kenyan regimes undergo—from colonial to Kenyatta, Moi, Kibaki and the Grand Coalition—the more they remain the same.

#### THE REPORT OF THE TASK FORCE ON THE ESTABLISHMENT OF A TRUTH, JUSTICE AND RECONCILIATION COMMISSION.

The ideal of the Task Force, in the way it is written in the acknowledgement was to worship “President Mwai Kibaki and the Government of the National Rainbow Coalition (for promising) to reconstruct Kenya into a democratic rule of the law.” Out of the 16 members of the Task Force, 3 refused to bow and sign the report because they worshipped other gods. Now we have a new god but made of the same old components, promising to deliver the same “democratic rule of the law.”



Before the Task Force engaged in the exercise of public hearings and receiving written submissions from individuals and groups it perused material from at least 25 commissions established throughout the world since 1974 to learn about their characteristics and conducted a national conference to test our views with those of Kenyan professionals and laity. We learned that TJRCs are temporary, funded and empowered, are quasi-judicial bodies, are usually created at points of transition from war or dictatorship to peace and democracy, and focus on the past violations of human rights and economic crimes. They may not be created by the state, but they have to be state-authorized and funded. Of the 21 Truth commissions that we looked at 12 were created through executive decrees, 4 by legislature (e.g. Sierra Leone) 3 through the venue of the United Nations, 2 by Political parties (ANC in South Africa). Out of concern that the Kenya legislature consisted of some violators, our recommendation was that the President appoint the TJRC.

The work of the TJRC was to conduct investigations into the following:

- State brutality in parts of North Eastern and Eastern Province through security agents – the Kenya Army and police – exemplified in massacres (particularly the burning of Garissa in 1980, Bura Irgu in July 1967, Bura Kartasi in 1980, Maalkam Ari, in Mandera, 1982, bagala in 1998 – and other less reported but equally brutal and devastating executions).
- Torture – including the dropping of tortured persons to their deaths from helicopters,
- Rape of women and girls – including the forced impregnation of women and girls (‘watoto wa Moi’ phenomenon),
- Abduction of girls – for immoral purposes
- Other killings/executions of persons, sponsorship of and prosecution of inter-clan warfare and tribal clashes
- Confiscation of civil property – notably livestock - by security personnel, oppressive laws including the Closed District Act, Indemnity Act, and operation laws), the emergency period 1964 – 1967, the shifta and bandit flushing operations;
- Marginalisation of the Province by the government since independence in allocation of national resources for development: infrastructure, educational institutions, market development among other issues;
- Violation of women’s rights other than those already referred to above;

- The October-November 1967 Peace Agreement between Kenya and Somalia: content, context, operation, impact on policy and administrative methods since 1967 – 2003;
- Specific provincial administrators during the time of the most heinous violations of human rights, and notably those in charge during the emergency years (1964-67), 1980 and 1998;
- Religious discrimination and victimization;
- Institutional and structural victimization;
- Open sale of sophisticated weapons and ammunition all over the province;
- Land grabbing;
- Cruelty to animals by security personnel and the Kenya Army; the mass shooting of livestock deliberately to impoverish the communities;
- Strictures on the use of River Tana; which is administratively under Coast Province, not North Eastern Province;
- Destruction of schools;
- Discrimination in the issuance of national identity cards and passports to Somalis (including the Somali Verification Programmed);
- Dumping of toxic wastes in the province (especially on the reported cases of rising incidence of cancer of the oesophagus on residents of the suspect sites, and the increasingly poisonous waters around the sites that have killed livestock, as well as the increasingly visible environmental degradation around the suspect sites);
- Plight of original occupiers of land forcibly evacuated by the State's security agents;
- Abuse of office power;
- Discriminatory treatment at Mwingi, Meru District, where Somalis are frisked by the police on suspicion of being 'shifta'
- Translocation of the Hirola, a wild animal traditionally resident in the Province and an endangered species, to a private farm in Laikipia, in defiance of a court order;

- Government policy on Northern Frontier Districts and today's North Eastern Province and parts of Eastern Province since 1963.

What lacks in the above is whether a few men and women are justified to mobilize hundreds or thousands of young men, galvanize them into weapons or mass destruction and use them against other ordinary Kenya citizens.

**The Task Force** recommended the following powers for the TJRC:

- Investigative powers
- Prosecutorial powers
- Compensation mandate
- Power to make reparations
- Power to recover grabbed property and restore it to the rightful owners
- Powers to order restitution of property

The Task Force failed to recommend legislation of an implementation body with powers to follow up. Specific submissions were also made on the following:

*Compensation:* a poor country with huge developmental needs like Kenya cannot afford to compensate all people for their loss. It might be possible to make token compensation to the countless victims if the colossal sums of money looted by perpetrators of economic crimes are recovered, but that it might be infinitely better to make compensation in other forms, such as enhancing access to basic services in the form of access to education, health, clean water, user-friendly roads, restoration of respect and humanity to the provincial administration, an end to all forms of discrimination, among many other humane needs for the benefit of the residents of the province.

*Reconciliation:* is a non-factor before retributive justice is administered. They recommended that justice be done by way of prosecuting perpetrators of various atrocities and compensating victims for property looted by security agencies before healing can follow. I am lifting out some of these recommendations because I find them relevant for this discussion: I recommend that you read the whole Report yourself.

## **THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION BILL, 2008.**

### **INHERENT DEFECT**

THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION BILL, 2008 is inherently defective, decidedly amateurish and deadly weak in that it does not have any preamble to set out the ethical and juridical standards that those to serve as commissioners must meet, or identify the outcome for after the truth is told, justice done and reconciliation accomplished. It lacks a philosophy, ideology, beliefs and articulate goals with which to guide perpetrators and victims to face the future differently than in the past. This makes the Bill appear as if it were written by the department of criminal law: the offenders and offended come as adversaries.

While I appreciate the excellent legal jargon and nuances in which the Bill is written, if its sets up a Selection panel that does appoint some of the TJRC from members of the Task Force, there will be a big disconnect between theory and practice. The Bill miserably fails to cite that its legitimacy lies in the findings of the Task Force—that over 90% of the Kenyans who wrote to or addressed the Task Force wished to have a TJRC established, and the issues that Kenyans said should be inquired into. While the Bill has captured much of the spirit of the Task Force’s recommendation, it lacks the mention of any cases specific to specific contexts. While the Bill has taken into account the core issues on recommendations of the Force, it has framed them too technically and lost the mention of many vital details pertinent to specific contexts such as the Wagalla massacre.

It also denies the Truth Commission (TC) prosecutorial powers and powers to grant amnesty for crimes against humanity, which I would argue include rape. It limits the time frame and jurisdiction of the commission between December 28, 1963 and February 2008 and only uses the word “antecedents,” which I don’t think covers well enough the British land-grabbing and Mau Mau “British Gulag”; it is notable, though, that it gives the Truth commission powers to “request information from relevant authorities of a foreign country” (7 (2) (f)).

The other issue is whether 7 (2), the stipulation that the TC has powers to summon “officers or the government,” would include the President.

The fact that the civil society which called for Transitional justice as part and parcel of the constitutional reforms is not included in the selection panel is another disconnect between reality and politics. The idea of a Truth Commission came long before what the members of the grand coalition promised to deliver to their voters, and, in fact, some members of coalition subscribed to the Police brutality during their tenure of service in the previous regimes.

## CONCLUSION.

We should not equate transitional justice with shock therapy.