

## Accountability Debate in Kenya Unfolds in a Near Policy Vacuum and Ethnic Tension

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There seems to be consensus around the need to deal with injustices— gross human rights violations, economic crimes and abuse of power —perpetrated in Kenya over the last 35 years. However, Kenya lacks a coherent policy on the broader question of transitional justice: which institutions should be used (Special Tribunal for Kenya,<sup>1</sup> Truth, Justice and Reconciliation Commission<sup>2</sup> [TJRC] or criminal courts), how these mechanisms should be deployed, how they would relate to each other, and how such mechanisms would fit within the ongoing constitutional and institutional reforms proposed under Agenda Four of the Kenya National Dialogue and Reconciliation (KNDR) process that produced the current Government of National Unity (GNU).<sup>3</sup>

While Agenda Four of the KNDR<sup>4</sup> prescribes several measures including broad institutional reforms, transparency accountability and ending impunity – measures usually associated with transitional justice approaches in their broadest conception – it cannot be regarded as a transitional justice policy. Other than the resolution adopted by the KNDR for the establishment of a TJRC that prescribes the granting of amnesty for crimes against humanity and attempts to enunciate broad ‘principles’ on the operation of the TJRC,<sup>5</sup> Agenda Four lacks specificity on any of the crucial questions relating to transitional justice. Further, since the decisions to establish a Special Tribunal and the TJRC were taken, the government has made no attempt to enunciate such a framework. While recent crisis talks in the Cabinet on the role of the International Criminal Court (ICC) yielded varying suggestions from different Ministers on what should be done,<sup>6</sup> it was not intended as a policy forum. The President convened the meeting in order to fashion a response to the handing over to the ICC Prosecutor of the list of key suspects (prepared by the Commission on Post Electoral Violence) by Kofi Annan, the mediator of the KNDR. The tense and

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<sup>1</sup> Recommended to try those who bear the greatest responsibility for alleged crimes against humanity committed between 27 December 2007 and 28 February 2008 by the Commission of Inquiry into Post Electoral Violence (Waki Commission) appointed by President Kibaki. See Government of Kenya, *Report of the Commission of Inquiry into Post Electoral Violence* (2008).

<sup>2</sup> To be established in terms of the Truth Justice and Reconciliation Act 2008.

<sup>3</sup> For the National Accord and Reconciliation Act 2008, and other documentation related to the Kenya National Dialogue and Reconciliation, see <<http://www.dialoguekenya.org/agreements.aspx>>

<sup>4</sup> Agenda Four of the National Dialogue and Reconciliation process relates to ‘Long-Term Issues and Solutions’

<sup>5</sup> See Kenyan National Dialogue and Reconciliation *Truth, Justice and Reconciliation Commission*. The ‘principles’ are: independence [of TJRC]; fair and balanced inquiry; [grant of] appropriate powers; full cooperation [from government and all concerned]; strong financial support [from government and donors].

<sup>6</sup> Cabinet Meeting, July 14 2009. It is reported that Cabinet is divided into various camps: between those who favour prosecutions (before the ICC, the Special Court or before national courts); and those who oppose prosecutions and favour an expanded role for the TJRC to deal with post-election crimes.

rancorous exchanges reported to have happened in the meeting were perhaps not conducive to sober reflection.

Moreover, the sharp disagreements within Cabinet over how to deal with post-electoral criminality have not been conducive to a coherent approach. Nowhere is this more evident than in the government's approaches to the Special Tribunal and the TJRC. Government démarches relating to the two mechanisms seem to proceed in isolation from each other. As a result, discussions on the questions of transitional justice itself remain largely impoverished, focusing – even in this case indecisively – on only on a select number of politically contentious issues such as amnesty and the ICC, and exclude 'alternative' mechanisms such as 'ordinary' criminal courts.

A number of reasons can be proffered for the lack of an official transitional justice policy – in whatever form – and the resultant incoherence in approach.

First, the decisions to establish both mechanisms were taken in the middle of a national crisis. The immediate purpose of the KNDR was to bring an end to violence and to install a broad-based GNU. Such circumstances were clearly not conducive to a reasoned articulation of a transitional justice policy. Second, the debate on transitional justice – to the extent that it exists within government – is taking place within a polarized political environment. Beyond the convergence of views on the need to address past injustices, the GNU partners do not seem to agree on much. As elaborated in the discussion of various mechanisms, there are competing notions of justice that dictate different approaches. Lack of agreement also stems from the fact that the President, the Prime Minister and those who readily do their bidding are engaged in a vicious power struggle. For the President, who has previously enjoyed unfettered executive power inherited under a draconian constitution, the idea of sharing such power does not seem to have sat well with him. For his part, the Prime Minister has been keen to assert executive power – albeit for the most part ill defined<sup>7</sup> – vested in the new office by the national accord that created the GNU. In an event that underscored the nature of these struggles in government, in April 2009, the Speaker of Parliament was forced to enter the fray by deciding in a historic ruling on whether the President was entitled to appoint the powerful Leader of Government Business in Parliament (which comes with potential control over the government's legislative and reform agenda) without consulting the Prime Minister in terms of the KNDR Act; and whether in fact the Prime Minister, rather than the Vice President (affiliated to the Party of National Unity [PNU]) should assume that position.<sup>8</sup>

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<sup>7</sup> S 4 (a) of the National Dialogue and Reconciliation Act, 2008 provides, without elaboration that the PM 'shall have authority to coordinate and supervise the execution of functions and affairs of the Government of Kenya including those of Ministries'. While this suggests a parliamentary system in which the PM should run government while the President maintains a backseat, the NDR Act leaves intact other powers of the President that undercut those vested in the PM. While ODM has favoured this wide construction, PNU has sought to limit the PM's functions as much as possible. The struggle has pitted the PM and the head of the Civil Service and Secretary to the Cabinet (a Presidential appointee, who under the old dispensation supervises ministries), with the latter accused of undermining the PM.

<sup>8</sup> See *Decision of the Speaker of Parliament on the Interpretation of the Constitution and the National Dialogue and Reconciliation Act (Speakers Communication') of April 28 2009* available at <<http://www.bunge.go.ke/parliament/>> (accessed on 12 July 2008).

Third, the apparent attempt by one side of the government – the PNU – to shape the course of transitional justice seems to have reduced the chances of what should be a cooperative effort, especially in the context of a government of national unity.<sup>9</sup> From the author’s discussions with a number of stakeholders, it emerged that the then Minister of Justice, Ms Martha Karua (PNU), had drafted the first TJRC Bill without sufficiently involving coalition partners, civil society or other key stakeholders. Heated parliamentary debates relating to key provisions of the bill reflected dissatisfaction with this approach. The few members of civil society who were contacted by the author suggest that it was too late for them to provide any input, having been given less than two days to respond before the bill was presented to Parliament.<sup>10</sup> Similarly, the defeat in Parliament of the bill aimed at entrenching the Special Tribunal law in the Constitution can be attributed in part to the failure by government to engage with relevant actors, including MPs across the political party divide. Some MPs have suggested that they did not have enough time to familiarize themselves with the contents and voted against the bill because of their suspicion of the government’s true intentions.<sup>11</sup> It is noteworthy that President Kibaki and Prime Minister Odinga have lobbied their constituencies in Parliament to pass the law after the two principals came under sustained pressure from international actors. No sooner had President Kibaki named the commissioners and chair of the TJRC (22 July 2009) than they (the commission and its chair) came under attack from various quarters. The [credibility crisis](#)<sup>12</sup> that has engulfed the TJRC reflects at least one of the pitfalls of a government-driven transitional justice process (real or perceived): the possibility that the institution could lack total legitimacy, a necessary ingredient for a successful transitional justice process.

Fourth, while most Kenyans want justice in one form or another, an interesting dynamic has developed in the context of ethnic-based contestation within the current political sphere.<sup>13</sup> Those clamouring for justice on occasion recede into ethnic constituencies where action against particular individuals is invariably seen as a witch-hunt. Since questions of accountability seem inextricably linked to political succession and reorganization of the state, at a certain level, justice has an ethnic dimension whose contours must be internalized and acknowledged. Few can deny that this renders the task at hand even more complex and difficult to realize. For one, the result of this ethnic dimension is the dilution of civil society pressure on government and subsequent lack of incentive for timely and appropriate government action to drive accountability processes forward.

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<sup>9</sup> A number of civil society representatives working on issues of justice and victims had expressed concern over their exclusion from the legislative process, both for the Special Tribunal Bill and TJRC Bill. At the height of controversy over the amnesty question (against which the Justice Minister Martha Karua, (PNU), stood vehemently opposed), it emerged that the ODM – supposedly an equal partner in terms of the National Accord – had not been involved in the formulation of the draft law.

<sup>10</sup> See for instance, Amnesty International, ‘Concerns about the Truth Justice and Reconciliation Bill’ May 21, 2008 at 11-12 raising concerns over limited CSO involvement in the preparation of the TJRC Bill.

<sup>11</sup> *Standard Reporter* ‘Bill: What went wrong with the big guns?’ *The Standard* (Nairobi) February 15 2009.

<sup>12</sup> See author’s comments on this issue at: <http://rethinkingjustice.blogspot.com/>

<sup>13</sup> On the lingering role of ethnicity in the political discourse in Kenya see various in George Wachira (ed) in *Ethnicity, Human Rights and Constitutionalism in Africa* (2008).

Apart from the lack of agreement on how the past should be reopened for scrutiny, and whether any penal consequences should apply as one of the prescriptions, post-Kibaki succession scenarios and broader issues of institutional and constitutional reforms also underpin the actions of various actors in the transitional justice debate. When one dissects the transitional justice debate – itself inseparable from the wider context of constitutional and institutional reforms – it emerges that transitional justice questions invariably rally ‘reformist forces’ against an illiberal, pro-*status quo* group that does not favour the dissolution of the oppressive post-independence political and economic order that has operated to the benefit of a few.<sup>14</sup> The forces opposed to institutional reforms seem by extension inimical to any accountability process that would open and in a transparent manner scrutinise the numerous closets of historical injustice. Together with this historical legacy, the dynamics of a coalition government and succession battles that come with it are defining not only the ‘kind’ of justice that Kenya might pursue but also the roles of various actors in that process.

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<sup>14</sup> On historical injustice and the nature of the post-independence state see generally See generally Makau Mutua, Human Rights and State Despotism in Kenya: Institutional Problems, 41 *Afr Today* 5 0 (1994).and Republic of Kenya, *Report of the Commission of Inquiry Into Land Clashes* (Akiwumi Report), 1999.